No. S086269 **SUPREME COURT COPY**

SUPREME COURT
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DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JONATHAN K. JACKSON,

Defendant and Appellant.

(Riverside Superior Court No. CR-69388)

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Riverside
Hon. Edward Webster and Hon. Russell Schooling, Judges

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

No. S086269

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INTRODUCTION.

Jonathan K. Jackson was tried for murder with a REACT belt – a device worn around the waist and attached with prongs to the kidneys, designed to inflict on its human subject a 50,000-volt shock of eight seconds' duration – strapped to him, despite the trial court's determination that a REACT belt was not necessary, and that the presence of two deputies would be adequate to assure courtroom security.

The first jury was unable to reach a verdict at the penalty phase. Mr. Jackson then faced a second penalty phase trial, before a different judge. This judge ordered that Mr. Jackson again be tried for his life strapped to a REACT belt, despite the absence of any evidence in the record that Mr. Jackson posed a threat of disruptive courtroom behavior, relying on an out-of-court, unsworn representation by an unidentified bailiff.

Neither judge inquired into Mr. Jackson's medical suitability for the REACT belt; he was an unsuitable subject, because he had been hospitalized for a traumatic head injury shortly before the events at issue. At trial, a scar running up Mr. Jackson's forehead was visible from the witness box.

The unjustified use of the REACT belt, designed by its manufacturer to achieve "total psychological supremacy" over the subject, effectively destroyed Mr. Jackson's ability to consult with or assist his attorney or to participate effectively in his defense; he was tried in a state of abject domination, *in terrorem*. Because this damaging restraint deprived Mr. Jackson of numerous constitutional rights necessary for a fair trial, both guilt and penalty verdicts must be overturned.

Independently, the judgment of felony-murder, special circumstance finding, and judgment of death must be reversed due to insufficient

evidence. The prosecution's sole theory of first-degree murder was felony-murder, and that was also the basis for the only charged special circumstance. The jury returned a special finding that the murder was committed while the defendant was engaged in the commission of robbery. But the evidence is inadequate to show that a completed robbery occurred: there was no proof of a taking. Indeed, the supposed robbery victim, convicted drug dealer Robert Cleveland, testified that he did not believe anything was missing from his house as a result of the alleged robbery; his neighbor and his cousin recovered from Cleveland's house all the drugs and money that were not removed by law enforcement. Because the evidence is insufficient to support the jury's finding as to an essential element of robbery, upon which the judgment of felony-murder in this case depends, that judgment, the special circumstance finding, and the penalty judgment must be reversed.

Separately, the penalty phase judgment cannot stand. The central theme of the prosecutor's argument for death at the second penalty phase was that Mr. Jackson deserved the death penalty because he had personally "executed" victim Monique Cleveland, who died of a single gunshot to the face. But the verdict is constitutionally unreliable due to the trial court's erroneous failure to instruct on a concept that was essential to the case and necessary for the juror's understanding.

The guilt phase jury was never called on to decide whether or not Mr. Jackson, or another one of the several participants in the night's events, personally killed victim Monique Cleveland. Yet at the second penalty phase trial, the trial court directed the clerk to read to the new jurors the guilt phase jury's finding that Mr. Jackson had "personally used" a firearm in the commission of the murder. The guilt phase jury's finding on

personal use of a firearm, as read to the penalty phase jury in the context of the other instructions and findings, but in the absence of any explanation by the trial court as to the legal meaning of "personal use" of a firearm under California law, prejudicially misled penalty phase jurors by conveying that the guilt phase jury had actually decided that Mr. Jackson had personally used a firearm to unlawfully kill the victim when, in reality, the guilt phase jury had made no such determination. The risk that penalty phase jurors were misled as to what the guilt phase jury had actually decided regarding Mr. Jackson's personal role in the crimes is so great that the penalty judgment cannot stand.[1]

The trial court's failure to instruct the penalty phase jurors on the meaning of the guilt phase jury's finding of personal use of a firearm is one of many errors in a record replete with error. Mr. Jackson's second penalty phase trial was marked by egregious prosecutorial misconduct, the erroneous admission of highly prejudicial evidence, and further serious instructional errors that, taken together or singly, mandate reversal of the penalty judgment.

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[1] Indeed, there is substantial evidence, not presented to either jury, that Mr. Jackson was *not* the actual killer. In a post-trial motion, appellant brought before the trial court the transcript of a statement made by separately-tried codefendant Carl Bishop to law enforcement. In his statement, Bishop, who was present at the scene, identified codefendant Leon West, not appellant, as the actual killer of Monique Cleveland.

STATEMENT OF THE CASE.

On June 27, 1996, a felony complaint was filed charging defendant and appellant Jonathan Keith Jackson in count one with the murder of Monique Cleveland in violation of Penal Code section 187, in count two with the attempted murder of Robert Cleveland in violation of Penal Code section 664/187, and in count three with being a felon in possession of a firearm in violation of Penal Code section 12021, subdivision (a)(1), all crimes alleged to have been committed on or about June 15, 1996. 1 CT 001-002.[2]

The complaint further alleged the special circumstance that the murder of Monique Cleveland was committed by appellant while he was "engaged in the commission of . . . murder" [*sic*], and alleged as to count one that appellant personally used a firearm within the meaning of Penal Code sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8), and that in the commission and attempted commission of the offense a principal was armed with a handgun within the meaning of Penal Code section 12022, subdivision (a)(1). As to count two, the complaint alleged that appellant personally used a firearm within the meaning of Penal Code sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8), and that appellant personally inflicted great bodily injury on Robert Cleveland within the meaning of Penal Code sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8). 1 CT 001-002. The complaint further alleged that appellant had been convicted of robbery, a serious and violent felony

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[2] As is customary, "CT" refers to the clerk's transcript, and "RT" to the reporter's transcript; volume and page numbers precede and follow, respectively.

within the meaning of Penal Code sections 667, subdivisions (c) and (e)(1), on or about October 19, 1992, and had not remained free of custody after his term within the meaning of Penal Code section 667.5, subdivision (b). 1 CT 002-003.

On November 4, 1996, the court granted the prosecution's motion to consolidate appellant's case with that of codefendant Alejandro Ortiz. 1 CT 019-020 (motion); 018 (order).

On November 18, 1996, the prosecution filed its notice of intention to seek capital punishment against Mr. Jackson. 1 CT 025.

The prosecution filed an amended complaint (1 CT 021-024) and then a second amended complaint (1 CT 033-036) charging both appellant and Ortiz on the murder and attempted murder counts. The second amended complaint alleged the special circumstance of murder in the commission of robbery or attempted robbery. 1 CT 033.

A preliminary hearing was held on February 18, 1997 (1 CT 037-205), after which appellant and Ortiz were held to answer on all charges. 1 CT 031, 201.

On March 11, 1998, appellant's counsel declared a conflict and, after an in camera hearing, the court granted counsel's motion to be relieved. New counsel was appointed thereafter. 1 CT 227, 229, 235.

The prosecution filed an information (1 CT 208-212) and then an amended information on April 13, 1998. Unlike the pleadings previously filed, the amended information named an additional individual, Carl Bishop, as a defendant, as well as Jonathan Jackson; the amended information omitted to charge Alejandro Ortiz. 1 CT 231-234.

Thereafter, the prosecution filed a motion to consolidate the case against Jackson with those against three other individuals: alleged

accomplices Carl Bishop, Henry Jones and Leon West. 1 CT 250-253. Shortly, however, the prosecution announced it wished to try appellant separately. 2 RT 95. The defense did not object to severance. 2 RT 96.

On March 30, 1999, the prosecution filed a third amended information, on which it ultimately proceeded to trial. 2 CT 446-449. The third amended information charged only appellant as a defendant.

On April 6, 1999, jury selection began before the Honorable Edward D. Webster. 2 CT 474. On April 19, 1999, the prosecution began the presentation of evidence in the guilt phase of trial. 2 CT 482. The presentation of evidence concluded on April 28, 1999, counsel presented closing argument on May 3, 1999, and the case went to the jury on guilt. 2 CT 493-495. On May 6, 1999, the jury announced it had agreed upon the verdicts. 3 CT 623.

The jury found Jonathan Jackson guilty of a violation of section 187 of the Penal Code as charged in count one of the information and fixed the degree as murder in the first degree. The jury found that the murder was committed while the appellant was engaged in the commission of robbery in violation of section 211 of the Penal Code as set forth in the allegation of special circumstances, within the meaning of Penal Code section 190.2, subdivision (a)(17)(i); that in the commission of the offense charged under count one Jackson personally use a firearm within the meaning of Penal Code sections 12022.5, subdivision (a) and 1192.7 subdivision (c)(8); and that in the commission of the offense charged in count one a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a)(1). 3 CT 607-610.

The jury also found Jackson guilty of a violation of section 664/187 of the Penal Code, attempted murder as charged in count two. 3 CT 602.

The jury found that the attempted murder was willful, deliberate and premeditated within the meaning of Penal Code sections 664/187; that in the commission of the attempted murder Jonathan Jackson personally used a firearm within the meaning of Penal Code sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8); and that in the commission of the offense charged under count two, appellant inflicted great bodily injury within the meaning of sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8). 3 CT 602-605.

The jury additionally found Jackson guilty of violation of Penal Code section 12021, subdivision (a)(1), felon in possession of a firearm, as charged in count three of the third amended information. 3 CT 606.

Separately, the trial court found all allegations regarding the prior robbery to be true. 3 CT 624.

On May 12, 1999, the penalty phase of the trial commenced. 3 CT 650. On May 25, 1999, counsel gave closing arguments and the court instructed the jury. 3 CT 796. On May 26, 1999, the jurors informed the court they were unable to reach a verdict; the court instructed them to deliberate further. 3 CT 865. On May 27, 1999, the jurors again informed the court they were unable to reach a verdict, and the court declared a mistrial. 3 CT 869.

After the proceedings ended, the trial judge (the Hon. Edward D. Webster) had an off-the-record conversation with some of the jurors, in which the judge expressed an opinion on some of the evidence. The trial judge informed counsel of this communication with the jurors, and offered to disqualify himself if either party requested. 3 CT 874; 19 RT 2960-2962. Appellant requested reassignment to a different judge. 3 CT 876; 19

RT 2969. The case was set for retrial of the penalty phase before the Hon. Russell F. Schooling. 3 CT 881.

The penalty phase retrial began on October 25, 1999. 3 CT 887. The presentation of evidence concluded on November 18, 1999. 9 CT 2660. The courtroom went dark over the holiday, and counsel presented closing argument on November 29, 1999. The jury began deliberating the next day. 9 CT 2664-2666. On December 1, 1999, the jury returned a verdict of death. 9 CT 2747, 2749.

On February 18, 2000, the trial court (Judge Webster) denied appellant's motion for a new trial as to the guilt phase, and the trial court (Judge Schooling) denied his motion for a new trial as to the penalty phase. 10 CT 3047, 3048. That same date, the trial court (Judge Schooling) denied appellant's motion to modify the verdict of death under Penal Code section 190.4, subdivision (e), and his motion to bar the death penalty based on intra-case proportionality. 10 CT 3049, 3050. The trial court imposed the death penalty for the murder count. 10 CT 3066.

The trial court additionally sentenced appellant to life with the possibility of parole on the attempted murder count, to 13 years in aggregate enhancements on that count, and to the upper term of four years on count three, possession of a firearm. All these sentences were stayed based on the judgment of death on count one. 10 CT 3066-3068.

This appeal is automatic. Penal Code section 1239.

STATEMENT OF FACTS – GUILT PHASE

A. Three Main Prosecution Witnesses.

There were three main prosecution witnesses, all criminals: a drug dealer, one of his incarcerated street-level subsidiary dealers, and the incarcerated brother of the street dealer.

Robert Cleveland was a convicted drug dealer. 7 RT 1071. Cleveland and his wife Monique Cleveland lived in a remote area of Riverside County. 7 RT 1066.

Cleveland kept numerous guns at his mobile home. 7 RT 1025 (.45 caliber handgun), 7 RT 1162 (Tec-9 semiautomatic handgun), 7 RT 1058 (.32 caliber semiautomatic handgun) 7 RT 1164 (a .380 caliber weapon, apparently a handgun), 8 RT 1196-1197 (one or two .22 caliber rifles). Although he had been arrested twice for possessing weapons on probation (7 RT 1071), Cleveland claimed he did not know it was unlawful for him to possess firearms. 7 RT 1158.

Cleveland admitted that he dealt drugs. 7 RT 1053-1054. Ninety percent of his transactions were done at his home. 7 RT 1135.

Cleveland had known Jonathan Jackson for 6 to 8 months before the shooting. 7 RT 1052, 1133. He had fronted Jackson cocaine nine or ten times, for $150 each time; Jackson would take the cocaine, and later bring Cleveland money. 7 RT 1055. Jackson was overdue in bringing Cleveland back $150 for the last cocaine deal. 7 RT 1061.

On June 15, 1996, Cleveland saw a blue minivan pull up the driveway (7 RT 1166), either between 5 p.m. and 7 p.m. or between 7 p.m. and 10 p.m. 7 RT 1136. Jackson and at least three others were in the minivan. 7 RT 1064. Cleveland picked up his .45 before answering the door. 7 RT 1062. He heard Monique go to the bathroom. 7 RT 1062.

After letting Jackson in, he locked the door behind him. 7 RT 1064. At that time, Cleveland weighed about 230 pounds and Jackson about 140 pounds. 7 RT 1072, 1157-1158.

Cleveland testified their conversation was in a normal tone (7 RT 1070), but was not sure if he used harsh words with Jackson (8 RT 1180) because Jackson had brought the others with him. 7 RT 1064. After talking with Jackson for 1 to 1½ minutes, Cleveland put down the .45. 7 RT 1069. He told Jackson that he had no drugs for him; he was expecting someone else to come over and pick up two ounces of cocaine that night. 7 RT 1063. He told Jackson to come back the next day. 8 RT 1182.

After six or seven minutes (8 RT 1220), Jackson had turned to leave when he suddenly shot Cleveland in front of the right ear. 7 RT 1075. Cleveland fell to the floor and saw that Jackson's gun had jammed. 7 RT 1076. Jackson's gun was either a .25 or .32. 8 RT 1225, 1243.

After trying to clear his jammed gun for 20 to 30 seconds, Jackson opened the door. Cleveland tried to pull himself up. 7 RT 1089.

There were two others: one man in the doorway holding a semiautomatic and the other holding a shotgun. Cleveland could not see the face of the person with the shotgun, only his leg, the shotgun and his hand. 7 RT 1094, 8 RT 1218.

The man with the semiautomatic demanded to know where the drugs and money were, and said, "Let's get the bitch too". 7 RT 1076. He shot Cleveland in the side (7 RT 1076) before stepping into the house. 7 RT 1148-1149. Cleveland pointed to the kitchen light (7 RT 1096) and then heard the light cover fall to the ground. 8 RT 1228.

After the second shooter stepped inside, Cleveland heard two more shots fired by a different gun (7 RT 1144) in rapid succession. 7 RT 1152.

The second man was the same size as Jackson, but more muscular; he weighed 160-170 lbs. and was dark-skinned. 7 RT 1155, 1158.

Cleveland scrawled "Vally J"[3] in blood on the floor, but he was not certain whether he did so after he was first shot, after second shot but before the second round of shots, or after everyone left. 8 RT 1187. He did not remember being shot a third time. 7 RT 1079, 1098. Cleveland got up to look for paper towels to blot the blood and tried to clean his face. 7 RT 1099. He was not sure if he went in to the bathroom to clean up. 8 RT 1195.

Cleveland called 911. 7 RT 1096. A tape of the 911 call was played at trial. 7 RT 1024; 12 RT 1980; 3 CT 891-902 (transcript of tape). He told the operator he had been shot, but could not stay on the phone because he was too weak. 7 RT 1103. He then called his neighbor (Michael Blanton) asking for help. 7 RT 1106. His neighbor came to help him. 7 RT 1107, 1127. His next memory was waking up in the hospital. 7 RT 1108.

While hospitalized, Cleveland identified Jackson to Investigator Gill as the person who shot him. 7 RT 1118. Cleveland admitted that he lied to Gill on a number of topics. 7 RT 1131, 1132-1133, 1161, 1169. Cleveland told this investigator that when he came to the door for Jonathan Jackson, he did not arm himself, or do so thereafter. This was a lie. 7 RT 1145.

There were 11 ounces of cocaine in the house that night: two ounces in the light fixture, and nine ounces in the second bedroom inside a panel by the roof. 8 RT 1203. There was $4,500 in the closet panel in a brown bag (8 RT 1204) and Cleveland had $1,200 in his wallet. 8 RT 1241.

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[3] See 10 RT 1597 (this spelling of "Valley J" omits the "e.")

Law enforcement recovered the cocaine from the kitchen light. 7 RT 1114. Cleveland called his landlord and neighbor Michael Blanton from the hospital to instruct him to recover the cocaine and the money from second bedroom. 8 RT 1210-1211. Blanton recovered the cocaine, but could not find the money. 8 RT 1237-1238. When Cleveland returned from the hospital, the money was still there. 8 RT 1211-1212. Cleveland's cousin recovered his wallet from his home, returning it to Cleveland, with "[e]verything that was in it." 8 RT 1241. Cleveland testified that he could not say that any items were missing from his house. 7 RT 1142.

Kevin Jackson, the second witness, was in jail during the trial for assault and making a terrorist threat. He had known Jonathan Jackson for about 7 years before the shooting. 9 RT 1502-1503. After he was arrested on June 28, 1996 for possession and attempted sale of cocaine (9 RT 1527), the DA was prepared to make a deal in exchange for his testimony. 9 RT 1538. The next time he was in court he would be released and would receive a sentence of probation. 9 RT 1530. Kevin Jackson stayed out for 2½ years, before he was arrested in November 1998 for spousal abuse. He was testifying because of the 1996 deal (9 RT 1531), which hinged on his testimony. 9 RT 1540. He also faced considerable time in state prison if convicted on pending charges of assault with a deadly weapon and making terrorist threats. 9 RT 1540-41.

Kevin Jackson had been a drug dealer for Cleveland until the shooting. He bought cocaine from Cleveland every other week for 5-6 months. Both Kevin Jackson and his mother were friends with Monique Cleveland's parents. 9 RT 1507-1508.

Kevin Jàckson heard Rob and Monique were dead the morning after the shootings. 9 RT 1510. He went to Kevin Simmons' house (9 RT

1511) and found Jonathan Jackson and Alejandro Ortiz there. 9 RT 1513. Kevin Jackson had smoked marijuana before he arrived; he could tell that they had been smoking marijuana (9 RT 1515), and they smoked marijuana together. 9 RT 1517. When, according to Kevin Jackson, he asked if they had heard that Rob and Monique were dead, Jonathan Jackson responded, "Yeah, so what?" (9 RT 1516), and then "Don't trip, but I did that". 9 RT 1517.

Jonathan Jackson assertedly told Kevin Jackson that when he went to Cleveland's to purchase drugs, there was a conflict about some money he owed. 9 RT 1518, 1550-1551. Jackson went with the money to pay Cleveland, but Cleveland disrespected him by calling him a "'bitch'", a "'bitch-ass nigger'" and a "'punk-ass nigger'" who "'ain't even come back with my first $150.'" 9 RT 1550-1551. Cleveland told Jackson, "You can get the fuck away from my house." 9 RT 1556. The first conversation in kitchen inside Cleveland's home ended when Jackson went back to the car. 9 RT 1577.

Outside, according to Kevin Jackson, Jonathan Jackson told his friend that he was going to "jack" Cleveland. When Jackson went back to the house, Cleveland answered the door with a loaded .45, let him in and locked the door behind him. Once inside, Cleveland put down his gun. When Jackson pulled his gun, Cleveland lunged at him, and Jackson fired. 9 RT 1518-19, 1578.

In Kevin Jackson's account, Jonathan Jackson's "homies" ran into the house when they heard the gun fire. 9 RT 1519. Once inside, according to Kevin Jackson's story to law enforcement, Alejandro Ortiz gave Jackson a .357 because he was out of bullets (9 RT 1561) and the "homies" told Jackson to finish the job. 9 RT 1520.

According to Kevin Jackson, when Monique came screaming out of the bedroom (9 RT 1519), Jackson demanded to know where the money was, and then blew her brains out with the .357. 9 RT 1520-1521. Kevin Jackson later said that Jackson just said he shot her. 9 RT 1578.

Kevin Jackson never saw Jackson with any cocaine or money while at the Simmons residence (9 RT 1565-66) and Jackson did not tell him that he took any cocaine or money from Cleveland. 9 RT 1565.

Kevin Jackson admitted that, although he told law enforcement that Alejandro Ortiz gave Jackson the .357 used to kill Monique, he "just added [Ortiz's] name in without knowing for a fact" whether the statement was true or not. 9 RT 1561; see 9 RT 1535-1537.

Donald Profit, the third witness, was 17 years old at the time of trial, in state prison, and a member of the Mead Valley Gangsta Crips. 11 RT 1748, 1750, 1754. He met Jonathan Jackson when the gang initiated Profit. 11 RT 1752. Profit claimed not to know that Kevin Jackson, who was his brother (11 RT 1750), bought dope from Cleveland, but he also testified that he had seen his brother selling dope for Cleveland in Hemet. 11 RT 1803.

Two or three days after it happened, according to Profit, Jackson told Profit that he shot Robert and Monique Cleveland. 11 RT 1755. Supposedly, Jackson went to their house, knocked on the door, and shot Rob over the right ear (11 RT 1763) when he answered. When he saw Monique, he shot her (11 RT 1755) in the head. 11 RT 1764. He told Profit he used a .22 semiautomatic, with a brown handle. 11 RT 1764. Jackson had accomplices (11 RT 1763), who were armed with a .380 and a 9mm. 11 RT 1767. Jackson told Profit that he took eight ounces of

cocaine from Cleveland. 11 RT 1762. Profit claimed that he later saw Jackson with eight ounces of cocaine. 11 RT 1773.

B. Forensic Evidence.

Dr. Joseph C. Choi, a forensic pathologist for the Riverside County Sheriff Coroner's Office, performed the autopsy on Monique Cleveland. 9 RT 1462. One bullet had entered the left side of her face and exited the right side of her neck, severing an artery; she died immediately. 9 RT 1464-1465, 1474. The gunpowder tattooing on her face showed that the shot was fired 2-4 inches away from her face. 9 RT 1470.

The injury was consistent with the victim lying prone on the floor, with her head lifted up by her hair and the shooter firing in a downward trajectory through her cheek. 9 RT 1475-1476. From that position the bullet would have passed through her face at a 30-degree angle. 9 RT 1471. The line through the cheek and neck could come from a different angle depending on the position of the head when the shot was fired. 9 RT 1477.

Dr. Choi recovered five lead fragments from around the bullet's entry site, indicating a lead-only (unjacketed) bullet. 9 RT 1472. He thought it was likely a .22 caliber bullet, but the bullet could have been as big as .38 caliber. He ruled out .25 caliber bullets because they are fully jacketed. 9 RT 1475, 1480.

Elissa Mayo, a senior criminalist with the California Department of Justice, conducted blood spatter analysis at the scene. 10 RT 1588. In the rear of the trailer, near the bedroom, there was a pool of blood and spatter on the walls. 10 RT 1596. Blood spatter was deposited with some force against the side of the doorframe. 10 RT 1601. According to Mayo's

analysis, Monique Cleveland's head could not have been higher than two feet off the ground when she was shot. 10 RT 1604.

C. Other Evidence.

Michael Blanton was Robert Cleveland's good friend, landlord, and neighbor. 8 RT 1285. Around 1:00 a.m., he heard three shots of a smaller caliber weapon, and one or two larger caliber shots. 8 RT 1287. When the 911 operator called his house, he realized what was happening and went next door. 8 RT 1294. Cleveland was sitting on the back porch with his back against the house, shot in the face and losing consciousness. 8 RT 1295. Cleveland did not know how many men had been in his house. 8 RT 1299. Blanton saw Monique in the hallway, dead. 8 RT 1302.[4]

Blanton visited Cleveland in the hospital. 8 RT 1310. Cleveland asked him to go to the mobile home, and look for a package in the wall of the second closet, some money, and a phone book. Someone would pick up the package from Blanton. 8 RT 1317. After the person picked up the package, Blanton visited Cleveland and told him he gave the guy everything. 8 RT 1328.

Deputy Joseph Hack was the first to respond to the Cleveland residence. Michael Blanton told Hack that Cleveland had been shot and needed medical help. 8 RT 1337. Hack had Blanton and his two daughters exit the residence. 8 RT 1341. There was blood all over the kitchen floor

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[4] Blanton's daughters, Mica and Myesha Blanton, generally corroborated their father's account regarding the gunfire, and their subsequent joint discovery of the wounded Robert Cleveland. See 8 RT 1272-1281 (Mica Blanton); 8 RT 1249-1266 (Myesha Blanton).

and next to the deceased's head. 8 RT 1342. Cleveland told Hack that Jackson had tried to rob him, had shot him and that there were two or three more black males who had fled in a car. 8 RT 1344-45.

Detective Kenneth Gregory assisted with the investigation; his task was to identify Valley J. 9 RT 1487. He found five photographs of the same suspect bearing the moniker "Valley J" in the Sheriff's Department gang book. 9 RT 1491. Gregory recovered a green folder with Jonathan Jackson's name on the outside and "Mista Valley Jay" written on the inside from Jackson's grandparents' house in Moreno Valley. 9 RT 1493-1494.

When Investigator Sheldon Gill arrived at the scene, Robert Cleveland was already gone. 11 RT 1841. The hazardous device team found rock cocaine in the recessed light fixture in the kitchen. 11 RT 1845-1846.

Gill visited Robert Cleveland in the hospital, and Cleveland identified Jackson as the person who shot him first; he was lying on the floor after Jackson shot him and a second person came in and shot him in the back. 11 RT 1892-93.

At Jackson's grandparents' home, Gill found paperwork identifying Jackson as Valley J. 11 RT 1854.

After Officer Damon Aoki arrested Jonathan Jackson for drinking in public, he determined that Jackson was wanted on a murder warrant. 9 RT 1458.

On July 24, 1996, officers served warrants on 15 suspected gang members' homes in an effort to find .22 caliber and mid-caliber pistol cartridges that matched the projectiles at the scene. 11 RT 1859, 1861.

On the day of the gang sweep, Gill spoke with Donald Profit at the Perris Police Department. Profit denied having any knowledge about who

committed the homicide, and said he hadn't seen Jackson in months. 11 RT 1870, 1911. A few days later, Profit wanted to talk. Profit mentioned that his brother, Kevin Jackson was in custody, but did not ask for any favors. Profit told Gill that Jackson had told him that he shot Rob in the face and Monique in the forehead, the motive being to steal cocaine. 11 RT 1875.

Initially, Profit could not remember the day or the month of the murder; later, Profit told Gill that Jackson told him about the murder in April 1996. The murder occurred in June 1996. 11 RT 1912-1914. Profit described a chrome automatic gun that Jackson showed him. 11 RT 1915. He also claimed that Jackson had taken eight ounces of cocaine from Cleveland's house. 11 RT 1915.

Based on this information, Gill visited Kevin Jackson in jail. 11 RT 1876. Kevin Jackson wanted to make a deal. 11 RT 1877.

STATEMENT OF FACTS – PENALTY PHASE RETRIAL

A. The Underlying Crimes.

Because the jury empanelled for the second penalty phase had not, of course, heard the guilt phase evidence, the prosecution reprised its guilt phase case. There were major differences. Two of the prosecution's three main guilt phase witnesses – Robert Cleveland and Donald Profit – did not testify at the second penalty phase. Kevin Jackson did. In addition, as in the first trial, the jury heard the tape recording of Robert Cleveland's 911 call, and the testimony of forensic experts, law enforcement officers, and neighbors.

Kevin Jackson was a drug dealer who was incarcerated at the time of trial. 26 RT 3988-3989. He had known Jonathan Jackson since 1989. 25 RT 3950. They were not related. 26 RT 3963. Kevin Jackson was an "associate," but not a member, of the Mead Valley Gangster Crips. 26 RT 4001-4002.

Kevin Jackson purchased rock cocaine from Rob Cleveland, two to five ounces at a time, once every two or three weeks. 26 RT 3965.

At the end of June 1996, the month of the Cleveland crimes, Kevin Jackson was arrested and jailed for attempted sale and possession of rock cocaine. 26 RT 3983. Law enforcement officers were looking for another member of the Mead Valley Gangster Crips, who was wanted for murder. 26 RT 3983-3984. They found the suspect, who was staying at Kevin Jackson's mother's house, and then asked Kevin Jackson's mother, his wife and his little brother if they knew the whereabouts of Jonathan Jackson, or anything about the Cleveland murder. 26 RT 3984. His wife Tanesha told them that Kevin did know something, and she would get Kevin to talk to them if they would get him out of jail. 26 RT 3984.

After Kevin Jackson had been in custody for about a month, Investigator Gill came to see him in the county jail. 26 RT 3993. When Gill told him he knew he had information about the homicides, Kevin Jackson said he wasn't involved, and told the investigator he wasn't saying anything unless Gill could get him out of jail. 26 RT 3985.

Ultimately, Kevin Jackson made a taped statement, recorded by Investigator Gill, recounting what he said he knew (26 RT 3991), and got a deal. Under the deal he struck with prosecutor Barham, in return for his testimony, he would be released from custody on his drug sale and possession charges, and instead of a four-year prison sentence, he would receive probation. 26 RT 3988.

Kevin Jackson was released, but was arrested again for the attempted murder of his wife, and was sentenced for assault with a deadly weapon and terrorist threats to a two-year prison term, for which he was then in custody. 26 RT 3997-3998. He expected to be released soon. Kevin Jackson had yet to be sentenced on the drug sale and possession charges; his sentencing date was in two days. In order to receive his deal, and get probation and not a prison sentence on his drug charges, he had to testify. 26 RT 3998-3999.

This is the story Kevin Jackson told at the penalty phase retrial:

Jonathan Jackson had been staying at the Simmons place. 26 RT 3973. It was daylight when Kevin Jackson arrived at the Simmons' residence on the day after he heard that Rob and Monique Cleveland had been killed. 25 RT 3951-3952. When he saw Jonathan at the Simmons' house, he was still thin and weak. 26 RT 3974, 26 RT 4014. Kevin knew that Jonathan had been hospitalized with a head injury. The injury was still visible. 26 RT 4014.

Kevin, Jonathan, and Jonathan's friend Alejandro Ortiz were talking and smoking marijuana. Kevin asked if either one had heard about the murder. 25 RT 3952-3953. "Jon says, yes, he heard and asked me what did I hear about it. And I told him I heard that Rob and his wife had -- was killed." Jonathan asked him if he was sure that Rob was dead. Kevin said he wasn't sure, but had heard that Rob was dead. 26 RT 3976-3977. Jonathan said don't trip, but he did that. 25 RT 3954. Kevin asked him what happened. 25 RT 3955.

Jonathan told Kevin he just went there to make a drug transaction with Rob. Jonathan said that Rob disrespected him, because he owed Rob $150 from an earlier transaction. 25 RT 3955. Jonathan told Rob he was not dodging him; he did not have the money because he had been in the hospital. 26 RT 3978. Rob called Jonathan "a punk ass bitch" and a "bitch ass nigger." 26 RT 4012-4013. Jonathan got offended, went back outside where some friends were in a car, and told them he was going to "jack" Rob. 25 RT 3955.

When he went back to the door, Rob answered with a gun in his hands. They had a few more words. Jonathan told Rob he just wanted to make a deal with him. Rob set his gun down on the kitchen counter, and Jonathan pulled out his gun. 25 RT 3955. Rob was about 6 feet or 6 feet 1, a little over 200 pounds, possibly as much as 250. 26 RT 4013. Rob jumped at him and tried to take his gun from him, and he started shooting Rob. 25 RT 3955, 26 RT 3979.

Jonathan was armed with a .22 or .25 gun. 26 RT 3956-3957. He said he shot Rob five or six times. Jonathan told Kevin he still had the gun he used, and opened up the drawer and showed it. 25 RT 3957.

Once Jonathan started shooting, Rob's wife got up and ran into the

bathroom. Then his homies came in from outside and one of them told Jonathan to finish what he had started. Jonathan got the .357 from one of his homies. He went to where Rob's wife Monique was hiding. 25 RT 3957, 26 RT 4020.

According to Kevin Jackson, Jonathan said he asked about the money, and Monique said, "What money?" She was on her knees on the floor. Standing over her, with her hair in his left hand and his gun in his right hand, and looking away to his right, he shot her in the head with the .357. Jonathan Jackson allegedly demonstrated the position as he described it to Kevin. Kevin Jackson then demonstrated the position for the jury. 25 RT 3958-3959, 26 RT 3980.

Jonathan thought Rob was dead when he passed by him. 26 RT 3981. That ended Jonathan Jackson's report to Kevin Jackson, according to the latter.

In his taped statement, Kevin Jackson identified another individual, Alejandro Ortiz, as one of those present and participating with Jonathan Jackson in the Cleveland shootings.

At trial, Kevin Jackson admitted that he had falsely implicated Alejandro Ortiz in the murder and attempted murder in his tape-recorded interview with law enforcement; he had

"put [Ortiz] there without knowing for a fact if he was there or not." 26 RT 4001; see 26 RT 3991, 3986-3987.

Michael Blanton, a friend, landlord, and neighbor of Rob Cleveland's, heard three or four shots the night of the crime. 24 RT 3762-3763. In the meantime, Rob Cleveland called 911 and told them that "Madly" had shot him and his girlfriend. 3 CT 891-892. Cleveland begged them to send an ambulance. 3 CT 892. Cleveland also called and spoke to

Michael Blanton's daughter Mica and asked for help. 24 RT 3748. Michael, Mica, and Myesha, his other daughter, all went to the Cleveland residence, where they found Rob sitting up against the wall on the back porch, in agony. 24 RT 3749-3751. Cleveland had been shot three times; in the face, in the shoulder, and in the abdomen. 27 RT 4243. Mica crossed the linoleum and found Monique, apparently dead. 24 RT 3751-3752. Rob told Michael Blanton that four guys came in; one named "Valley J" shot him. 24 RT 3767-3768. Michael Blanton called 911. 3 CT 900-901.

Deputy Joseph Hack responded to the call at 1:30 a.m. on the night in question. 24 RT 3796. When Hack arrived at the Betty Road residence, Michael Blanton directed Hack to Rob Cleveland, who said that Valley J shot him and that two or three others were involved. 24 RT 3798-3799.

Next, Blanton led Hack to Monique Cleveland, who appeared to be dead. 24 RT 3803-3804. Hack then asked the Blantons to leave so he could secure the area. 24 RT 3804. There had been six people in the house already, the Blantons, and three deputies. 24 RT 3805-3816.

Sheldon Gill, an inspector with the Riverside Sheriff's Department, learned of the crime, and arrived at 2:56 a.m. to direct the investigation. 26 RT 4064-4066-4067. The team collected shell casings, projectiles, and firearms. 26 RT 4069-4070. In the morning, someone found some writing in blood in the kitchen: the words "Valley J." 26 RT 4069. Later, Gill learned that some containers of rock cocaine had been found. 26 RT 4074.

Kenneth Gregory, a detective with the Riverside Sheriff's Department, was called to the crime scene in the early morning hours of June 16, 1996. 26 RT 4032-4033. He located a phone book that contained the name Valley J, and a phone number, which belonged to the Simmons family. 26 RT 4033-4035.

Inspector Gill and Detective Gregory went to the Simmons residence on Tuesday, June 18, 1996, but Valley J. was not there. 26 RT 4035, 26 RT 4080. Gill and Gregory also went to appellant's grandparents' house. 26 RT 4036. While there, Gregory went to appellant's room and found a green folder with the appellation "Mista Valley J" on it, and other documents with the name Jonathan Jackson. 26 RT 4037, 26 RT 4082.

Gregory was present when Gill found a packet of narcotics in the recessed lighting area of the kitchen at the Betty Road location. 26 RT 4042.

In connection with the search warrants, Gill and the team collected about five firearms. 26 RT 4087. They were looking for .22 and mid-caliber .38 or .357 magnums. 26 RT 4088. They submitted these to the forensics lab, as well as expended projectiles from the scene. 26 RT 4088. They also searched a field in Mead Valley, finding a gun on October 9, 1996. 26 RT 4089-4091. The weapon also was submitted to the crime lab for analysis. 26 RT 4092.

On Monday, June 17, 1996, Gill visited Rob Cleveland in the hospital. 26 RT 4074. Gill had photos with him. 26 RT 4076. Cleveland identified the person as Valley J by nodding his head. 26 RT 4075-4077.

The prosecution also played a videotape of crime scene photographs. 31 RT 4737.

Officer Damon Aoki detained Jonathan Jackson in Los Angeles on July 25, 1996, and found that he had an arrest warrant for murder in Riverside County. 26 RT 4097-4105. On July 25, 1996, Gregory went with Gill to Los Angeles to retrieve appellant. 26 RT 4042.

Gill contacted Kevin Jackson on August 1, 1996. 26 RT 4092. They interviewed him at the Southwest Detention Center. 26 RT 4092.

Then Gill contacted the prosecutor, because he could not make any deals, and together they interviewed Kevin Jackson. 26 RT 4093.

Dr. Joseph Choi, a forensic pathologist for the Riverside Sheriff Coroner's Office, performed an autopsy on Monique Cleveland on June 19, 1996. 25 RT 3819-3821. She died of massive hemorrhaging from the right and common carotid arteries, which were severed. 25 RT 3836. She had a single gunshot wound, with an entrance hole on the left cheek and an exit hole below the right ear on the neck. There was gunpowder tattooing on the left cheek. 25 RT 3825.

The entrance hole was oval due to the bullet's angle of entry; it would have been a round hole if the bullet had met the face straight. The oval measured three-eighths of an inch by one-quarter of an inch. The exit wound was half an inch. 25 RT 3829. Dr. Choi estimated the muzzle was about three inches away when the gun fired. 25 RT 3832-3833.

In Dr. Choi's view, the wound was most likely caused by a small caliber weapon, a .25 or .22 bullet, because a "larger bullet cannot make a smaller hole." 25 RT 3839. The bullet fragments and lead particles Dr. Choi collected in the autopsy were unjacketed, from lead slugs. 25 RT 3837. .25 caliber bullets are usually fully jacketed, and .22 caliber bullets are usually unjacketed. 25 RT 3839. Dr. Choi could not "absolutely" rule out a .38 caliber projectile as causing the injury, but it was "not likely." 25 RT 3840.

Phillip Pelzel, a senior criminalist with the state Department of Justice, explained the operation of a Taurus .357 magnum revolver, a gun provided for demonstration purposes. 26 RT 4108, 4116-4117. It fired a variety of .38 cal. ammunition, including .38 special cartridges and .357

magnum cartridges. 26 RT 4117-4118. After it was fired, the cartridge stayed in the revolver. 26 RT 4118.

A .38 caliber bullet is .357 of an inch in diameter. 26 RT 4143. Pelzel did not know whether it was possible for a .38 caliber bullet to penetrate a body leaving an entrance would of just a quarter-inch. 26 RT 4144.

All guns produce some muzzle flash. If the marks evident on an autopsy photograph of the decedent's face were muzzle flash, then the muzzle flash was more consistent with a shot fired from a .357 handgun than one fired from a .22 handgun. But Pelzel could not identify the marks as muzzle flash. 26 RT 4136.

Pelzel identified two objects – Item 14 and Item 16 – as .38 caliber bullets.[5]

Elissa Mayo, a senior criminalist in the serology section of the California Department of Justice Riverside Crime Lab, was called to the Betty Road crime scene on June 15, 1996 to document blood patterns. 29 RT 4467, 4481. Mayo explained that by examining evidence of blood spatter at a crime scene, patterns could be ascertained and a point of origin for the blood could be determined. 29 RT 4472, 4484.

Mayo first discussed the blood patterns in the front of the home. 29 RT 4485-4491, and then turned to the second major area of blood, in the

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[5] William Davies, a forensic technician with the Riverside County Sheriff's Department, documented the crime scene with photos and diagrams, and collected evidence. 25 RT 3866-3875-3910. Davies testified that Photo 118 showed evidence Item 16, the bullet removed in the dirt underneath the kitchen floor below the bullet hole labeled J. 25 RT 3914. Item 14 was a bullet that was removed from the south wall of the bathroom off the hallway. 25 RT 3914-3915.

back, in the bathroom and the door-frame to the master bedroom. 29 RT 4481. There was a large pool of blood, and spatter on the walls. 29 RT 4481. There was blood spatter no higher than 12 inches from the floor on some objects. 29 RT 4483.

There was blood evidence on the master bedroom door itself. 29 RT 4492. Item G showed a gunshot "wound" to the exterior of the door. 29 RT 4496. Photo 113 showed a bullet hole through a towel inside the bathroom. Picture I showed a projectile that was recovered from a wall. 29 RT 4496. Picture 68 was of the hallway bathroom. 29 RT 4497. There were blood smears on the counter, and also diluted-appearing blood along the sink area. 29 RT 4497. An area in the hallway contained a substantial amount of blood. 29 RT 4498. People's 130 was a photo of the doorframe and door. 29 RT 4498. There was significant blood spatter present on the doorjamb, part of the wall and part of the door. 29 RT 4498.

Mayo had prepared a model to depict the blood pattern evidence, though the model was not to scale. 29 RT 4499-2500. It showed direction and placement of the victim in the crime scene to make it easier to explain how she thought the shot occurred. 29 RT 4500. Mayo placed a cutout in the approximate position of the victim in the photos. 29 RT 4501. The blood spatter was at a maximum two feet from the ground. 29 RT 4501. Mayo testified:

> "[T]he shot was from somewhere inside the frame of the master bedroom directed out into the hallway impacting part of the door frame and part of the wall." 29 RT 4501.

The victim's position was consistent with a wound occurring no higher than 2 feet off the ground. 29 RT 4503. Mayo could not say if the shooter was right- or left-handed. 29 RT 4503.

There was a large pool of blood under the victim's head. 29 RT 4504. The victim's feet were behind her. 29 RT 4505. Her position was consistent with the gunshot being where she lay. 29 RT 4505. Mayo saw no evidence of a struggle by the victim before she was shot. 29 RT 4505.

Dr. Frank Rogers, a plastic surgeon, treated Robert Cleveland at Riverside County Hospital in June of 1996 and thereafter. 27 RT 4239-4247. Cleveland had multiple gunshot wounds and was stabilized in the emergency room. 27 RT 4240.

After being evaluated and stabilized, Cleveland would have been transported directly to the operating room. 27 RT 4241. Medical records indicated he had an entry wound in the right lower abdomen, with injury to the colon and spillage of fecal material. 27 RT 4241. The abdominal surgeon did not describe finding or removing a projectile. 27 RT 4247.

Dr. Rogers operated on the facial injuries nine days after they occurred. 27 RT 4246. Cleveland had two injuries to the face, on the right in front of the ear, and on the left anterior cheek, below the eye. 27 RT 4244. The injury was consistent with a .22 caliber gunshot wound to the face, due to the size of the apparent entry and exit points, the small wound channel, and the presence of lead fragments indicating an unjacketed projectile. 27 RT 4248-4249.

B. Joseph Canada Robbery.

On July 15, 1991, Joseph Canada pulled over to the side of the road in Perris to eat his lunch in his car, a black Nissan. 27 RT 4167. After eating, he dozed off, and woke up to find a black male teen pointing a shotgun in his face. 27 RT 4168-4169-4170.

Three other teenage males sat in a Jeep Cherokee parked 15 feet

away, also pointing shotguns at Canada. 27 RT 4170-4171. The teen near him demanded the keys to his car and wallet, and directed him to lay face down on the ground behind his car. 27 RT 4171. The teens left in Canada's car and the Jeep; Canada went to a nearby house and called the police. 27 RT 4178-4180.

Shortly thereafter, Riverside County Sheriffs' Deputies Burchett and Welch heard a call over the radio about a carjacking in Perris. 27 RT 4192. The deputies saw a white Jeep traveling past them with three black males in it. 27 RT 4193. The deputies went in pursuit, in separate vehicles. 27 RT 4193. The pursuit terminated in Perris. The suspects had run into a mobile home. 27 RT 4200. A standoff ensued; the first person emerged over two hours later. 27 RT 4203.

After the police apprehended the teens, Canada identified the teen who came to his car as Jackson. 27 RT 4179-4181. The incident affected Canada. 27 RT 4187-4188.

C. Empire Drug Store Robbery.

On July 29, 1992, Derrick Palmer and his cousin Jonathan Jackson entered the Empire Drug store in Los Angeles, yelling "Robbery." 28 RT 4385-4387, 28 RT 4370. Jonathan approached employees Kenny Johnson, Jr. and Daila Llamas in the break room, put a gun in Johnson's face, and made Johnson get on the floor. 28 RT 4374. Jonathan demanded that Johnson tell if there were cameras in the store and pressed the gun into Johnson's neck, threatening him with death. 28 RT 4374. Derrick went straight to the pharmacy and put the store owner, Melvin Nakashima, on the floor, hurting him. 28 RT 4389. Derrick and Jonathan took the money and ran from the store. 28 RT 4383. Nakashima pursued them with a gun and

shot at them. Johnson did not remember the robbers firing their guns. 28 RT 4383-4384.

They split the money and went to Hawthorne. 28 RT 4431-4433. Derrick's mother found out that they had committed the robbery, and turned them in to the police. 28 RT 4434.

Jonathan, Derrick and a third person, Troyan Bedford, were prosecuted for the robbery. Jonathan pleaded guilty to a violation of Penal Code section 211 on October 19, 1992. 3 CT 906, Exhibit 139.

Daila Llamas and Martha Barron, employees of Empire Drug when it was robbed, testified as to the impact of the crime on them. 28 RT 4393, 4400.

D. Riverside Incident September 1994.

On September 7, 1994, City of Riverside Police Officers Miera and Toussaint were patrolling in an unmarked car. 27 RT 4257, 4264-4265. They saw two Cadillacs driving at a high rate of speed, and pulled over a yellow Cadillac containing three black males. 27 RT 4260.

After determining that the driver had a suspended license, Officer Toussaint received permission to search the vehicle, and asked the right front passenger, Jackson, to step out. 27 RT 4261. Miera saw a handgun lying on the seat, a loaded .25 semiautomatic. 27 RT 4261-4262. Jackson was arrested (27 RT 4263) and convicted of being a felon in possession of a firearm (3 CT 905, Exhibit 139).

E. Mule Creek State Prison June 1995.

Corrections officer James Ghan testified that, in June 1995, in Facility A of Mule Creek State Prison, there were "factions" in the yard,

including Mexicans, Crips, Bloods, and 415s. On June 29, 1995, the Crips gathered in an area along the track. 28 RT 4303.

The 415s were a group of black inmates from the Bay Area. The day before, there had been three different fights between the Crips and the 415s. 28 RT 4304. Ghan noticed that Hispanic and white factions were "staying clear" and he surmised that "something was brewing." 28 RT 4307.

A group of 415s started running toward and rushing the Crips. 28 RT 4308-4309, 4321. Ghan yelled at the inmates over the P.A. to "get down" and stop. 28 RT 4307. Ghan then fired a warning shot with his rifle. 28 RT 4312. The inmates fought. 28 RT 4307-4312. People started running to help the Crips. Eighteen people were eventually involved. 28 RT 4311.

Ghan observed an inmate kicking another inmate who was down and could not defend himself. 28 RT 4312. Ghan fired at the inmate doing the kicking, and injured him. 28 RT 4312. The person that Ghan shot was later determined to be a member of the 415s. 28 RT 4321. The person who was kicked was a Crip, but not Jackson. 28 RT 4321-4322. Officer Greg Mason recognized Jonathan Jackson among the Crips who were attacked, but not as one of the fighters. 28 RT 4431. Ghan did not personally observe who was who in the melee or who held weapons. 28 RT 4322.

F. Mule Creek State Prison August 1995.

On August 8, 1995, Vern Nichols, a correction sergeant, was working inside Administrative Segregation Facility C. 28 RT 4357-4361. The control booth officer said the yard was down, which indicated there was a fight in the yard. 28 RT 4361.

Nichols went to Yard 2 and told the inmates to get down; some did not respond. 28 RT 4362. He asked another officer to identify those prisoners in Yard 2. 28 RT 4363. Jonathan Jackson was among those identified. 28 RT 4362. He was in the company of two other inmates, Bass and Bradley. 28 RT 4363.

One of the three said, "Fuck you. We don't have to get down." Nichols did not know which prisoner said it. 28 RT 4363-4364. All three, including Jackson, were written up for a disobeying an order. 28 RT 4364.

G. Mule Creek State Prison November 1995.

Floyd Haynes worked at Mule Creek Prison on November 11, 1995, and was assigned to Yard A. 28 RT 4337. He noticed a fight near the basketball courts. 28 RT 4339. He saw Jonathan Jackson and Inmate Ruffin fighting. 28 RT 4341-4346. He called for them to get down, then they ceased fighting, and laid down on their bellies. 28 RT 4346-4347. They were escorted to Medical. 28 RT 4347.

Haynes could not recall anything about the other prisoner, nor did he recall Jackson's age and size at the time. 28 RT 4348. He did not have any idea whether Jackson was merely defending himself from Ruffin. 28 RT 4349. Haynes did not follow up on the investigation to learn whether Jackson was at fault. 28 RT 4349.

H. Detention Center Incident September 1996.

On September 7, 1996, William Rose, a correctional deputy with the Riverside County Sheriff's Department, did the night head count. 27 RT 3922. Each inmate had to answer with his first name and show identification bands at the time of head count. 25 RT 3925. Jonathan

Jackson did not answer immediately, so Rose raised his voice and asked Jackson to step out of his cell. 25 RT 3926-25 RT 3932-3933. Jackson complied. 25 RT 3932-3933. Rose could not recall whether Jackson used derogatory language, but he testified that Jackson used profanity, so Rose handcuffed him. 25 RT 3933-3934, 25 RT 3926. Another deputy, Gruwell, also handled Jackson, facing him toward the wall, and apparently pushed his head into the wall. 25 RT 3934. Jackson then challenged them to a fight, and was escorted to a holding cell. 25 RT 3928.

I. Detention Center Incident June 1997.

On June 11, 1997, Jerry Baker was a correctional officer with the Riverside Sheriff's Department, assigned to Presley Detention Center. 27 RT 4157. Jonathan Jackson and Robert Mayo were assigned to his unit. 27 RT 4159.

Although Baker did not see the incident from the beginning, he saw that Jackson and Mayo had gotten into an altercation. 27 RT 4159-4160. They looked like they were wrestling. 27 RT 4160. Jackson said that Mayo had entered his cell for unknown reasons, so he punched him. 27 RT 4160. It was a violation of jail rules for Mayo to be in Jackson's cell. 27 RT 4164. Mayo said he went into Jackson's cell to borrow soap. 27 RT 4160.

Baker was able to break up the altercation via intercom, and neither man appeared injured. 27 RT 4165-4166.

Robert Mayo testified that he was in jail for possession for sale of rock cocaine and in the same cellblock as Jonathan Jackson on June 11, 1997. 29 RT 4455. According to Mayo, he got frustrated while playing basketball, and got into it with Jackson. 29 RT 4456. Mayo was generally

frustrated with being in jail. 29 RT 4459. He was angry that day at everyone, not just Jackson. 29 RT 4462. The guards told them to go to their separate cells. 29 RT 4456.

Mayo then went into Jackson's cell, with an attitude, because he did not like the way the earlier dispute was resolved. 29 RT 4457-4460. Jackson said something Mayo did not like, and Mayo pushed Jackson. 29 RT 4457. Mayo finally started to leave the cell after about two minutes of scuffling, and Jackson hit him on the back of the head on his way out. 29 RT 4457-4458. The deputies did not have to intervene to break up the fight; they stopped on their own. 29 RT 4458.

J. Victim Impact Evidence.

Jeanette Burns, the only witness to testify regarding the impact of Monique Cleveland's death, was Monique's (Nikki) second cousin. 28 RT 4271. Jeanette was Nikki's matron of honor at her wedding. 28 RT 4280.

Nikki liked going to church and school. 28 RT 4272-4273. Nikki received many honors and degrees and wanted to become a doctor. 28 RT 4272. Nikki was very close to her mother, who was present in the courtroom. 28 RT 4275, 4272. Nikki had gone into the military. 28 RT 4286. Nikki did not drink, smoke, or run the streets. 28 RT 4276-4284. She was a role model for the family, and Jeanette's sons called on Nikki for help with their homework. 28 RT 4274.

At the time of Nikki's death, Jeanette and Nikki worked together at a loan place in Moreno Valley. 28 RT 4288. Nikki continued to take computer classes. 28 RT 4289.

Nikki never dated before she met her husband. The family owned a club, the Starlight Inn. 28 RT 4281. Cleveland played pool there, and met

Nikki. 28 RT 4281. Jeanette knew that Cleveland was the biggest drug dealer in Mead Valley, but did not tell Nikki that. 28 RT 4290-4291. Jeanette did tell Nikki that she thought Cleveland was not the right person for her. 28 RT 4291. Jeanette thought Nikki would have married a doctor or someone who was in school. 28 RT 4282.

Jeanette "kind of figured" that Nikki was pregnant, and asked her, but Nikki just smiled. 28 RT 4285. Nikki wanted to be a housewife and go to school. 28 RT 4282.

After Nikki's death, her mother became ill with heart problems and went into the hospital for a week. 28 RT 4284-4285. Jeannette recounted the circumstances under which she learned of her cousin's death. Nikki's death was hard on Jeanette. 28 RT 4278.

Dr. Joseph Choi, the pathologist who performed the autopsy, testified that there was placental tissue and an amniotic sac in the victim's uterus, with a 10-millimeter embryo inside the sac, which he photographed. 25 RT 3840. People's Exhibit 211A was a photo of the amniotic sac and placenta. 25 RT 3840. Dr. Choi pointed out the embryo's head, back, spine, and legs. 25 RT 3840. The victim was about one month pregnant when she died. 25 RT 3841.

The prosecution also introduced, and played for the jury, an eighteen-minute victim impact videotape with music, featuring photographs of the crime scene, of the decedent, both alive and dead, of her tombstone, and of certificates and personal memorabilia from her life, including her wedding. 31 RT 4747.

K. The Case in Mitigation.

The case in mitigation featured testimony from four of Jonathan Jackson's family members: his mother, Paula Rice; his brother, Antione Rice, and his maternal grandparents, Walter and Ora Mae Rice.

Paula Rice, Jonathan Jackson's mother, was the daughter of Walter and Ora Mae Rice. 30 RT 4608-4610. Walter and Ora Mae each had children from other marriages and relationships. 30 RT 4608. Paula's father Walter was not a consistent presence in her life, moving in and out of the house. 30 RT 4608. Paula's father would take his paychecks and go gambling, leaving the family without enough money to live. 30 RT 4609. Her parents were separated for 17-18 years. 30 RT 4643. Her father had no role in Jonathan's upbringing. 30 RT 4643.

When Paula was 13, her parents separated and lived apart. Paula stopped going to school at the tenth grade. 30 RT 4608.

Paula got pregnant at age 16 with her first son, Antione. She became pregnant with Jonathan at 17 by John Jackson. 30 RT 4610. John Jackson never contributed financially or emotionally to support her and Jonathan. 30 RT 4611-4612. After Jonathan's birth, they went to live at her mother's house at 74th and San Pedro. 30 RT 4612.

For the first three years of his life, Jonathan was frequently hospitalized with bronchitis. When Paula would go to see Jonathan in the hospital, "He would just scream and holler when I got ready to leave, so the people at the hospital told me to stay away until it was time for him to come home, because it would get him in an uproar because I had to leave." 30 RT 4613. They would put him in a cage so he could not climb out – a baby bed with the rails pulled up and a net over the top. The hospital staff told her not to come back until it was time for him to leave. 30 RT 4613.

Paula did not work. 30 RT 4614. She received public assistance, and lived on and off with her mother or father. 30 RT 4614-4615.

When Jonathan was almost four, Paula met, over the phone at his sister's house, a man who was in the state penitentiary, Alonzo Stewart. When Alonzo got out of prison, they got together. He was a nice looking guy with good manners who treated her well, at first. 30 RT 4615.

Paula moved them in with Alonzo when Jonathan was about 5 years old. 29 RT 4569.

Alonzo started making Jonathan and Paula sit in the car all day long while he worked. Paula had no say-so in the decision; she was afraid, because Alonzo would "go off" and fight her. 30 RT 4620. She had no toys in the car for Jonathan; they were only permitted to "sit there." 30 RT 4620. There were no toys in the house either, and the boys were not allowed to go outside and play. 30 RT 4622. They were prisoners. 30 RT 4628. Antione and his brother did not play together; they just sat still, because their mother told them to do so. 29 RT 4589. Antione, 16 months older than Jonathan, had specific recollections of the time living with Alonzo. 29 RT 4570. All four of them slept in the same room. 29 RT 4587. Alonzo started locking Paula and Jonathan in the house instead of making them sit in the car. 30 RT 4622. After locking Paula and Jonathan in, Alonzo would take Antione to kindergarten, then go to work. 30 RT 4622.

Antione saw Alonzo physically beat his mother numerous times, using his fist and hands, and weapons, including belts, and anything else he could get his hands on. 29 RT 4572-4573. Antione would stand back and cry. However, Jonathan attacked Alonzo while he was beating his mother. Alonzo would continue to hit their mother and sometimes throw Jonathan,

around 3 years old, across the room. Antione described the household environment: "Torture. Agony. Pain. Unhappy. Whole nine yards." 29 RT 4573. His mother reacted to the abuse; she was afraid, withdrawn. 29 RT 4574. The abuse affected his relationship with his mother. 29 RT 4574. This went on for over a year, maybe two years. 30 RT 4631.

Alonzo sexually abused Paula in front of Jonathan and Antione. 30 RT 4631.

Alonzo would threaten Paula to gain her cooperation in his criminal activities. 29 RT 4575. Antione stated, "We would ride along in a car. He would get out, steal another car, and have my mother follow him." 29 RT 4574. This criminal activity happened numerous times. At the time, Antione had no perception that it was a crime; it was just an everyday thing. 29 RT 4574.

Finally, Paula got sick of the abuse; one day, she stabbed Alonzo in the arm with her sewing scissors. He released her and got out the door. 30 RT 4631.

After the stabbing incident, Paula moved back to her mother's house with the children. 30 RT 4632-4633. At first, she stopped seeing Alonzo. Then, he caught her going to a friend's house, and told her if she was with anybody else, what he would do to them and do to her; but if she went back to him, he would never put his hands on her again. Thereafter, she continued to see him. 30 RT 4633.

Their relationship ended after someone set Alonzo on fire, causing third-degree burns from head to toe. 30 RT 4633. Alonzo came in his burned condition to Paula's mother's house, where Jonathan witnessed him pulling the last layer of skin off his arm. Antione recalled walking out of the bathroom at his grandma's house and "seeing Alonzo standing there

with his flesh burning." 29 RT 4575. He looked, with his third-degree burns from head to toe, "like he was melting." 29 RT 4575. Jonathan was standing about 5 feet away from Alonzo. 29 RT 4575.

Alonzo died three weeks later. 30 RT 4634. Alonzo never apologized to the boys for the way he treated them before he died, or for the way he treated their mother. Their mother never talked to Antione and Jonathan about Alonzo, or explained anything about him. Antione and Jonathan were never taken for counseling to deal with all the horrors of knowing Alonzo. 29 RT 4576.

After Alonzo, Paula took up with Robert Fields. He became the father of her daughters Tamara, then 16, and Tierra, then 14. Paula never lived with Fields but saw him for a long time. He played a very small role in Jonathan's upbringing. 30 RT 4635. He took them places they had not been before, including amusement parks. 30 RT 4635.

After Paula ended the relationship with Fields, she took up with James Ferrell. 30 RT 4639. Ferrell was an alcoholic who did not work. He would stay home, drink beer, smoke weed and play dominoes. 30 RT 4640. Her children did not like him. 30 RT 4639. There were instances when Jonathan had to defend her from Ferrell. 30 RT 4639. Jonathan was twelve to fourteen years old at the time. 30 RT 4640.

The boys knew that their Uncle Kendel participated in gang activity with the Seven Trey Gangster Crip gang. 29 RT 4577. Paula and the boys moved to Inglewood, to a Blood neighborhood. 30 RT 4636. To protect the boys from the gang members, Paula would only let the boys out on Fridays, but they could not go too far. She knew that the boys were attacked by opposing gang members on their way to and from school, so she picked the boys up from school. 30 RT 4637.

One evening she arrived to pick the boys up but they were not there; a girl told her gangs had chased her sons. She drove down the street and saw some boys beating on one boy. Then she found her boys in the bushes, hiding. 30 RT 4638.

They moved from Crips neighborhoods to Blood neighborhoods and back. In a Bloods neighborhood at 105th and Compton Avenue, they wanted Jonathan in the gang. An older guy paid two boys to come fight Jonathan, and a girl came and got Paula when she heard about it. 30 RT 4638. Paula allowed the fight to happen because she did not want Jonathan to be jumped. 30 RT 4639. After Jonathan beat both boys twice, they kind of left him alone. 30 RT 4638.

At age 15, Antione was caught up in the criminal justice system, his first contact with law enforcement. 29 RT 4580, 4593. After a fistfight at school, Antione kicked someone's tooth out, and broke his thumb. 29 RT 4593. Antione was charged with assault and battery, and received a four-year sentence. He was sent to Camp Scudder, where he had problems at the camp involving gang activity and fights, which added time to the sentence he was serving. 29 RT 4581. A counselor saw potential in him, and spent a lot of time helping him see another way of life in his future. 29 RT 4581-4582, 4595. Antione was back out of Camp Scudder when Jonathan robbed the drug store in 1992. 29 RT 4594.

Paula heard that Jonathan and his cousin Derrick robbed the Empire Drug Store, and got away. Paula went to Newton Street station and reported that her son Jonathan was involved in a robbery and she would bring him in. 30 RT 4641. She turned him in to the juvenile facility on Central. 30 RT 4642.

Antione went in the military in 1992. 29 RT 4595. Antione was aware of Jonathan's robbery of the pharmacy in L.A. He was in boot camp at the time. He was kind of hurt. He had some contact with Jonathan when he was in prison. 29 RT 4603. Antione visited him when he had been incarcerated. 29 RT 4595.

Asked whether he ever tried to help his brother, Antione testified: "That's the problem. I don't think I ever did. . . . " 29 RT 4601.

Ora Rice, appellant's maternal grandmother, testified generally in corroboration of the testimony of other family members, though she stated that at age seventy, "it's hard for me to remember things." 29 RT 4537. She continued to love Jonathan, and spoke with him on the phone; they prayed together. 29 RT 4528.

Walter Rice, appellant's maternal grandfather, testified that in 1993, he moved to Moreno Valley. 26 RT 4551. He had reunited with his wife. When Jonathan got out of prison he came to live with them at their house on Cholla Street. Rice did not know how old Jonathan was then, or at the time of trial. 26 RT 4552.

When Jonathan was living with his grandparents, he was involved in a motorcycle accident. He was hospitalized as a result. Rice visited him in the hospital. Injuries to Jonathan's head, and stomach or side, were visible to Rice. "He was really messed up." 26 RT 4552. Rice did not know how long Jonathan was in the hospital. 26 RT 4552.

After he got out of the hospital, Jonathan came back to live with them. Jonathan still had some problems. His jaw was wired up, and he had bandages and scars on his head. 26 RT 4553.

Jonathan appeared somewhat different after he was released from the hospital. Jonathan "wasn't the happy-go-lucky fellow he was before he

went in the hospital." 26 RT 4553. And "he seemed to be like he was into space at times. . . . " 26 RT 4553.

I. MR. JACKSON'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY REQUIRED HIM TO WEAR A REACT BELT AT THE GUILT AND PENALTY PHASES OF HIS TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO BE FREE OF UNREASONABLE PHYSICAL RESTRAINTS, AND IMPAIRING HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, HIS RIGHT TO BE PRESENT AND TO PARTICIPATE AT TRIAL, AND HIS RIGHT TO A RELIABLE PENALTY PHASE TRIAL.

A. Introduction.

At all stages of his trials, Jonathan Jackson was forced to wear a device capable of inflicting on him, at any moment, a potentially life-threatening electric shock.

The use of electric shock instruments is generally considered barbaric. They have been referred to as a form of "state-sponsored torture and abuse . . . commonly thought to be practiced only outside this Nation's borders." *Hudson v. McMillian* (1992) 503 U.S. 1, 14 (conc. opn. of Blackmun, J.). One such instrument is the "stun belt" or "REACT belt" such as used in this case. "REACT" is an acronym for "Remote Electronically Activated Control Technology."

> "Powered by nine-volt batteries, the belt is connected to prongs attached to the wearer's left kidney region. When activated remotely, 'the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds.' *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1234 (9th Cir. 2001)."[6]

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[6] Although it is not possible to simulate the sensation of such an electric shock, the reader can use a watch to count off eight seconds.

Gonzalez v. Pliler (9th Cir. 2003) 341 F.3d 897, 899.

In *People v. Duran* (1976) 16 Cal. 3d 282, this Court, mindful of the "possible prejudice in the minds of the jurors, the affront to human dignity, [and] the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints," reaffirmed the rule that "'a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a *manifest need for such restraints*.'" *Id.* at pp. 290-291 (emphasis added).

In *People v. Mar* (2002) 28 Cal.4th 1201, this Court made clear that the "manifest necessity" test applicable to shackling and other physical restraints applies to REACT belts. *Id.* at p. 1216.

A manifest necessity arises only when there is a showing, on the record, of "violence or threat of violence or other nonconforming conduct" sufficient to justify the restraint. *Duran, supra,* 16 Cal.3d 282, 291; *People v. Mar, supra*, 28 Cal.4th at p. 1217. Moreover, the court should only authorize "the least obtrusive or restrictive restraint" to provide the necessary security. *Id.* at p. 1226; see also Penal Code section 688, requiring that any person charged with a public offense not be subjected "to any more restraint than is necessary for his detention . . . ." Once the court has determined a REACT belt is warranted, it should then consider the distinct features and risks of a REACT belt to the defendant before compelling its use, including, *inter alia*, the potential adverse psychological consequences and health risks. *Mar, supra,* at pp. 1225-1226.

In addition to the state law limits set forth in *Mar*, the unnecessary use of any physical restraints on a state criminal defendant violates his right to due process under the Fourteenth Amendment. *Holbrook v. Flynn* (1986) 475 U.S. 560, 569-570; *Deck v. Missouri* (2005) 544 U.S. 622, 631-

632. The unnecessary use of physical restraints also violates the Sixth Amendment:

> "[T]he Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. See, *e.g.*, Amdt. 6; *Gideon* v. *Wainwright*, 372 U.S. 335, 340-341, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963). The use of physical restraints diminishes that right. Shackles can interfere with the accused's 'ability to communicate' with his lawyer. *Allen*, 397 U.S., at 344, 25 L. Ed. 2d 353, 90 S. Ct. 1057. Indeed, they can interfere with a defendant's ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf."

Deck v. Missouri, supra, 544 U.S. 622, 631.

Moreover, the improper use of a REACT belt violates a defendant's due process and Sixth Amendment rights, including the right to confer and communicate with counsel, and the right to be present and participate at trial. *Gonzalez v. Pliler, supra,* 341 F.3d 897, 899-900*; United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1304-1306. For this reason, "a decision to use a stun belt must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints." *Durham*, at p. 1306; see also *Gonzalez*, at p. 900 [before a stun belt is used there must be compelling circumstances showing the need for physical restraints, and the court must pursue less restrictive alternatives]; accord, *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 713, 728 [failure to consider and impose less restrictive forms of restraint is violation of due process requiring reversal of conviction]. The erroneous imposition of a REACT belt at the penalty phase of a capital trial further violates the Eighth Amendment by depriving the defendant of a reliable determination of penalty. See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.

In this case, a REACT belt was strapped around Mr. Jackson's waist, over his objection, at his guilt phase trial, and at the first penalty phase trial.

After the first penalty phase ended with a hung jury, Mr. Jackson was again required to wear the REACT belt by a second judge at the penalty phase retrial.

In neither instance did the trial court comply with established constitutional and statutory standards.

At the guilt phase trial, the trial court actually concluded that a REACT belt was ***not*** necessary to restrain Mr. Jackson – but nevertheless required him to be restrained with the REACT belt because the sheriff's department would not provide two deputies unless a REACT belt was employed. This was an abuse of discretion, and constitutional error.

At the second penalty phase, the trial court abused its discretion and violated federal and state constitutional standards; the trial court made numerous errors, including ordering the REACT belt despite a complete absence of on-the-record evidence of any "nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' " *People v. Cox* (1991) 53 Cal.3d 618, 651, quoting *Duran*, *supra*, at p. 292, fn. 11.

As will be shown, the errors were prejudicial, and require reversal of the guilt and penalty phase judgments.

B. Guilt Phase Proceedings.

Before trial, anticipating a prosecution request that Mr. Jackson be physically restrained at trial, appellant's counsel filed a written objection to Mr. Jackson "being physically restrained during any court proceedings in the cases pending against him," accompanied by a memorandum of law

specifically invoking the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution, as well as state law. 2 CT 333, 335-347. The prosecution later filed its "points and authorities regarding shackling of defendant during court appearances." The prosecutor argued that the use of a shock belt did not constitute physical restraint within the meaning of *People v. Duran* (1976) 16 Cal.3d 282, and therefore *Duran*'s protections did not apply. 2 CT 440, citing *People v. Garcia* (1997) 56 Cal.App.4th 1349.

The prosecutor requested that the court, "after conducting an appropriate hearing, order that the defendant be required to wear a restraining belt during the course of the trial. Should the defendant be opposed to wearing such a belt, the . . . court could then offer the defendant the option of wearing shackles . . . ." 2 CT 441-442.

Thereafter, in the course of deciding pre-trial motions, the trial court turned to the question whether Mr. Jackson would be physically restrained. The court stated it would not shackle appellant, but asked Mr. Jackson's counsel for his views on using the REACT belt. Counsel replied that Mr. Jackson had demonstrated his ability to be responsible in the courtroom, and no restraint was needed. 3 RT 300.

The trial court determined it would be "inappropriate to have the react belt." 3 RT 304. The trial court verified with courtroom deputy Young that the deputy was confident that two deputies could "handle the situation" without the REACT belt. 3 RT 304. During the colloquy that followed, the trial court noted:

> "THE COURT: . . . I haven't had a problem with him in court. He has been cooperative. He hasn't mouthed off in any way. And the cases are clear that if I could avoid shackling him or handcuffing

him or anything like that I should do that. So I don't intend to do that." 3 RT 305.

Though the trial court did not consider the medical consequences of using the REACT belt, the court did note that wearing the belt "may have some adverse psychological consequences, I don't know." 3 RT 306.

> "So what I'm going to do is call Captain Moreland, who is the person over in the jail, and tell him that I need to have a second deputy, if you can't provide it I will need to order the react belt, which then will require a second deputy because there is always a deputy that monitors the react belt. So that's what I am going to do." 3 RT 306.

The trial court noted it was "close to" ordering the REACT belt, but did not do so, and advised Mr. Jackson there was no incentive for misconduct. 3 RT 309, 311. A minute order reflects that the defense motion regarding shackling of defendant was granted, with the notation

> "deft to remain unshackled[.] Court orders 2 deputies in Court during trial[.]" 2 CT 466.

The trial court's minute order did not direct the use of the REACT belt.

Despite the minute order, Mr. Jackson appeared at his next court appearance wearing a REACT belt. The trial court stated:

> "I could not be assured of a second officer without having the REACT Belt. That's why we called you yesterday. He does have the REACT Belt on. There is an officer who has been trained in it. It's been approved." 4 RT 335.

The court opined that the REACT belt "should be comfortable enough on Mr. Jackson". 4 RT 336.

Immediately, appellant's counsel informed the court that there was a problem – Mr. Jackson could not lean back, but was limited to sitting in just one position as a result of wearing the REACT belt, and it would be "very

uncomfortable" for him to be limited to sitting in one position "being here all day" for the length of the trial. Counsel requested that the court consider a leg brace in lieu of the REACT belt. 4 RT 336.

The court asked the deputy sheriff in charge of administering the belt if the belt could be readjusted; the deputy said that Mr. Jackson could lean back. The court asked Mr. Jackson:

> "THE COURT: Why don't you lean back?
> "THE DEFENDANT: It's punching up in my side." 4 RT 336.

The deputy sheriff explained that the REACT belt was "designed to be worn around the waist tightly". 4 RT 336. The deputy stated that the instructions for the REACT belt required that the belt be placed over the subject's kidney, and it was "going to protrude because it's designed . . . to protrude." 4 RT 336-337.

The deputy was unable to rearrange the REACT belt away from Mr. Jackson's kidney. A wider chair did not help. 4 RT 337.

The deputy sheriff placed a pillow with the REACT belt to marginally alleviate the pain; Mr. Jackson agreed it was "a little better." 4 RT 338-339.

The trial court stated that in the future, "we'll keep adjusting it [the REACT belt] until it gets comfortable for you, okay?" Mr. Jackson assented. 4 RT 338.

That afternoon, Mr. Jackson's counsel again raised the issue of the REACT belt, reporting that Mr. Jackson had indicated that afternoon that the belt was "very uncomfortable, tighter that it was before." 4 RT 479.

The court instructed the deputy sheriff to try to make Mr. Jackson more comfortable, and noted that

"a REACT belt is something completely concealed around the waist, but there's a box, see, on the hip, over the kidneys, which is where the battery unit is. . . . . [¶] . . .

"Problem is, sitting backwards with the box at the hip now, it's concealed from the jury, so you can't see it, but it certainly can be uncomfortable. . . ." 4 RT 479.

Trial counsel observed that the REACT belt was "cutting [Mr. Jackson] off at the waist," but that problem had been resolved. The trial court instructed the deputy to "[d]o what you can" to make Mr. Jackson comfortable. The deputy confirmed he would do what was possible. 4 RT 480.

The REACT belt was referenced again the next day, when the trial court discussed with counsel and the deputy the security plans to be used for Robert Cleveland's testimony. The issue arose solely because Mr. Cleveland harbored hostility toward Mr. Jackson, according to the prosecutor. The deputy explained that the plan was to have three deputies present in court, one with the REACT belt button. 5 RT 547.

There were no further on-the-record references to the REACT belt at the guilt phase, or the first penalty phase.

C. At the Guilt Phase, The Trial Court, After Determining that a REACT Belt Was Not Necessary, Abdicated its Authority in Mistaken Deference to a Sheriff's Department Policy.

In this case, Mr. Jackson was forced to wear a REACT belt at the guilt phase and first penalty phase, ***not*** because the trial judge determined REACT belt was necessary, but ***despite*** the trial court's determination that the REACT belt was not necessary.

This is unmistakably clear from the record, relevant portions of which are quoted above. The trial court consulted with a deputy sheriff assigned to the courtroom, who believed that two deputies would be sufficient to handle any problems that might arise. 3 RT 300, 303-304.

The trial court determined that two deputies would be adequate, and that there was no need to restrain Mr. Jackson with the REACT belt. 3 RT 306. And the trial court ordered that two deputies be present at trial. 2 CT 466.

Yet the sheriff's department would not provide a second deputy without the REACT belt. The trial court, in response -- and despite its determination that a REACT belt was not necessary -- ordered Mr. Jackson restrained with the REACT belt. 4 RT 335.

As this Court stated in *People v. Mar, supra*, 28 Cal.4th at p. 1218:

> "the cases emphasize that a trial court under *Duran* is obligated to make its *own* determination of the 'manifest need' for the use of such restraint as a security measure in the particular case, and may not rely solely on the judgment of jail or court security personnel in sanctioning the use of such restraints. As we explained in *People v. Hill* (1998) 17 Cal.4th 800, 841: '[*Duran*'s] emphasis that a showing exist on the record of 'manifest need' for shackles presupposes that it is the trial court, not law enforcement personnel, that must make the decision an accused be physically restrained in the courtroom. A trial court abuses its discretion if it abdicates this decision-making authority to security personnel or law enforcement. (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825 [abuse of discretion to delegate shackling decision to bailiff]; *People v. Jacla* (1978) 77 Cal.App.3d 878, 885 [same].)'" (Original emphasis.)

In this case, the trial court violated the standards of *Duran* and *Mar*, abusing its discretion and transgressing constitutional boundaries, by requiring Mr. Jackson to wear the REACT belt despite its determination

that this harsh measure was not necessary, in mistaken deference to sheriff's department policies.

The trial court should have directed compliance with its determination that two deputies would be sufficient to satisfy security concerns and the REACT belt was not necessary. The court plainly had the authority to do so. Code of Civil Procedure section 128, subdivision (a)(5) confers broad and plain authority upon the trial court to

> "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."

Penal Code section 1044 gives the trial court the duty and plenary authority to control the proceedings before it. Every court also has the "inherent power . . . to conform its procedures to the fundamentals of due process." *People v. Superior Court (Schomer)* (1970) 13 Cal.App.3d 672, 680.

The trial court did not have the discretion to elevate compliance with sheriff's department policies above a defendant's constitutional right not to be restrained with a REACT belt unless necessary for courtroom security.

Moreover, as if this abdication of authority were not enough, the trial court allowed the REACT belt despite the absence of any on-the-record evidence of nonconforming behavior by Mr. Jackson. As this Court has emphasized, such a showing is required. *Duran, supra,* 16 Cal.3d at pp. 291-292.

Additionally, in violation of constitutional standards, the trial court failed to make any inquiry into Mr. Jackson's medical suitability to be restrained with a REACT belt; had it done so, Mr. Jackson's unsuitability would have been revealed. *People v. Mar, supra*, 28 Cal.4th at p. 1229; see discussion at subsection E.5, *infra* (incorporated herein by reference).

D. Penalty Phase Proceedings.

As noted in the Statement of the Case, the first jury was unable to agree on a verdict, and the trial court declared a mistrial. 3 CT 870, 869. Some jurors were apparently troubled by questions of lingering doubt. 3 CT 872.

After the first trial, the trial judge had contacts with the trial jurors, which he later disclosed to trial counsel. When the district attorney's office decided to proceed with a penalty phase retrial, Mr. Jackson's counsel successfully moved to recuse the trial judge, and the case was reassigned to a different trial judge, the Hon. Russell Schooling. 3 CT 875-876, 879, 881.

The REACT belt issue was raised by the prosecutor in pre-penalty phase proceedings; she stated that "we probably need to decide it by Monday." 20 RT 3000. The trial court responded

> "*I've been informed that there was a need for such by the sheriff's department and my deputy.* And so I had indicated we would address that today." 20 RT 3000 (emphasis added).

Trial counsel objected, arguing that the REACT belt was both unnecessary, and extremely uncomfortable. He pointed out that Mr. Jackson had not done anything unruly, or exhibited disrespect in court. Counsel urged the court to use the leg brace instead. 20 RT 3000. The trial judge stated:

> "It's my understanding that although there has not been any issue in the courtroom, there has been sufficient issues out of the courtroom that give rise to considerable concern for the safety of the public and the safety of the deputies who would be called upon to attend to the security of the defendant and the people in attendance. So that fact that he has not acted out in the courtroom itself is not necessarily determinative. The Court can look at and needs to look at the totality of the situation and make a decision based upon that.

> Unfortunately, my bailiff who brought the subject to me originally is not with us this morning." 20 RT 3001.

The trial court did not, however, obtain further information from the bailiff, or evidence from any other source, substantiating the need for Mr. Jackson to be restrained with a REACT belt.

Mr. Jackson's counsel pointed out that the belt was large and uncomfortably placed on his kidney-liver area. Counsel stated he was worried about unconscious grimacing by Mr. Jackson, and expressions of discomfort that might be construed as a reaction to testimony. 20 RT 3002.

Instead of considering the prejudicial impact of the REACT belt, the trial court minimized it:

> "I've seen it used in other instances in my courtroom, and I haven't noticed that much physical discomfort on the part of the inmate."

20 RT 3002.

The trial court recognized that a leg brace would adequately address the potential for an escape attempt. 20 RT 3003. But the trial court reasoned that a leg brace would not keep Mr. Jackson from attacking others. 20 RT 3003.

> "THE COURT: . . . But from the little I've seen, it appears that the defendant is sufficiently violent that it's not a matter of we're concerned about so much his escape, which would be the subject of the leg restraint, or whatever you call it – I've forgotten the word you used.
>
> "MR: CHANEY: The leg brace.
>
> "THE COURT: The leg brace. And that would solve the problem of escape, which is not really – it is a concern also, of course. But here we're concerned about the violent nature of his responses to people in authority. And that is just not sufficiently addressed by a leg brace. . . ." 20 RT 3003.

The trial court declared that the leg brace was insufficient to secure the safety of the public, and ordered the REACT belt, plus a pillow, to be used on Mr. Jackson. 20 RT 3004; 3 CT 885-886.[7]

E. The Trial Court Abused Its Discretion in Ordering Mr. Jackson to Wear the REACT Belt at the Second Penalty Phase.

1. The Trial Court Failed to Apply *Duran*, Erroneously Presuming the REACT Belt to be a Less Restrictive Alternative to Shackling.

As explained above, before a trial court may impose physical restraints upon a defendant at a criminal trial, the court must satisfy the "manifest necessity" standards of *People v. Duran*, *supra*, 16 Cal.3d 282

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[7] Moreover, during jury selection at the second penalty phase, trial counsel brought an issue arising from the restraint to the court's attention:

> "MR. CHANEY: One quick third thing. I talked to Deputy Portillo very briefly about this and didn't have a chance to talk to Deputy Morales. Yesterday it came to my attention that Jonathan Jackson's instructions at counsel table are to face forward, not turn around at all.
>
> "Because this is an unusual proceeding where we have all the jurors behind us, I'm asking for permission to let him turn and be able to look at the jury, because I realized yesterday that he hasn't seen any of these jurors. *He's not able to participate fully in helping me select this jury. And plus I don't want to give the wrong impression to the jurors that he doesn't care and he's not going to turn around and be able to look them in the eye.*" 23 RT 3362 (emphasis added).

The trial court suggested that Mr. Jackson move to the end of the table. 23 RT 3362.

and, under federal due process guarantees, imposition of restraints must be justified by a showing of "compelling circumstances" demonstrating the need for physical restraints, and the court must pursue less restrictive alternatives. *Gonzalez v. Pliler*, *supra*, 341 F.3d at p. 901.

Here, just as in *People v. Mar*, *supra*, 28 Cal.4th at p. 1222:

> "there is nothing in the trial court's . . . comments . . . that indicates it was aware that the procedural and substantive requirements established in *Duran* governed its consideration and determination of defendant's objection to the use of the stun belt."

The prosecutor argued that the imposition of the REACT belt was "not like shackling a defendant," and did not require the court to make specific findings regarding the defendant. 20 RT 3001-3002. The trial court presumed that the REACT belt was less "offensive" than traditional shackles. 20 RT 3004.

> "THE COURT: . . . And the Court now has the points and authorities in favor of, the points and authorities in opposition to the shackling, as well as -- I don't see any reason for shackling if we have – this react belt available to us, and it does appear we do. And therefore it appears that that is the appropriate remedy, vis-à-vis shackling, which I find most offensive and would like to avoid at all costs simply by reason of the reaction that has been generated by the appellate courts to that." 20 RT 3004.

The trial court's operative assumption that a REACT belt is "the appropriate remedy, vis-à-vis shackling," was incorrect. *People v. Mar* states:

> "any presumption that the use of a stun belt is always, or even generally, less onerous or less restrictive than the use of more traditional security measures is unwarranted."

People v. Mar, supra, 28 Cal. 4th at p. 1228. In fact, as *Mar* makes clear, the use of a REACT belt requires additional considerations by the trial judge before it may pass constitutional muster. *Id.*

2. The Trial Court Ordered the REACT Belt Despite the Absence of Any Evidence of Nonconforming Behavior in the Record.

The trial court's misconception about the level of judicial scrutiny brought to bear on REACT belts as compared to shackles led it to make further errors, including failing to assure on-the-record evidence of nonconforming conduct, and relying on off-the-record, undisclosed, non-sworn oral representations.

In *People v. Mar, supra*, 28 Cal.4th at pp. 1220-1221, this Court stated:

> "As we have seen, the court in *Duran* explicitly held that ***'[t]he showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record*** and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. ***The imposition of physical restraints in the absence of a record showing of violence or threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'*** (*Duran, supra,* 16 Cal.3d 282, 291, italics added.) *Duran* further explained that 'it is the function of the court . . . to initiate whatever procedures the court deems sufficient in order that it might make *a due process determination of record* that restraints are necessary.' (*Id.* at p. 293, fn. 12, italics added.) Subsequent cases applying *Duran* establish that '[w]hile no formal hearing as such is necessary to fulfill the mandate of *Duran*' (*People v. Cox, supra,* 53 Cal.3d 618, 651-652), when the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, ***sufficient evidence of that conduct must be presented on the record*** so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated

> comments of others. (See, e.g., *Cox, supra,* 53 Cal.3d at pp. 649-652; *People v. Hill, supra,* 17 Cal.4th 800, 839-842.)"

In this case, the trial court ordered that Mr. Jackson wear a REACT belt at his penalty phase retrial in the absence of "a record showing of violence or threat of violence or other nonconforming conduct," in clear violation of the standards of *Duran* and *Mar*.

Just as in *Mar*,

> "in this case the security officials who placed the stun belt on defendant made no on-the-record showing of any circumstances to support the imposition of a stun belt on defendant and the trial court failed to require any such showing."

People v. Mar, supra, 28 Cal.4th at p. 1220.

Nor was any other "evidence of that [nonconforming] conduct . . . presented on the record" in connection with the prosecution's motion.

Not only was there no record showing of nonconforming conduct – the trial court inappropriately relied on out-of-court statements of an unidentified bailiff, who

> "knew something of the background of the defendant."

20 RT 3000, 3001.

But the bailiff was not available when the court decided the motion. 20 RT 3001-3004.

Accordingly, what the bailiff purportedly knew – and the trial court relied upon -- was not disclosed on the record. Nor was the bailiff sworn. The bailiff was not subject to cross-examination.

It was a violation of federal and state due process guarantees and the Sixth and Eighth Amendments for the trial court to rely on off-the-record, undisclosed, non-sworn oral evidence – and nothing else – in determining that Mr. Jackson would wear a REACT belt at the penalty phase of his trial.

3. The Trial Court Failed to Consider the Absence of Evidence of Escape Attempts or Threats, and Mr. Jackson's Unbroken Record of Courtroom Cooperation Over More than Three Years of Proceedings.

The trial court stated that it "need[ed] to look at the totality of the situation and make a decision based on that." 20 RT 3001. But it notably failed to do so.

Whether or not it is likely that a criminal defendant will disrupt court proceedings is, of course, a critical question in determining the suitability of restraints. The trial court failed to consider factors that indicated that Mr. Jackson posed no serious or likely threat of disrupting courtroom proceedings, and that if any measure of restraint was necessary, it was one far less extreme and burdensome than a REACT belt.

Just as in *Gonzales v. Pliler, supra,* 341 F.3d 897, 902:

> "the trial court did not determine 'by compelling circumstances that some measure was needed to maintain security of the courtroom.' *Id.* The record is completely devoid of any action taken by the defendant in the courtroom that could be construed as a security problem. . . . Gonzalez did not create any disturbance at trial. He did not try to escape. He made no threats. Despite this, the trial court did not even hold an evidentiary hearing before ordering the use of the belt. This procedure did not satisfy the safeguards required by the Constitution."

Similarly, in this case Mr. Jackson did not create any disturbance in any court. He did not try to escape. He made no threats.

Mr. Jackson attended courtroom proceedings no less than 37 times before he was first ordered to wear the REACT belt. See 1 CT 10, 12, 14, 15, 18, 28, 29, 30, 207, 215, 216, 217, 218, 219, 222, 223, 224, 225, 226,

227, 228, 229, 230, 235, 236, 237, 243-244, 245-246, 247, 248, 254, 255, 275, 280; 2 CT 389, 444-466.

His conduct, during all court appearances stretching over 39 months – from July 30, 1996 (1 CT 010) through October 21, 1999 (3 CT 885-886) -- had been blameless.

Mr. Jackson had already been tried for his life once. He had not misbehaved or "acted out" in any way.

The trial court failed to consider the compelling disincentive for Mr. Jackson to attempt physical violence on others at the second penalty phase. He had heard the jury instructed on the applicable law at the first penalty phase trial and knew, presumably, that any and all aspects of his character would be open to evaluation by the jurors. Committing acts of violence would only assure the jurors would view him negatively, and increase the likelihood he would be sentenced to death. Mr. Jackson knew there was a realistic possibility he would not be sentenced to death -- he had not been sentenced to death in the first penalty phase trial. It clearly made more sense for him to try to achieve a life sentence by behaving well, rather than to make a violent, long-shot attempt to escape, or, worse, act out violently for no reason at all.

Under these circumstances, Mr. Jackson had every incentive to continue his consistent record of rational, unproblematic courtroom behavior, and no reason to act out.

The trial court abused its discretion by failing to consider, before ordering the REACT belt, the absence of any evidence of threats, Mr. Jackson's unbroken, three-year-plus record of courtroom cooperation, and his strong incentive to continue that record of cooperation.

4. The Trial Court Failed to Consider Less Drastic Alternatives.

As this Court made clear in *People v. Mar, supra*, 28 Cal.4th at p. 1226:

> "[E]ven when the record in an individual case establishes that it is appropriate to impose some restraint upon the defendant as a security measure, *a trial court properly must authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purposes*. [Citations.]" (Emphasis added.)

Accord, *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636 ("[D]ue process requires the trial court to engage in an analysis of the security risks posed by the defendant and to consider less restrictive alternatives before permitting a defendant to be restrained.")

Here, even assuming *arguendo* it was appropriate to impose some security measures, the trial court failed to consider other measures apart from shackling and the REACT belt. The trial court found that a leg brace

> "would solve the problem of escape, which is not really – it is a concern also, of course. But here we're concerned about the violent nature of his responses to people in authority. And that just is not sufficiently addressed by a leg brace. . . . " 20 RT 3003.

But the trial court failed to consider and weigh whether measures less restrictive and obstructive than either shackles or the REACT belt would satisfy court security needs.

Notably, the trial court failed to consider whether the combination of two deputies in the courtroom, together with the leg brace, would be adequate to ensure court security under the circumstances. It is relevant in this context to note that Mr. Jackson is not a physically-imposing individual, but is "a little guy." 9 RT 1518; see 1 CT 061. At the guilt phase trial, the trial court had solicited the view of deputy sheriff Young,

who stated his view, on the record, that two deputies would be sufficient. 3 RT 304. And the trial court at the guilt phase had found this proposed procedure sufficient. 3 RT 305-306.

As discussed above, Mr. Jackson had no history of misbehavior in court, no incentive to engage in misbehavior, and the most compelling disincentive not to misbehave – entirely without the REACT belt. Under these circumstances, the trial court at the second penalty phase abused its discretion, and violated constitutional standards, by failing to consider less restrictive alternatives, including the two-deputy alternative that had been found satisfactory (though not implemented) at the guilt phase.

5. The Trial Court Failed to Inquire About or Consider Potential Adverse Medical Consequences of the REACT Belt to Mr. Jackson.

In *People v. Mar, supra*, this Court discussed some of the potential adverse health consequences of the REACT belt:

> "[T]he manufacturer of the REACT stun belt and regular users of the device apparently recognize that the stun belt poses special danger when utilized on persons with particular medical conditions, such as serious heart problems. (Welsh, *Electroshock Torture and the Spread of Stun Technology, supra*, 349 The Lancet 1247; see also Schulz, *supra*, N.Y. Review of Books at p. 53 [quoting statement of the Assistant Director of the Federal Bureau of Prisons indicating the bureau's policy not to use stun belts on " '1) pregnant female inmates, 2) inmates with heart disease, 3) inmates with multiple sclerosis, 4) inmates with muscular dystrophy, and 5) inmates who are epileptic' "].) Despite these significant medical risks, we are unaware of any formal procedural safeguards that have been established to *ensure that the medical records of defendants for whom the use of a stun belt is recommended have been thoroughly reviewed and, if necessary, that such persons are provided with an adequate medical examination, prior to use of the belt.* Particularly

> when the risk of accidental activation is considered, ***use of a stun belt without adequate medical precautions is clearly unacceptable."***

People v. Mar, supra, 28 Cal.4th at p. 1229 (emphasis added). See *People v. O'Dell* (2005) 126 Cal.App.4th 562 (trial court reversibly erred by ordering that defendant be involuntarily medicated at trial without considering the particular circumstances of defendant's medical condition).

In this case, the trial court ordered use of the REACT belt without any medical precautions whatsoever, and without any inquiry into Mr. Jackson's medical suitability for the REACT belt.

In fact, the record shows that Mr. Jackson was a completely unsuitable candidate for a REACT belt due to medical issues.

According to the uncontroverted testimony of several prosecution witnesses at the guilt phase trial, Mr. Jackson had been injured in a motorcycle accident, and had been discharged from the hospital shortly before the crimes in this case.

Prosecution witness Kevin Jackson told the jury that when Mr. Jackson made incriminating statements to him the day after the shootings, he had recently been released from the hospital, where he had been for injuries resulting from a motorcycle accident, and had stayed quite a while. 9 RT 1510, 1552-1553. In fact, Kevin Jackson had gone to a "little party" when Mr. Jackson got out of the hospital, and confirmed that he had an obvious head injury – and had a large scar down the middle of his forehead. 9 RT 1553.

Prosecution witness Donald Profit confirmed that he had also seen Mr. Jackson with an evident serious head injury from a motorcycle accident at the party that was held for him after Mr. Jackson got out of the hospital. Profit further confirmed that -- nearly three years after the events in

question, and three years after Mr. Jackson's motorcycle accident and hospitalization -- he could see Mr. Jackson's scar from his head injury from the witness stand at trial. 11 RT 1787, 1830-1831.

The scar ran up the middle of Mr. Jackson's forehead. 11 RT 1831.

It is generally recognized that serious head injuries, requiring hospitalization, can result in brain damage that may cause epilepsy. See *Colangelo v. State Bar* (1991) 53 Cal.3d 1255, 1262 (attorney suffered temporal lobe epilepsy resulting from head injury). It is estimated that post-traumatic epilepsy resulting from brain injury represents more than 20% of all cases of symptomatic epilepsy.[8]

There is a substantial, non-negligible risk of accidental or otherwise unnecessary activation of the REACT belt. There have been "a disturbing number of accidental activations of the REACT stun belt." *People v. Mar, supra*, 28 Cal.4th at p. 1228.

This Court has recognized that the deliberate or accidental activation of a REACT belt can cause, among other physiological or neurological events, seizures. *People v. Mar, supra*, 28 Cal.4th at pp.1215; *Gonzales v. Pliler, supra*, 341 F.3d at p. 899. A law review comment cited with approval by this Court in *Mar* reports, in pertinent part:

> "The British Forensic Science Service found that high-voltage, short-duration impulses, similar to those inflicted by the belt, could cause heart attacks, ventricular fibrillation, and ***possibly death in people with epilepsy*** or individuals using psychotropic medications."

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[8] Gupta A, Wyllie E Lachhwani DK (2006). The Treatment of Epilepsy: Principles & Practice. Hagerstwon, MD: Lippincott Williams & Wilkins, 521-524. ISBN 0-7817-4995-6.

Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions* (1998) 30 St. Mary's L.J. 239, 250-251 (emphasis added).

Under these circumstances, and with all due respect, it was nothing short of reckless for the trial court to order that Mr. Jackson – a person who had suffered a serious head injury, the scar from which was clearly visible three years after the accident – be strapped to a REACT belt at the penalty phase. It was an abuse of discretion to do so under any circumstances; the abuse is especially egregious because the trial court not only failed to ensure adequate medical precautions, but failed even to inquire into the safety of the REACT belt's use on the obviously head-injured Mr. Jackson.

6. The Trial Court Failed to Consider the Psychological Effects of the REACT Belt, or to Make Findings Regarding its Use or Visibility.

The trial court also completely failed to consider the psychological impact of the REACT belt upon Mr. Jackson. This was an abuse of discretion because the judge must "take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and give considerable weight to the defendant's perspective in determining whether traditional security measures -- such as chains or leg braces -- or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." *People v. Mar, supra,* 28 Cal.4th at 1228; see *People v. O'Dell, supra,* 126 Cal.App.4th 562 [failure to consider the facts and special circumstances of the defendant's case provided insufficient evidence to support involuntary

medication of the defendant].)

Moreover, the trial court also did not even consider whether or not the REACT belt was visible to the jury, or whether the remote control activating device was visible (see *Gonzales v. Pliler, supra,* 341 F.3d 897, 903 ["The trial court did not make any findings about whether the activating device was visible to the jury"]), and further failed to consider either the design of the REACT belt, or the risk of accidental activation (*People v. Mar, supra*, 28 Cal.4th at pp. 1230, 1228-1229). These failings also demonstrate that the trial court abused its discretion, and violated due process and Sixth and Eighth Amendment guarantees.

7. Conclusion.

Thus, as shown above, the trial court at the second penalty phase failed to apply *People v. Duran, supra*, and erroneously presumed the REACT belt was less offensive to constitutional values than shackling, applying a lesser degree of scrutiny than was required. The trial court ordered Mr. Jackson to wear the REACT belt in the absence of any record evidence that Mr. Jackson had committed, or was at serious risk to commit, any nonconforming act that would disrupt the courtroom, instead relying on off-the-record comments of an unidentified bailiff. The trial court failed to consider the absence of evidence of escape attempts or threats, and Mr. Jackson's unbroken record of courtroom cooperation over more than three years of court appearances, and his incentive to continue his cooperation. The trial court failed to consider less drastic alternatives, including whether additional courtroom security would obviate any perceived need for physical restraints beyond a leg brace. The trial court failed to inquire about, let alone consider, the possible adverse medical consequences to the

head-injured Mr. Jackson if the REACT belt were activated. And the trial court failed to consider the psychological effects of the REACT belt, or to make any findings regarding its visibility, or its use, or the visibility of the activating device.

Any one of these failures, standing alone, is enough to demonstrate an abuse of discretion under California law, and a violation of due process and the Sixth and Eighth Amendments under the federal constitution. Taken together, they make the conclusion of error inescapable.

F. The Judgment Must Be Reversed Because Mr. Jackson Was Prejudiced By Being Forced To Wear A REACT Belt During The Guilt Phase and Second Penalty Phase.

In *People v. Mar, supra*, this Court determined that even under the *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818, 836-837), the improper use of a REACT belt in the circumstances of that case was prejudicial. But the Court pointedly left open the proper standard of prejudice in future cases:

> "Although this court has not addressed the issue directly, a number of Court of Appeal decisions have suggested that at least when the physical restraints imposed upon a defendant are not visible to the jury, trial court error under the *Duran* decision properly is subject to the *Watson* prejudicial error standard. [Citations.] None of these decisions, however, involved the improper use of a stun belt, where the greatest danger of prejudice arises from the potential adverse psychological effect of the device upon the defendant rather than from the visibility of the device to the jury. In *United States v. Durham, supra,* 287 F.3d 1297, the Eleventh Circuit recently held that when a trial court without making adequate findings improperly requires a defendant to wear a stun belt, the error is of federal constitutional dimension and " 'reversal is required unless the State proves the error was harmless beyond a reasonable doubt.' " (*Id.* at p. 1308.) Because we conclude that the

error in the present case was prejudicial even under the *Watson* standard, *we need not determine whether the trial court's error in requiring defendant to testify while wearing a stun belt, without an adequate showing of danger, constituted federal constitutional error that is subject to a more rigorous prejudicial error test.*"

People v. Mar, supra, 28 Cal.4th at p. 1225 fn. 7 (emphasis added).

Federal courts have long recognized the erroneous imposition of physical restraints to be of federal constitutional dimension. As demonstrated above, erroneous imposition of a REACT belt is a federal constitutional error.

As this brief will show, under Supreme Court precedent, the improper use of a REACT belt is not subject to harmless error analysis.

At a minimum, the error should be subject to the *Chapman* prejudice standard. *Chapman v. California* (1967) 386 U.S. 18, 23-24

But under any standard of prejudice, the trial court's erroneous impositions of a stun belt on appellant during the guilt phase and second penalty phase requires reversal of the judgment.

1. The Erroneous Imposition of a REACT Belt on a Defendant is Not Subject to Harmless Error Analysis, and Reversal is Required Under *Riggins v. Nevada.*

In *Arizona* v. *Fulminante* (1991) 499 U.S. 279, as explained in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, the Court had

> "divided constitutional errors into two classes. The first we called 'trial error,' because the errors 'occurred during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' *Id.*, at 307-308, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (internal quotation marks omitted). These include 'most constitutional errors.' *Id.*, at 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302. The second class of

> constitutional error we called 'structural defects.' These 'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'"

United States v. Gonzalez-Lopez, supra, 548 U.S. 140, 148.

The high court emphasized in *Gonzalez-Lopez*, however, that structural error is ***not*** limited to "*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable," though it includes such errors. *Gonzalez-Lopez, supra*, 548 U.S. at p. 148 fn. 4 (orig. emphasis). The Court elaborated:

> "Although it is hard to read [*Arizona v. Fulminante*] as doing anything other than dividing constitutional error into two comprehensive categories, ***our ensuing analysis in fact relies neither upon such comprehensiveness nor upon trial error*** as the touchstone for the availability of harmless-error review. ***Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.*** See *Waller* v. *Georgia,* 467 U.S. 39, 49, n. 9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance'); *Vasquez* v. *Hillery,* 474 U.S. 254, 263, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) ('[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained')."

Gonzalez-Lopez, supra, 548 U.S. at p. 148 fn. 4 (emphasis added).

Thus, the Supreme Court, while continuing to use the terms "structural error" and "trial error," has made clear that these are not separate categories that can be distinguished apart from their effects. Under the approach consolidated and set forth by the Supreme Court in *United States v. Gonzalez-Lopez, supra*, a federal constitutional error is a structural error if it is either impossible or extremely difficult to prove the harmful

effects of the error at trial. *Gonzalez-Lopez, supra*, 548 U.S. at p. 148 fn. 4, and cases cited therein.

Riggins v. Nevada (1992) 504 U.S. 127, is an example of structural error under the high court's paradigm. In *Riggins*, the high court reversed a murder conviction and sentence of death obtained against a defendant who was involuntarily medicated at his trial without an adequate showing that such a measure was justified by an essential interest.

Riggins's robbery and murder convictions had to be reversed because the Nevada courts failed to make sufficient findings to support the forced administration of the drug Mellaril. *Riggins v. Nevada, supra,* 504 U.S. at p. 129. Riggins was not required to show how the trial would have proceeded differently if he had not been given Mellaril, nor was the state given the option of disproving prejudice. *Id.* at p. 137. As the Court explained:

> "***Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative.*** We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. [Citation.] Like the consequences of compelling a defendant to wear prison clothing, see *Estelle* v. *Williams*, 425 U.S. 501, 504-505 (1976), or of binding and gagging an accused during trial, see *Allen, supra*, at 344, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. . . ."

Riggins v. Nevada, supra, 504 U.S. at p. 137 (emphasis added).

The Supreme Court would "not ignore . . . a strong possibility that Riggins' defense was impaired due to the administration of Mellaril." *Riggins v. Nevada, supra,* 504 U.S. at p. 137. The Court held that, even if the Nevada Supreme Court was correct in holding that expert testimony

allowed jurors to assess Riggins's demeanor fairly, "an unacceptable risk of prejudice remained." *Id.* at p. 138.

Although the *Riggins* Court did not expressly invoke the categories of structural error and trial error the Court had first set forth in *Arizona* v. *Fulminante* (1991) 499 U.S. 279, its analysis was entirely consistent with, and in effect was, a determination of structural error.

Though *Riggins* concerns antipsychotic medication and not a REACT belt, its analysis is instructive.

As this Court explained in *People v. Mar, supra,* 28 Cal.4th at pp. 1227-1228,

> "Because its psychological consequences pose a significant risk of impairing a defendant's ability to participate and assist in his or her defense, ***a court order compelling a defendant to wear a stun belt at trial over objection bears at least some similarity to the forced administration of antipsychotic medication to a criminal defendant in advance of, and during, trial.***" (Emphasis added.)

This Court recognized there were "obvious differences" between the administration of antipsychotic drugs and the use of a REACT belt – the belt is not claimed to be medically beneficial, and the literature about its harmful effects is comparatively not as well-established – but found guidance in the opinion of the Supreme Court in *Riggins, supra,* 504 U.S. 127. See *Mar, supra,* 28 Cal.4th at pp. 1227-1228. Specifically, this Court in *Mar* found it significant that *Riggins* also dealt with

> "concerns that arise from the circumstance that ***the state's intervention may result in the impairment, mental or psychological, of a criminal defendant's ability to conduct a defense at trial.***"

People v. Mar, supra, 28 Cal.4th at p. 1228 (emphasis added). As a result, the Court determined that "a trial court must take into consideration the

potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures--such as chains or leg braces--or instead a stun belt constitutes the less intrusive or restrictive alternative for purposes of the *Duran* standard." *Id.*

Just as with the wrongful involuntary administration of antipsychotic medication, the erroneous imposition of a REACT belt on a criminal defendant in violation of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment is highly likely to have harmful effects on the defense, "the precise consequences" of which "cannot be shown from a trial transcript." *Riggins v. Nevada, supra,* 504 U.S. at p. 137.

As this Court explained in *Mar*:

> "The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and ***in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.*** *Promotional literature for the REACT stun belt provided by the manufacturer of the belt reportedly champions the ability of the belt to provide law enforcement with* ' "***total psychological supremacy*** *. . . of potentially troubling prisoners*" ' (*REACT Security Belt, supra,* 30 St. Mary's L.J. 239, 248, citation omitted), and a trainer employed by the manufacturer has been quoted as stating that ' "at trials, people notice that the defendant will be watching whoever has the monitor." ' (Cusac, *Life in Prison: Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry* (July 1996) The Progressive, p. 20.) Other courts have noted that the psychological effect of a stun belt may affect adversely a defendant's participation in the defense (see, e.g.,

> *Hawkins v. Comparet-Cassani, supra,* 251 F.3d 1230, 1239-1240), and, indeed, the Supreme Court of Indiana recently held that stun belts should not be used in the courtrooms of that state at all, because other forms of restraint 'can do the job without inflicting the ***mental anguish that results from simply wearing the stun belt*** and the physical pain that results if the belt is activated.' (*Wrinkles v. State, supra,* 749 N.E.2d 1179, 1194-1195.)"

People v. Mar, supra, 28 Cal.4th at pp. 1226-1227 (emphasis added).

Defendants forced to wear REACT belts may remain physically present in the courtroom. However,

> "[plresence at trial is meaningless if the defendant is unable to follow proceedings or participate in his own defense. Mandatory use of a stun belt implicates this right, because ***despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense***."

United States v. Durham, supra, 287 F.3d 1297, 1306 fn. 7 (emphasis added).

The REACT belt effects a constructive denial of a criminal defendant's right to be personally present at his trial. This in turn impairs his ability to effectively participate in his defense, to confront the witnesses against him, to respond and react to the evidence and to consult with counsel. The Supreme Court has consistently held that due process and confrontation principles guarantee a criminal defendant's right to be present "at every stage of his trial where his absence might frustrate the fairness of the proceedings." *United States v. Gagnon* (1985) 470 U.S. 522, 526-527; *Illinois v. Allen* (1970) 397 U.S. 337, 338.

Because the erroneous imposition of a REACT belt in violation of due process and Sixth Amendment guarantees leads to harms that are impossible to reliably quantify, reversal of the entire judgment of conviction is required.

2. In Any Event, Reversal Is Required at the Penalty Phase Without A Prejudice Inquiry.

Even assuming for purposes of analysis that the unconstitutional imposition of a REACT belt on a criminal defendant at an ordinary trial of guilt does not amount to structural error that is reversible without an actual prejudice inquiry, this Court should alternatively hold that the erroneous imposition of a REACT belt on a death penalty defendant at the penalty phase is reversible *per se*.

As we have seen in the preceding discussion, unconstitutionally requiring a defendant to wear a REACT belt at a criminal trial brings with it a heightened yet unquantifiable risk of serious prejudice. Indeed it may, *inter alia,* eviscerate a defendant's ability to take a meaningful part in the proceedings. *People v. Mar, supra*, 28 Cal.4th at pp. 1226-1227; *United States v. Durham, supra*, 287 F.3d 1297, 1306 fn. 7. All the reasons why erroneous imposition of a REACT belt is prejudicial at the guilt phase apply with at least equal force in the penalty phase context.

But there is an additional compelling reason to find the erroneous imposition of a REACT belt at a penalty phase trial is reversible *per se*.

This is because, at the sentencing phase of a capital trial, the jury can and does consider all aspects of the defendant's character and background. This inevitably includes the jurors' observations of the defendant in the courtroom while he is on trial for his life -- as the defendant reacts to evidence and rulings, consults with his counsel, occupies himself during down-time, and otherwise comports himself in public, under pressure.

This Court has squarely held that a prosecutor may comment in argument on the demeanor of a death penalty defendant during trial, and the

jury may properly consider that demeanor. *People v. Navarette* (2003) 30 Cal.4th 458, 516 ("a defendant's demeanor at trial—which, like the demeanor of witnesses, is rarely reflected in the record—is relevant at sentencing."). Indeed, a prosecutor may argue that, based in part on his demeanor at trial, a defendant deserves death. *People v. Cunningham* (2001) 25 Cal.4th 926, 1023; *People v. Beardslee* (1991) 53 Cal.3d 68, 113–114.

Justice Anthony Kennedy explained, with reference to involuntary medication in his concurring opinion in *Riggins v. Nevada, supra*:

> "As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. *The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness.* ***In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.*** See Geimer & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 51-53 (1987-1988)."

Riggins v. Nevada, supra, 504 U.S. at pp. 143-144 (conc. opn. of Kennedy, J.) (emphasis added).

This Court, in its opinion in *People v. Gurule* (2002) 28 Cal.4th 557, 598 footnote 8, quoted the above language from Justice Kennedy's *Riggins* concurrence.

The empirical evidence confirms that Justice Kennedy, and this Court, are correct about the critical role of remorse.[9]

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[9] In an empirical study that used data from California capital sentencing proceedings and was funded by the National Science

(footnote continued on next page)

Thus, it can be especially prejudicial to the defense for the defendant to remain passive while horrific descriptions of the crime are put in evidence. Yet if the REACT belt – which was specifically designed by its manufacturer to achieve "total psychological supremacy" over its subjects (*Mar, supra*, 28 Cal.4th at p. 1226) – works as advertised, a defendant will be removed, for the duration of the penalty phase trial in front of the jury, from a condition in which he may react, and interact, normally, into a state of abject psychological domination that all but guarantees he will not respond appropriately, or in a manner that a jury might conclude reflects remorse. The use of the REACT belt, to the contrary, greatly magnifies the chance one or more jurors will perceive, based on a defendant's in-court reactions and behavior at the penalty phase, that the defendant in fact *lacks* all remorse, and therefore deserves to die. See *Riggins, supra,* 504 U.S. at pp. 143-144 (conc. opn. of Kennedy, J.).

This is an unacceptable risk for a system of justice that values due process. For these reasons, this Court should hold that, under the Eighth and Sixth Amendments, the federal Due Process Clause, and their

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Foundation, the evidence showed that

> "Above all else, however, the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defendant's remorse."

Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty,* 83 *Cornell Law Review* 1557, 1561-1562 (1998).

> "What struck jurors again and again was the defendant's lack of emotion during the trial, even as the prosecution introduced into evidence horrific depictions of his crimes."

Id. at p. 1563.

California Constitutional correlatives, the unlawful imposition of a REACT belt on a capital defendant at the penalty phase trial is structural error, warranting reversal without an actual prejudice inquiry.

3. Even Assuming the Erroneous Use of a REACT Belt Is Subject to Harmless Error Review, Reversal Is Required Under Both the *Chapman* and the *Brown* Standards.

Assuming that erroneously forcing a criminal defendant to wear a REACT belt during trial, in violation of the Fourteenth, Sixth and Eighth Amendments, does not require reversal as structural error, this Court should hold that the *Chapman* standard applies in determining whether the erroneous use of a REACT belt requires reversal. The same standard in substance and effect applies to penalty phase error under state law. *People v. Brown* (1988) 46 Cal.3d 432, 448; see *People v. Ashmus* (1991) 54 Cal.3d 932, 965.

Under *Chapman,* the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Chapman v. California, supra,* 386 U.S. at p. 24.

The prosecution will not be able to meet this burden.

II. THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE JURY'S EXPRESS FINDING THAT THE MURDER WAS COMMITTED WHILE MR. JACKSON WAS ENGAGED IN THE COMMISSION OF A ROBBERY; ACCORDINGLY, THE FELONY-MURDER CONVICTION, SPECIAL CIRCUMSTANCE FINDING, AND JUDGMENT OF DEATH MUST BE REVERSED.

A. The Prosecution's Special Instruction, and the Jury's Special Finding.

Penal Code section 190.4, subdivision (a), provides, in part, that "[w]henever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance." In this case, only one special circumstance was alleged. The jury at the guilt and special circumstance trial was instructed pursuant to CALJIC 8.81.17 that to find the special circumstance true, it must find, *inter alia*, that the murder was committed "while the defendant was engaged in the commission or attempted commission of a robbery". 12 RT 1966, 2015; 2 CT 549. The jury was similarly instructed on both robbery and attempted robbery with regard to the prosecution's felony-murder theory. 2 CT 544; CALJIC 8.21.

The prosecution also requested a three-paragraph special instruction focusing on robbery:

> "You are instructed that if you find the defendant, Jonathan Keith Jackson, guilty of murder of the first degree, as charged under count I of the information, then you shall also make a finding in one of the following forms as to whether the murder was committed while the defendant, Jonathan Keith Jackson, was engaged in the commission of, attempted commission of, and the immediate flight

> after committing and attempting to commit the crime of robbery, in violation of section 211 of the Penal Code, within the meaning of Penal Code section 190.2 (a)(17)(i):
>
> "We, the jury in the above-entitled action, find that the murder of Monique Cleveland, as charged under count I of the information, was committed while the defendant, Jonathan Keith Jackson, *was engaged in the commission of the crime of robbery*, in violation of section 211 of the Penal Code as alleged in the allegation of special circumstance, within the meaning of Penal Code section 190.2 (a)(17)(i),
>
> or
>
> "We, the jury in the above-entitled action, find that the murder of Monique Cleveland, as charged under count I of the information, was not committed while the defendant, Jonathan Keith Jackson, was engaged in the commission of the crime of robbery, in violation of section 211 of the Penal Code as alleged in the allegation of special circumstance, within the meaning of Penal Code section 190.2 (a)(17)(i)."

2 CT 588 (emphasis added).

In accordance with the prosecution's request, the trial court so instructed the jury. 12 RT 2069-2070. The prosecutor's requested instruction omitted any mention of attempted robbery.

The jury found Mr. Jackson guilty of felony-murder, found the special circumstance true, and returned this special finding:

> "We, the jury in the above-entitled action, find that the murder of Monique Cleveland, as charged under count I of the information, was committed while the defendant, Jonathan Keith Jackson, was *engaged in the commission of the crime of robbery*, in violation of section 211 of the Penal Code as alleged in the allegation of special circumstance, within the meaning of Penal Code section 190.2 (a)(17)(i)."
>
> "Dated: 5 May 1999 [signed by Foreperson]"

3 CT 609 (emphasis added) (capitalizations omitted).

B. The Taking Element of Robbery.

The jury did not find that the murder was committed while Jonathan Jackson was engaged in the *attempted* commission of a robbery. 3 CT 609.

Penal Code section 211 defines robbery:

> "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

The crime of robbery is not the same as the crime of attempted robbery. As this Court stated in *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165:

> "We have held that ***once all elements of a robbery are satisfied, the offense has been initially committed and the principal may be found guilty of robbery, as distinct from a mere attempt***. (See, e.g., *People v. Bigelow* (1984) 37 Cal.3d 731, 753, and cases cited therein.) This threshold of guilt-establishment is a fixed point in time, but is not synonymous with 'commission' of a crime for our purposes.
>
> "For purposes of determining aider and abettor liability, the commission of a robbery continues until all acts constituting the offense have ceased. ***The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot.***" (Emphasis added.)

People v. Bigelow (1984) 37 Cal.3d 731, 754 made the same point in slightly different language:

> "In the case of robbery, for example, ***the crime is committed -- as distinct from a mere attempt -- when the defendant removes the victim's property***. (See *People v. Gibbs* (1970) 12 Cal.App.3d 526, 548; *People v. Green* (1979) 95 Cal.App.3d 991.)"

(Emphasis added.) See *People v. Anderson* (1966) 64 Cal.2d 633, 638; *People v. Carroll* (1970) 1 Cal.3d 581, 585; *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433.[10]

Thus, under this Court's precedents, in order to prove a defendant guilty of robbery, as distinct from attempted robbery, the prosecution must prove beyond a reasonable doubt each of the "two necessary elements" of "the taking element" of robbery (*Cooper, supra*, 53 Cal.3d at p. 1165): that the defendant (or a co-principal) (1) gained possession of the victim's property, and (2) carried away that property.

In this case, the prosecution failed to prove that Mr. Jackson, or any other alleged participant in the crimes at issue, had obtained possession of a victim's property, let alone carried away that property.

C. The Constitutional Standard.

A criminal defendant's state and federal rights to due process of law, a fair trial, and reliable determinations of guilt and penalty are violated when criminal sanctions are imposed on the basis of a conviction and/or special circumstance finding that is not supported by sufficient evidence. U.S. Const., Amends. V, VI, VIII, XIV; Cal.Const., Art. I, sec. 1, 7, 15, 17;

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[10] By contrast, to establish the crime of *attempted* robbery, the prosecution must prove that the defendant committed an act with the intent to steal:

> "'[T]o constitute an attempt, there must be (a) the specific intent to commit a particular crime, and (b) a direct ineffectual act done towards its commission . . . To amount to an attempt the act or acts must go further than mere *preparation;* they must be such as would ordinarily result in the crime except for the interruption.'"

In re Smith (1970) 3 Cal.3d 192, 200 quoting 1 Witkin, Cal.Crimes (1963) § 93, at p. 90; see 2 CT 541 (CALJIC 6.00).

In re Winship (1970) 397 U.S. 358, 364; *People v. Rowland* (1992) 4 Cal.4th 238, 269; *People v. Marshall, supra,* 15 Cal.4th at pp. 34-35.

Under the federal due process guarantee, the test is

> "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia (1979) 443 U.S. 307, 319. Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. *Id.* at p. 320.

Applying the federal constitutional standard, this Court stated in *People v. Bolden* (2002) 29 Cal.4th 515, 553:

> "'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)"

The same standard also governs review of the sufficiency of the evidence to support a special circumstance finding under Penal Code section 190.2. *People v. Tafoya* (2007) 42 Cal.4th 147, 170; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497.

Moreover, in capital cases such as this, the Supreme Court has made clear that a heightened standard of reliability is required by the Eighth and Fourteenth Amendments to the federal constitution. *Woodson v. North Carolina, supra*, 428 U.S. 280, 305. This heightened reliability required by the Constitution in capital cases applies to the guilt determination, as well as to penalty. *Beck v. Alabama* (1980) 447 U.S. 625, 638.

D. The Constitutional Standard Applied.

The record in this case contains no "evidence that is reasonable, credible, and of solid value" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128) from which a rational trier of fact could find that the murder was committed while appellant was engaged in commission of the crime of robbery. The overwhelming weight of the evidence was to the contrary; even in the light most favorable to the prosecution, the evidence does not show more than an attempt.

The most critical witness was the alleged robbery victim.

Robert Cleveland testified that after Jackson shot him, one of Jackson's companions, the man with the semiautomatic, shot him in the side (7 RT 1076) before stepping into the house. 7 RT 1096, 1148. The man then demanded to know where the drugs and money were. 7 RT 1076. Cleveland pointed to the kitchen light and then heard the light cover fall. 7 RT 1096, 8 RT 1228. He did not see anyone "go in the area" of the light. 7 RT 1096.

According to Robert Cleveland, there were 11 ounces of cocaine in the house that night: two ounces in the light fixture, and nine ounces in the second bedroom inside a panel by the roof. 7 RT 1114, 8 RT 1203. There was $4,500 in the closet panel in a brown bag (8 RT 1204) and Cleveland had about $1,200 in his wallet. 8 RT 1241.[11] He may have had some other cash in a pants pocket. 8 RT 1210.

All the drugs and money were accounted for, and none had been taken.

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[11] Cleveland initially testified that there was about $2,500 in the wallet (7 RT 1143), and later corrected himself. 8 RT 1240.

Law enforcement recovered the two ounces of cocaine from the light fixture itself. 7 RT 1114. The prosecution introduced into evidence a brown paper bag containing the two ounces of cocaine that law enforcement recovered from the fixture. 8 RT 1206, 1212; Exhibit 11.

Cleveland called his friend and landlord Blanton from the hospital to instruct him to recover the cocaine and the money from second bedroom. 8 RT 1210-1211. Cleveland told Blanton "this guy from L.A. would come and pick it up." 8 RT 1211, 1232-1233. Blanton delivered the cocaine in a brown paper bag. 8 RT 1237-1238. Michael Blanton confirmed Robert Cleveland's testimony. 8 RT 1310, 1317, 1328.

Blanton did not find the money, and when Cleveland returned from the hospital, the money was still there. 8 RT 1211-1212.

Cleveland's cousin later retrieved his wallet from his home, and returned it to Cleveland, with "[e]verything that was in it." 8 RT 1241.

Investigator Sheldon Gill testified that he collected $507 in cash from a pair of pants in the bedroom. 11 RT 1903; see 9 RT 1415 (testimony of forensic technician William Davies).

Cleveland admitted he could not testify that anything was missing from his house. 7 RT 1142. He testified that he did not believe anything was taken. 8 RT 1212. Indeed, when the prosecutor made the suggestion that "narcotics was essentially the motive of this incident," Cleveland refused to agree:

> "[W]hen I told the guys that all I had was the two ounces of narcotics that were up in the light fixture, there's no way in the world they would have left it up there if that's what they came for, and the police end up having the narcotics. I feel that they came to kill me." 7 RT 1114.

Kevin Jackson, who testified that Jonathan Jackson confessed to him the day after the crimes, never saw Jonathan Jackson with any cocaine or money while at the Simmons residence (9 RT 1565-1566) and Jonathan Jackson did not tell him that he took any cocaine or money from Cleveland. 9 RT 1565. Kevin Jackson told law enforcement he did not see Jonathan Jackson with any quantities of cocaine or money after the shootings. 11 RT 1908-1909.

Far from establishing the elements of a completed robbery, this evidence establishes that a robbery did not occur. Even the fact that most closely approaches a complete crime – that after one of the participants demanded to know where the drugs and money were, Robert Cleveland pointed to the recessed light fixture, and then heard the fixture fall to the ground – falls far short of a completed crime. In view of victim Robert Cleveland's testimony as to the recovery of the drugs from the house, and that he knew of nothing that was taken from him, which was substantially corroborated by the testimony of Michael Blanton and Investigator Gill, a reasonable trier of fact could not infer from this evidence that any of the principals "gain[ed] possession of the victim's property," let alone carried it away. *People v. Cooper, supra,* 53 Cal.3d at p. 1165. At most, the testimony shows, one of the participants made an ineffectual attempt to gain possession of the victim's drugs.[12]

The only testimony that drugs or money were taken from the Cleveland residence was not the testimony of a victim, or of a law enforcement officer, but that of an in-custody teenage informant who

[12] There was no evidence that any property whatsoever was taken from Monique Cleveland.

claimed, in testimony replete with contradictions, that Jackson confessed to him.

As shown in the statement of facts, Donald Profit was the younger brother of informant Kevin Jackson, and was incarcerated at the time of his testimony. 11 RT 1748. Profit was 14 or 15 years old when the crimes occurred, and in the ninth grade in a "probation school." 11 RT 1750, 1754, 1829. He claimed that he had witnessed a disagreement over money between Jackson and Robert Cleveland at some undetermined time before the shootings: according to Profit, Jackson disrespectfully refused to pay Cleveland money Jackson owed him and, in response, Cleveland told him he could keep the money "because he [Cleveland] got so much dope that he can ever have," and drove off in his truck. 11 RT 1757-1760. Even though the alleged confrontation was in public, in front of a popular apartment complex, Profit said he was the only witness. 11 RT 1804.

Profit testified that a couple of days after the crimes, he was playing Super Nintendo when Jonathan Jackson came over. They smoked marijuana together, and then Profit was surprised to hear Jackson volunteer that he "messed up," and "shot Rob and his girl." 11 RT 1761-1762.

According to Profit, Jackson next volunteered that he took eight ounces of "dope." 11 RT 1762. Profit claimed that in the days after the shooting, Jackson was selling dope "to everybody," and Profit himself bought cocaine from Jackson. 11 RT 1772-1773.

Substantial evidence, of course, must consist of more than bits of evidence viewed in isolation.

> "The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on isolated bits of evidence."

People v. Bradford (1997) 15 Cal.4th 1229, 1329.

There must be "evidence that is reasonable, credible, and of solid value," from which a rational trier of fact could find the special circumstance true beyond a reasonable doubt. *People v. Tafoya*, *supra*, 42 Cal.4th 147, 170. Donald Profit's testimony was not, even when viewed in the light most favorable to the prosecution, evidence that was of solid value, credible, or reasonable.

Donald Profit could not keep his story straight. Profit testified that it was two weeks *before* Rob Cleveland was shot that he saw Jackson with the eight ounces of cocaine. 11 RT 1816. When the trial judge questioned him on this, Profit testified, unequivocally, that the eight ounces of cocaine he saw Jackson with before Cleveland was shot was "the same eight ounces" of cocaine that Jackson had taken at the time he shot Cleveland. 11 RT 1816.

Profit's story is far from reasonable, credible, and of solid value – instead, it presents an impossibility. It is obviously not possible for Jackson to have possessed eight ounces of cocaine two weeks before the Cleveland shootings, and then to have robbed Cleveland of "the same" eight ounces, which he apparently continued to possess, on the night of the incident.[13]

Profit's testimony collapsed of its own weight. Profit told the jury that he saw Jackson with eight ounces of cocaine variously at Breeds Market (11 RT 1773) or at the barbeque at Wayne's house after Jackson got out of the hospital. 11 RT 1813, 1814. Profit variously said that the

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[13] Unless, of course, some reason existed to believe Jackson returned the drugs to Cleveland, and then robbed Cleveland, taking from him "the same" drugs he had just returned. But there is no evidence supporting this leap of logic, either.

barbecue was after Jackson told him about the shooting (11 RT 1813); not after Jackson told him about the shooting (11 RT 1814); two weeks after Jackson told him about the shooting (11 RT 1815); two weeks before Robert Cleveland was "killed" (11 RT 1815); and that Jackson told him about the shooting a couple of weeks after the barbecue. 11 RT 1833-1834. Profit also said that he had not seen Jackson from a few days after the crimes until that day in court. 11 RT 1770.

Profit first told Investigator Gill that he knew nothing about the shootings, and hadn't seen Jackson in months. 11 RT 1911. Later, Profit told Investigator Gill that Jackson had confessed the shootings to him in April 1996 – two months ***before*** the shootings. 11 RT 1912-1914.

Profit freely contradicted himself. Profit denied, and then confirmed, that part of the reason he was testifying was to help his brother, Kevin Jackson. 11 RT 1808. He both denied and admitted having conversations with the investigator about his brother (11 RT 1809-1810) and he felt that whether he would be able to speak with his family depended on how he testified, and also that it did not depend on how he testified. 11 RT 1810-1811, 1822.

Tellingly, after both counsel had repeatedly questioned Profit and had no further questions, the trial judge – in the jury's presence -- characterized Profit's testimony as "somewhat confused" as to chronology. 11 RT 1833.

After a further attempt at clarification, the trial judge excused Profit from the witness stand. The judge dismissively commented, with the jury present:

> "You are excused subject to recall just for technical purposes, although I don't believe it's likely you will be called back to court. *If they do want to have you come back, they will have to convince*

> *me, and it will take a lot. I will say that.* You are free to go at this time."

11 RT 1834 (emphasis added).

In view of the "entire record" (*Tafoya, supra,* 42 Cal.4th at p. 170), and particularly in light of victim Robert Cleveland's testimony that he did not believe anything had been taken from him, and the corroborating testimony of Michael Blanton, and Investigator Gill, Profit's testimony is simply not "evidence that is reasonable, credible, and of solid value" (*id.*) from which any rational trier of fact could find the taking element of robbery, and thus could find the allegation that the murder was committed during the course of a robbery (3 CT 609) to be true.

E. The Special Circumstance Verdict and Judgment of Death Must Be Reversed.

The prosecutor requested a special circumstance instruction on robbery that omitted any mention of attempted robbery as an alternative theory, and the trial court gave the prosecution's requested instruction. 2 CT 588. In a finding patterned after the prosecution's requested instruction, the jury in this case returned a "true" finding on a single special circumstance under Penal Code section 190.2, that the murder was committed while Mr. Jackson was engaged in the commission of a robbery. 3 CT 609. As this brief has shown, there is constitutionally insufficient evidence to support the jury's express finding that the murder was committed while Mr. Jackson was engaged in the commission of a robbery.

Accordingly, both the special circumstance verdict and the judgment of death, which depends entirely on the unsupported special circumstance finding, must be reversed.

F. The Felony-Murder Judgment Must Be Reversed.

Moreover, the judgment of felony-murder must also be reversed.

As noted above, at the guilt phase, the jury was instructed on both completed robbery and attempted robbery theories of felony-murder. 2 CT 544; CALJIC 8.21.

As demonstrated above, there was constitutionally insufficient evidence of completed robbery to support the conclusion of felony-murder on that theory. Assuming, only for the purposes of this argument, that there was sufficient evidence of attempted robbery, this means there was one factually sufficient ground for conviction, and one factually insufficient ground.

This Court has previously considered just such a situation in *People v. Marks* (2003) 31 Cal.4th 197, 233:

> "Where the jury considers both a factually sufficient and a factually insufficient ground for conviction, <u>and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground</u>. (*Silva, supra*, 25 Cal.4th at pp. 370–371; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129.)" (Emphasis added.)

In closing argument in this case, the prosecutor discussed both attempted robbery and completed robbery, and told the jury that "it doesn't matter" whether the robbery was completed, or merely attempted. 12 RT 1987-1988.

But here, it *can* be determined on which ground the jury relied, and there *is* an "affirmative indication that the jury relied on the invalid ground." *People v. Marks, supra*, 31 Cal.4th at p. 233.

That basis for reliance and "affirmative indication" is found in the unambiguous words of the jury's special finding:

> "We, the jury in the above-entitled action, find that ***the murder . . . as charged under count I of the information, was committed while the defendant . . . was engaged in the commission of the crime of Robbery,*** in violation of section 211 of the Penal Code as alleged in the allegation of special circumstance, within the meaning of Penal Code section 190.2 (a)(17)(i)."
>
> "Dated: 5 May 1999 [signed by Foreperson]"

3 CT 609 (emphasis added).

It is evident from the jury's finding that, in determining Mr. Jackson's guilt of felony-murder "as charged under count I of the information," the jury expressly relied on a theory of completed robbery, and did not rely on attempted robbery.

Because, as shown above, there is insufficient evidence of the taking element of completed robbery, and because the jury expressly relied on this factually insufficient basis for conviction, Mr. Jackson's judgment of conviction of felony murder must be reversed. *People v. Marks, supra*, 31 Cal.4th at p. 233.

III. BECAUSE THE TRIAL COURT INFORMED THE PENALTY PHASE JURY THAT THE GUILT PHASE JURY HAD DETERMINED THAT MR. JACKSON "PERSONALLY USED" A FIREARM IN THE COMMISSION OF THE MURDER, THE TRIAL COURT WAS REQUIRED TO INSTRUCT THE PENALTY PHASE JURY ON THE MEANING OF "PERSONAL USE" OF A FIREARM, AND THE JURY WAS PREJUDICIALLY MISLED BY THE COURT'S FAILURE TO GIVE THE REQUIRED INSTRUCTION.

A. Introduction.

After the first jury was unable to reach a verdict of life without parole or death, the prosecution elected to retry the penalty phase. Before opening statements to the penalty phase jury, at the prosecution's request, the trial court directed the court clerk to read the guilt phase jury's verdicts to the penalty phase jury. 24 RT 3672. The clerk read to the penalty phase jury the guilt phase jury's express finding that Mr. Jackson had, in the commission of the murder, "personally use[d] a firearm". 24 RT 3673.

But the penalty phase jury was never told that the guilt phase jury's express finding that Mr. Jackson had personally used a firearm was made pursuant to an instruction explaining that "The term 'personally used a firearm' . . . means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it." 12 RT 1978; 2 CT 0573.

The guilt phase jury was never called on to specifically decide whether or not Mr. Jackson personally killed the victim, and did not do so. The guilt phase jury's personal use finding is entirely consistent with a determination that Mr. Jackson personally used a firearm, but did not personally shoot the victim.

The instructions under which the guilt phase jury decided the case make this clear. As to the charge of robbery-murder, the guilt phase jury was specifically instructed, at the prosecution's request, that a defendant could be found guilty on a theory of aider-and-abettor liability. 2 CT 546.[14]

The guilt phase jury was further specifically instructed that it need not decide that Mr. Jackson was the actual killer to find the robbery-murder special circumstance true. 12 RT 1966-1967.[15]

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[14] "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery, all persons who either directly or actively commit the act constituting that crime or who have knowledge of the unlawful purpose of the perpetrator of the crime and with the -- with the intent or purpose of committing, encouraging or facilitating the commission of the offense aid, promote, encourage or instigate by act or advice its commission are guilty of murder of the first degree whether the killing is intentional, unintentional or accidental.

"In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the robbery at the time the fatal would was inflicted.".

12 RT 1965 (CALJIC No. 8.27 1998 Rev.).

[15] "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or aider and abettor, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded, induced,

(footnote continued on next page)

The prosecutor specifically argued to the guilt phase jury:

> "you don't need to decide actually in your verdict whether he is the one who actually shot her or not." 12 RT 1988-1989.

Under these circumstances, an instruction informing the penalty phase jury of the meaning of "personal use of a firearm" was necessary to the penalty phase jury's understanding of the guilt phase jury's verdict, and thus also essential to the penalty phase jury's understanding of the case.

The trial court's failure to instruct at all on this critical point violated California law, and additionally violated Mr. Jackson's federal due process and Eighth Amendment rights. The guilt phase jury's findings on personal use of a firearm, as read to the penalty phase jury in the context of the instructions given, led penalty phase jurors to believe that the guilt phase jury had actually decided that Mr. Jackson had personally used a firearm to unlawfully kill Monique Cleveland when, in reality, the guilt phase jury had made no such determination. Because Mr. Jackson suffered prejudice as a result, the penalty judgment must be reversed.

> solicited requested or assisted in the commission of the crime of robbery, in violation of Penal Code Section 211, which resulted in the death of a human being, namely Monique Cleveland.
>
> "A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being."

12 RT 1966-1967; 2 CT 0547-0548 (CALJIC No. 8.80.1, 1997 Rev.).

B. Proceedings at Trial.

As noted above, just before penalty phase opening statements, the clerk read aloud, in pertinent part, the prior jury's murder verdict and special findings:

> "[THE CLERK:] Verdict: We, the jury in the above-entitled action, find the defendant, Jonathan Keith Jackson, guilty of a violation of Section 187 of the Penal Code, murder, as charged under Count I of the Information, and fix the degree as murder in the first degree.
>
> "Dated May 5th, 1999. Signed by foreperson.
>
> "Finding: We, the jury in the above-entitled action, find that the murder of Monique Cleveland, as charged under Count I of the Information, was committed while the defendant, Jonathan Keith Jackson, was engaged in the commission of the crime of robbery, in violation of Section 211 of the Penal Code, as alleged in the allegation of special circumstance, within the meaning of Penal Code Section 190.2(a)(17)(i).
>
> "Dated May 5th, 1999. Signed by foreperson.
>
> "Finding: ***We, the jury in the above-entitled action, find the defendant, Jonathan Keith Jackson, in the commission of the offense charged under Count I of the Information, did personally use a firearm, to wit, a handgun***, within the meaning of Penal Code Sections 12022.5(a) and 1192.7(c)(8).
>
> "Dated May 6th, 1999. Signed by foreperson.
>
> "Finding: We, the jury in the above-entitled action, find that in the commission of the offense charged under Count I of the Information, or of any of the lesser offenses necessarily included therein, a principal was armed with a firearm, to wit, a handgun, said arming not being an element of the above offense, within the meaning of Penal Code Section 12022(a)(1).
>
> "Dated May 5th, 1999. Signed by foreperson."

24 RT 3672-3673 (emphasis added).

After the close of evidence, the trial court instructed the penalty phase jury with respect to the guilt phase findings and verdict as follows:

> "[THE COURT:] Homicide is the killing of one human being by another, either lawfully or unlawfully. Homicide includes murder and manslaughter, which are unlawful, and the acts of excusable and justifiable homicides, which are lawful.
>
> "***Every person who unlawfully kills a human being during the commission or attempted commission of a robbery is guilty of the crime of murder in violation of Section 187 of the Penal Code.***
>
> "A killing is unlawful if it was neither justifiable nor excusable. In order to prove this crime, each of the following elements must be proved: One, a human being was killed; two, the killing was unlawful; and, three, the killing occurred during the commission or attempted commission of a robbery.
>
> "The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime.
>
> "The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.
>
> "***The defendant in this case has been found guilty of murder of the first degree***. The allegation that the murder was committed under a special circumstance has been specially found to be true.
>
> "It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been specially found to be true.
>
> "Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant."

31 RT 4714-4715 (emphasis added); see 9 CT 2696-2699 (CALJIC Nos. 8.00, 8.10, 8.21 8.84).

These were the only instructions given at the penalty phase retrial that described or explained the guilt phase jury's verdicts and special findings regarding the murder, special circumstance, and personal use of a firearm.

By contrast, in conjunction with the special finding regarding personal use of a firearm, the guilt phase jury was correctly instructed, pursuant to CALJIC No. 17.19, that:

> "The term 'personally used a firearm' as used in this instruction means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it."

12 RT 1978; 2 CT 0573 (emphasis added).

The penalty phase jurors, however, never had the benefit of this explanation. Moreover, at no time did the trial court instruct or explain in any way to the penalty phase jurors that the prior jury did not find Mr. Jackson had personally used a firearm to kill the victim.

And, of course, the jurors were forbidden by the trial court's instructions from making any attempt to investigate the law on "personal use," or consult any reference works. 9 CT 2674, 24 RT 3663, CALJIC 1.03 (1998 Rev.).

Since the information at issue was given to "lay jurors not versed in the subtle distinctions that attorneys draw" (*People v. Steele* (2002) 27 Cal.4th 1230, 1266), there is no basis for assuming that such "reasonable lay jurors [were] aware of the correct legal definition" (*People v. Hughes* (2002) 27 Cal.4th 287, 349) of "personal use" in this context.

C. The Trial Court's Erroneous Failure to Instruct.

1. Under California Law the Trial Court was Required to Give a Sua Sponte Instruction Defining "Personal Use of A Firearm."

Trial courts are required to give certain instructions sua sponte:

> "The rules governing a trial court's obligation to give jury instructions without request by either party are well established. 'Even in the absence of a request, a trial court must instruct on general principles of law that are ... necessary to the jury's understanding of the case.' [Citations.] That obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' [citation], or has a technical meaning peculiar to the law or an area of law [citation].' (*People v. Roberge* (2003) 29 Cal.4th 979, 988.)"

People v. Hudson (2006) 38 Cal.4th 1002, 1012, accord, e.g., *People v. Rodriguez* (2002) 28 Cal.4th 543, 547 (sua sponte definition of statutory terms is required when "the jury would have difficulty in understanding the statute without guidance.").

The trial court's failure to instruct the penalty phase jury as to the legal meaning of the language, "personally use[d] a firearm," was erroneous.

Here, the finding that appellant "personally use[d] a firearm . . . within the meaning of Penal Code Sections 12022.5(a) and 1192.7(c)(8)," which was read to the penalty phase jury before its deliberations, does not have a plain, unambiguous meaning.

This Court has held that "a defendant is entitled to proper jury instructions regarding the meaning of a weapon use enhancement allegation which is tried to a jury," and that the trial courts have a sua sponte obligation to give such instructions. *People v. Wims* (1995) 10 Cal.4th 293, 303 (holding trial court erred in failing to give an instruction as to the

meaning of personal use of a weapon); accord, *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319 (instructions are required "particularly [on] the concept of personal use.").

Indeed, juries deciding whether or not a defendant has personally used a firearm under section 12022.5 are given a specific definition of personal use, as set forth in CALJIC No. 17.19: "personal use," in this context, means the defendant either

> "intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it."

Id. The definition is a statutory one, taken from Penal Code section 1203.06.

The reason this instruction is required is that the concept of "personal use" is inherently vague. Federal law is instructive. A federal statute, 18 U.S.C. section 924, subdivision (c)(1), provides for increased penalties when a defendant, "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." The United States Supreme Court has struggled with this statute. In interpreting the meaning of "use," the Supreme Court explained:

> "This action is not the first one in which the Court has grappled with the proper understanding of 'use' in § 924(c)(1). In *Smith*, we faced the question whether the barter of a gun for drugs was a 'use,' and concluded that it was. *Smith v. United States*, 508 U.S. 223, 124 L.Ed.2d 138, 113 S.Ct. 2050 (1993). As the debate in *Smith* illustrated, ***the word 'use' poses some interpretational difficulties because of the different meanings attributable to it.*** Consider the paradoxical statement: 'I use a gun to protect my house, but I've never had to use it.' 'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended."

Bailey v. United States (1995) 516 U.S. 137, 143 (emphasis added).

To say that a defendant "personally used" a firearm in the commission of a homicide could have a range of possible meanings. Consider, for purposes of illustration, four examples of "personal use" of a firearm during a homicide:

(1) A defendant uses a firearm to intentionally shoot and kill the victim.

(2) A defendant carries a concealed firearm during the commission of a burglary, using it to bolster his confidence, and inadvertently displays it to the elderly victim, frightening her; she dies of cardiac arrest.

(3) A defendant asks the victim, a prospective purchaser, to examine an antique firearm – and while the victim is distracted by the firearm, bludgeons him to death.

(4) A defendant unintentionally – but recklessly – discharges an automatic firearm while demonstrating it to a fellow gun enthusiast, killing the victim.[16]

The first of these four examples of "personal use" would be within the coverage of CALJIC No. 17.19, the instruction not given here; the second, third and fourth examples of "personal use" would not.

As the Supreme Court has observed, the concept of "use" is "concededly elastic." *Watson v. United States* (2007) 128 S.Ct. 579, 583, fn.7, 169 L. Ed. 2d 472.

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[16] "Th[e] felony-murder rule covers 'a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident. . . . ."

People v. Billa (2003) 31 Cal.4th 1064, 1068.

Thus, the statutory phrase "personal use" does not have a "plain, unambiguous meaning." *People v. Hudson, supra,* 38 Cal.4th 1002, 1012.

A proper definition of "personal use" in the terms of CALJIC No. 17.19 was nothing less than essential to the penalty phase jury's understanding of the case. Without it, the penalty phase jury was left with no instruction that adequately conveyed *what the guilt phase jury had actually decided* when it found the Mr. Jackson had "personally used" a firearm in the commission of the murder. Accordingly, it was state law error for the trial court to fail to instruct the penalty phase jury, sua sponte, on the legal meaning of "personal use" of a firearm.

2. The Trial Court's Failure to Instruct As to the Meaning of "Personal Use of a Firearm" Violated Mr. Jackson's Federal Constitutional Rights.

The trial court's failure to provide the penalty phase jury with the definition of "personal use of a firearm" also comprised federal constitutional error.

The penalty phase jury was told by the court clerk, at the trial court's direction, that the prior jury had determined (a) that Mr. Jackson was guilty of murdering Monique Cleveland, (b) that the murder of Monique Cleveland was committed while Mr. Jackson was engaged in robbery, and (c) that in the commission of the murder, Mr. Jackson personally used a handgun.

Then, in closing instructions, the trial court told the jury that (d) "[e]very person who unlawfully kills a human being" during a robbery or attempted robbery is guilty of murder, and (e) Mr. Jackson had been found guilty of first-degree murder.

From the standpoint of a penalty phase juror, the logical, natural and reasonable conclusion from the above is that the guilt phase jury determined Mr. Jackson "unlawfully kill[ed]" Monique Cleveland by personally using a handgun.

That conclusion, of course, is wrong. As discussed above at pages 92-94, the guilt phase jury had not rendered a verdict that Jonathan Jackson had personally used a firearm to kill the victim, or otherwise actually killed her. But the penalty phase jury was never informed of this.

In the particular context of this case, the failure to instruct the penalty phase jury as to what the guilt phase jury found violated California law, and violated the due process guarantee of the federal constitution because it rendered the trial fundamentally unfair. See *Estelle v. McGuire* (1991) 502 U.S. 62, 72. The trial was unfair because the trial court failed to instruct the jury on matters that were closely and openly connected with the facts of the case, and which were necessary for the penalty phase jurors' understanding of what the guilt phase jurors had actually decided, and because the penalty phase jurors were misled regarding the guilt phase jury's finding, the subject of which could not have been more material to the case for death that the prosecution presented.

In addition, this failure to properly instruct the jury resulted in a violation of due process under *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346. As this Court has explained:

> "In *Hicks*, the United States Supreme Court recognized that a state law guaranteeing a criminal defendant procedural rights at sentencing, even if not constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the due process clause."

People v. Frye (1998) 18 Cal. 4th 894, 1026. Here, Mr. Jackson had a state-law right to proper instructions on the meaning of personal use of a firearm; the result of the trial court's failure to give those instructions was that the penalty jury was left with an incorrect understanding that the guilt phase jury had determined Mr. Jackson had personally used a firearm to kill the victim. This incorrect understanding improperly delimited the penalty phase jury's exercise of its sentencing discretion, in violation of the Fourteenth Amendment.

The misinstruction of the penalty phase jury as to the guilt phase jury's findings in this case further violated Jonathan Jackson's Eighth Amendment right to a reliable and fair penalty phase trial.

As the Supreme Court explained in *Buchanan v. Angelone* (1998) 522 U.S. 269, 276:

> "In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 317-318, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. *Johnson v. Texas,* 509 U.S. 350, 362, 125 L.Ed.2d 290, 113 S.Ct. 2658 (1993); *Penry, supra*, at 326; *Franklin v. Lynaugh,* 487 U.S. 164, 181, 101 L.Ed.2d 155, 108 S.Ct. 2320 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in *Boyde v. California*, 494 U.S. 370, 108 L.Ed. 2d 316, 110 S.Ct. 1190 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "***whether there is a reasonable likelihood that the jury has applied***

> ***the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.*" (Emphasis added.)[17]

Under the "reasonable likelihood" standard, a defendant must show more than a possibility, but "need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction". *Boyde v. California* (1990) 494 U.S. 370, 380; accord, e.g., *Polk v. Sandoval* (9th Cir. 2007) 503 F.3d 903, 910.

Here, there is more than a reasonable likelihood the jury applied the instructions, in light of what the jurors were informed by the court the guilt phase jurors had decided, in a way that precluded consideration of constitutionally relevant evidence casting doubt on the "actual killer" theory.

Although under Supreme Court precedent the death penalty may be imposed on participants in felony murders either when they are the actual killers, or when they are major participants in the felony who act with reckless indifference to human life (*Tison v. Arizona* (1987) 481 U.S. 137, 158), the prosecutor did not argue that Mr. Jackson deserved the death penalty because he was a major participant but not the actual killer; instead, the prosecutor exclusively argued that Mr. Jackson deserved to die because he had personally executed the victim. 31 RT 4726-4727, 4727, 4731, 4732, 4736, 4745. The jury's death verdict demonstrates that it almost certainly accepted this proposition.

There were two paths the jurors hypothetically could have taken to the conclusion that Mr. Jackson was the actual killer and deserved to die.

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[17] Accord, e.g., *Tuilaepa v. California* (1994) 512 U.S. 967, 972-973.

First, the jurors could have come to the natural, logical and reasonable conclusion, based on the information conveyed to the penalty phase jury about the guilt phase jury's determination and in light of the trial court's instructions, that the guilt phase jury had determined that Mr. Jackson personally used a firearm to kill the victim. This scenario is even more likely in view of the fact that the prosecutor falsely informed jurors during voir dire that the guilt phase jury had convicted Mr. Jackson of taking the life of the victim "himself," and the trial court overruled the defense objection to this false representation, placing the court's seal of approval on it. 22 RT 3289; see Argument IV, *infra*.

Alternatively, the jurors might have, in theory, arrived at the same conclusion from the evidence.

But it is unlikely that the jurors arrived at the conclusion Mr. Jackson was the actual killer from the evidence presented at the second penalty phase, and far more likely that one or all jurors came to that conclusion based on what they understood the guilt phase jurors had already determined.

This is so because the evidence that Mr. Jackson personally used a firearm to kill the victim that was presented at the second penalty phase was far from compelling.

In fact, the evidence was equivocal at best, and sharply conflicting.

The crucial testimony supporting the prosecution's theory that the actual killer of Monique Cleveland was Mr. Jackson, rather than one of the

other individuals who went with him to the Cleveland residence that night, was the testimony of Kevin Jackson.[18]

Kevin Jackson testified that, the day after the shootings, he met with Mr. Jackson at the house of mutual friends. There, Mr. Jackson allegedly told Kevin Jackson the details of the crimes.

According to Kevin Jackson, Mr. Jackson told him that, after shooting Robert Cleveland with a .22 handgun, he got a .357 Magnum handgun "from one of his homies," and was told to "finish what you started." 26 RT 3980. He went into the bathroom, grabbed Monique by the hair, and asked her where the money was; she answered, "[w]hat money?" and he shot her in the head with the .357. 26 RT 3979-3980; see 26 RT 4020. She was on her knees on the floor when she was shot. 25 RT 3958.

But Kevin Jackson's testimony was highly suspect, for at least six reasons:

(1) Kevin Jackson was an informant for consideration; he would not receive his "deal" unless he testified. 26 RT 3999.

(2) Kevin Jackson was a convicted felon. 26 RT 3989.

(3) Kevin Jackson was in custody at the time of trial. 26 RT 3988-3989.

(4) Kevin Jackson was an "associate" of the Mead Valley Gangster Crips. 26 RT 4001-4002.

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[18] Robert Cleveland did not witness the shooting of Monique Cleveland, did not testify at the penalty phase, and did not identify the shooter of his wife in his taped call to 911, which was played at the penalty phase. Donald Profit did not testify at the penalty phase.

(5) Kevin Jackson ***changed his story***, making it more favorable to the prosecution, between the first trial and the second. Kevin Jackson testified in the first trial that Cleveland locked Jonathan in the house, and was holding a loaded .45 gun. 9 RT 1518-1519. In the second penalty phase trial, even when confronted with his prior testimony, Kevin Jackson denied that Mr. Jackson told him that Cleveland had locked him in the house and was armed with a loaded .45. 26 RT 4025-4026.

(6) Perhaps most importantly, ***Kevin Jackson admitted that, in his tape-recorded interview with law enforcement, he had knowingly and falsely implicated a third man – Alejandro Ortiz – in the felony-murder***. 26 RT 4001; 26 RT 3986-3987.

Moreover, Kevin Jackson's account of the killing was particularly unpersuasive because it was not only not substantiated by other evidence – but actually conflicted with the interpretation of the physical evidence by prosecution experts.

<u>Kevin Jackson's story of the killing conflicted with physical evidence presented by the prosecution on at least three points.</u>[19]

First, in Kevin Jackson's account, Jonathan Jackson, after shooting Robert Cleveland near the front door, then "ran in the bathroom to get

[19] Kevin Jackson's story also conflicted with the physical evidence as to the shooting of Robert Cleveland. According to Kevin Jackson, Jonathan Jackson shot Robert Cleveland five or six times. 25 RT 3957. But the testimony of Robert Cleveland's treating physician shows that Robert Cleveland had a total of <u>three</u> gunshot wounds. 27 RT 4243; see also 27 RT 4221-4222.

Monique," and shot and killed her while they were both in the bathroom. 26 RT 3979-3980.

But Monique Cleveland was not shot in the bathroom, as Kevin Jackson's account would have it. She was shot while the shooter was in the master bedroom, and she was in the hallway and doorframe leading to the master bedroom.

Prosecution witness Elissa Mayo, a criminalist with the state Department of Justice, testified based on her examination of the crime scene, and in particular from the evidence of blood spatter:

> "the shot was from somewhere inside the frame of the master bedroom directed out into the hallway impacting part of the door frame and part of the wall."

29 RT 4501; see 29 RT 4502 (Mayo testified that the shot was "directed . . . in from inside the bedroom towards the corner of the right door frame.").

Indeed, photographs of the crime scene admitted at trial clearly confirm that Monique Cleveland's body lay partly in the hallway, with her head in the master bedroom. Exhibit 77; see Exhibits 70-76.[20]

No part of her body or head is shown in the bathroom.

Second, Kevin Jackson's account of the killing placed Monique Cleveland "on her knees on the floor" when she was shot. 25 RT 3958.

But Monique Cleveland was not "on her knees" when she was shot.

The photographs of the crime scene show the victim's body prone – flat – on the floor in the hallway. Exhibits 70-77. Prosecution expert Mayo testified that the body did not appear to have moved after the victim was

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[20] A number of reproducible exhibits have been bound into two separate volumes; these exhibits are in the first volume.

shot. 29 RT 4505. The victim's head was no higher than 2 feet from the ground when she was shot. 29 RT 4504. Mayo further testified:

> "The other thing that's notable in the photograph of the victim -- you can notice that her feet are behind her. If one is standing and falls, it's possible that their feet may be pointed forward or to the side or something else. ***The victim's position, as I see it, is consistent with the gunshot being where she lay***. And that also being positioned -- or ***consistent with her being only in that position***."

29 RT 4505 (emphasis added). In other words, the physical evidence was not consistent with Kevin Jackson's story that Monique Cleveland was shot while she was kneeling. It was consistent "only" with the victim being shot "where she lay."

Third, Kevin Jackson's account of Mr. Jackson's supposed confession to him featured the "fact" that Mr. Jackson had killed Monique Cleveland with a .357 revolver. 26 RT 3980.

The alleged .357 caliber murder weapon was not introduced into evidence.

Moreover, the testimony of *prosecution witness Dr. Joseph Choi, the forensic pathologist who performed the autopsy, was in conflict with Kevin Jackson's claim about the caliber of the murder weapon.*

Dr. Choi was asked at trial about the caliber of the weapon he believed caused the death of Monique Cleveland. He answered:

> "I think it's medium caliber or less, either small caliber or medium caliber. But usually one-quarter inch on the entrance wound is more of a small caliber. And three-eighths of an inch is large caliber. Usually small bullet can make a larger hole. *But larger bullet cannot make a smaller hole. So it's more of a less-than-medium caliber bullet. It cannot be larger, large caliber. It cannot be -- actually, it's not likely medium caliber. It's small or less than medium caliber.*

Small caliber. Which is maybe .25 or .22 bullet. But .25 usually has fully jacketed bullet. The jacket -- the slug is completely covered by brass or copper. But I did not see any jacket, so it could be a small caliber. .22-caliber is usually unjacketed. Once in a while we see a jacketed one. But anyway, this one didn't have any jacket material. So it's -- by logic, it could be a small caliber.

"But basically, I cannot definitely say, because I don't see the bullet. The bullet passed by. And I'm looking at the wound. So this is my experience. I'm just talking my experience.

"Q So you can't absolutely rule out a .38-caliber projectile as causing this injury?

"A *Not likely*, but I cannot rule it out."

25 RT 3839-3840 (emphasis added).

Thus, Dr. Choi's testimony, based on his autopsy examination of the fatal wound from the perspective of an experienced forensic pathologist, conflicted with the claim of Kevin Jackson that Jonathan Jackson used a .357 to kill the victim.[21]

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[21] Prosecution expert Phillip Pelzel, a criminalist with the state Department of Justice (26 RT 4108), also testified as to whether the gun used to kill the victim could have been a .357 revolver. Pelzel's testimony was notable for what he could not say.

Pelzel's testimony was based on an examination of a photograph of the deceased Monique Cleveland (26 RT 4134, Prosecution Exhibit 128) and a diagram (Prosecution Exhibit 209, not in the bound exhibits) created by prosecution expert witness Dr. Joseph Choi. The entrance hole of the wound was elongated, and the diagram showed two measurements of the hole, at one point a quarter-inch across, and at another three-eighths of an inch across.

First, Pelzel testified, based on Dr. Choi's diagram, that the smaller measurement on the diagram was larger than the diameter (or "measurement across," as Pelzel put it) of a .22 caliber bullet, and that the larger measurement was larger than a .357 bullet. 26 RT 4135-4136.

(footnote continued on next page)

Given the weak state of the evidence tending to show that Jonathan Jackson had taken the life of the victim "himself," and the considerable evidence tending to show that the prosecution's factual theory of how Mr. Jackson allegedly shot the victim was incorrect, it is not likely that the penalty phase jurors concluded, based on the evidence alone, that Jonathan Jackson had personally "executed" Monique Cleveland -- since to do so would require them to cast aside the numerous, compelling reasons to disbelieve Kevin Jackson, and embrace the testimony of this convicted

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However, Pelzel also stated that he was not a pathologist, and further stated that he would not testify about the effects of bullets on skin. 26 RT 4144. Thus, he was simply not qualified to offer an expert opinion as to whether a .22 caliber bullet could have made an entrance wound in human flesh that was larger than the diameter of the bullet.

Nor could Pelzel testify to whether or not, or under what circumstances, a .357 bullet could leave an entrance hole *smaller* than its diameter, as would have to be the case if a .357 bullet had caused the wound. 26 RT 4144; see 25 RT 3828-3829.

Second, Pelzel testified that, if the marks on the decedent's face shown on a photograph, People's Exhibit 128, were, as the prosecutor stated, "muzzle flash," the muzzle flash was more consistent with a shot fired from a .357 handgun than shot fired from a .22 handgun. 26 RT 4136.

However, non-pathologist Pelzel also made clear the limits of his expertise; with respect to the marks on the decedent's face, he could not, in fact, identify them as muzzle flash: "I don't know what these marks are," he testified. 26 RT 4136.

Finally, Pelzel opined that the absence of shell casings found in the vicinity of the decedent's body was "an indication to us to start thinking along the lines of there being a revolver" rather than a semiautomatic. 26 RT 4137.

However, Pelzel admitted that .22 handguns, as well as .357 handguns, are available in revolver versions. Indeed, .22 revolvers are "not so rare." 26 RT 4139.

Thus, Pelzel's testimony provided no substantial support for Kevin Jackson's assertion that a .357 was used to kill Monique Cleveland.

felon and admitted fabricationist, in the face of conflicting testimony from *the prosecution's own experts* as to key features of this witness's story.

It is far more likely – and certainly well past the threshold of constitutional "reasonable likelihood" – that the jurors accepted the prosecution's theory that Mr. Jackson was the actual killer based on the erroneous conclusion that the guilt phase jury had already determined that Mr. Jackson had personally used a firearm to kill Monique Cleveland -- a conclusion directly resulting from the trial court's failure to instruct on the definition of "personal use" or otherwise clarify that the guilt phase jury had never made such a determination.

The penalty phase jurors were offered no option by the instructions to second-guess that presumed determination of the guilt phase jury. If the prior jury had determined that Mr. Jackson had personally used a firearm to kill the victim, as the penalty phase jurors likely concluded based on the findings and instructions, then they had no authority to revisit that determination -- any more than they had authority to revisit, for example, the determination that the murder was part of a robbery, as the prior jury had also specifically found. They had to accept the prior jury's findings and verdicts.

Accepting the prior jury's presumed finding that Mr. Jackson had personally used a firearm to kill the victim meant that this critical "circumstance of the crime" was fixed, as far as the second jury was concerned. While other circumstances of the crime might be considered open to question, as well as other facts that might extenuate the gravity of the crime, this was not open to question.

In the absence of any explanation by the trial court of the meaning of "personal use" of a firearm, the reading of the prior jury's finding that Mr.

Jackson had personally used a handgun in the commission of the murder had the likely effect of communicating that the question whether Mr. Jackson personally shot Monique Cleveland had already been decided, and thus precluding consideration of evidence which would, if believed, have discredited the prosecution's evidence purporting to show that Mr. Jackson was the actual killer.

D. Reversal is Required.

As we have seen, the jury instructions in this case were fatally incomplete, and left the penalty phase jurors with the incorrect understanding that the prior jury had determined Mr. Jackson personally used a handgun to kill the victim. This violated the Eighth Amendment because it affirmatively misled jurors, and precluded jurors from giving effect to constitutionally-relevant evidence regarding the circumstances of the crime. See *Tuilaepa v. California, supra,* 512 U.S. at pp. 972-973.

The error, without more, requires reversal of the penalty phase judgment. *Caldwell, supra*, 472 U.S. at pp. 340-341; *People v. Milner, supra,* 45 Cal.3d 227, 257-258.

Additionally, and more generally, when an error or a combination of errors occurs at the penalty phase of a capital case, this Court will reverse the judgment if there is a "reasonable possibility" that the jurors would have reached a different result if the error or errors had not occurred. *People v. Brown* (1988) 46 Cal.3d 432, 448. This Court has stated that the *Brown* prejudice standard is the same in substance and effect as the general standard for federal constitutional errors of the trial type, set forth in *Chapman v. California, supra,* 386 U.S. 18, 23-24; see *People v. Ashmus* (1991) 54 Cal.3d 932, 965.

Under *Chapman*, it is not the defendant's burden to show the error caused harm. On the contrary, it is the prosecution's heavy burden to demonstrate the *absence* of any harmful effect flowing from the error. The prosecution must "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Chapman v. California, supra*, 386 U.S. at p. 24. The focus of *Chapman* review is on "what the jury actually decided and whether the error might have tainted its decision." *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.

The prosecution will be unable to make its proof here. Indeed, it is likely that the error did contribute to the verdict, causing prejudice to Mr. Jackson under both *Brown* and *Chapman.*

As discussed, the only significant evidence that Mr. Jackson had personally shot and killed Monique Cleveland was the testimony of an in-custody informant for consideration, Kevin Jackson. But there were numerous powerful reasons for the jury to disbelieve Kevin Jackson's testimony, not least of which was this witness's admission that he had knowingly and falsely implicated a third party, Alejandro Ortiz, in the felony murder. The prosecution's evidence that Mr. Jackson had personally killed the victim was highly questionable, for the reasons delineated above.

The prosecutor did address other matters in her argument for the death penalty, such as the other crimes evidence presented, victim impact evidence, and the evidence in mitigation. Yet the main thrust of the prosecutor's closing argument for death was that Mr. Jackson deserved to die because he had personally "executed" the pregnant victim. For example, the prosecutor described Mr. Jackson as

"the single-handed executioner of a 28-year-old pregnant woman."

31 RT 4727. The prosecutor repeatedly stressed this alleged fact in her appeal to the jury. 31 RT 4726-4727, 4727, 4731, 4732, 4736, 4745. In closing argument, immediately after vividly describing Mr. Jackson's supposed "execution" of the victim ("[s]he doesn't know where the money is, and so at that point he blows her brains out, being sure he leans away so as not to get her blood and tissue on his person"), the prosecutor argued that,

> "*in and of itself this crime, this death of [Monique Cleveland], justifies a decision of death on defendant.*"

31 RT 4745 (emphasis added).

The trial court's failure to instruct the jury as to the meaning of the guilt phase jury's finding that Mr. Jackson had personally used a firearm in the commission of the murder, in light of its instruction that Mr. Jackson had "unlawfully killed" the victim, was perfectly suited to the prosecutor's strategy. The trial court conveyed to the jurors that the previous jury had determined that Mr. Jackson personally killed the victim, and the prosecutor told the jurors that fact was enough to warrant the death penalty in this case.

The probability the failure to instruct on "personal use" affected the verdict is enhanced by the fact that, as discussed in Argument IV, *infra*, the prosecutor falsely informed jurors in voir dire that the guilt phase jury had convicted Mr. Jackson "of taking the life of another human being himself," and further by the fact that, when defense counsel objected to this representation, the trial court overruled the objection, ratifying the prosecutor's false statement. 22 RT 3289.

The previous jury in Mr. Jackson's first penalty phase trial had hung, after sending the trial court a note indicating that one or more jurors were

troubled by questions of "lingering doubt," and after the trial court instructed jurors they could consider lingering doubt. 3 CT 872; __ RT 2933.[22] In the penalty phase retrial, however, deciding the penalty in light of the finding of the guilt phase jury regarding Mr. Jackson's "personal use" of a firearm, and in the absence of any instruction defining what that meant, the jury had no questions about lingering doubt.

Under these circumstances, the Court cannot fairly conclude that, beyond a reasonable doubt, the trial court's failure to adequately instruct the jury did not affect the verdict. Accordingly, the penalty phase judgment should be reversed.

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[22] Before declaring itself unable to reach a penalty verdict, the first jury submitted this written question:

> "What wait [sic] if any should lingering doubt or any doubt pertaining to this case in the guilt phase and the penalty phase be considered in determining the punishment[?]"

3 CT 872. The trial court gave this instruction on lingering doubt, after which the jury hung:

> "It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of the mind between a reasonable doubt and beyond all possible doubt."

18 RT 2933.

IV. BECAUSE THE PROSECUTOR FALSELY INFORMED JURORS, DURING PENALTY PHASE VOIR DIRE, THAT THE GUILT PHASE JURY HAD CONVICTED MR. JACKSON OF TAKING THE LIFE OF ANOTHER PERSON "HIMSELF," THE PENALTY PHASE JUDGMENT MUST BE REVERSED.

A. The Prosecutor Informed Jurors that Mr. Jackson Had Been Found Guilty by a Jury of "Taking the Life of Another Human Being Himself."

At the start of her voir dire of the first jury panel for the penalty phase retrial, the prosecutor addressed the jurors:

> "[PROSECUTOR]: I bet when you got that jury notice you didn't really think this is the kind of situation you were going to be put in, did you? You thought maybe a petty theft, a drunk driving case, huh? Maybe somebody in a little car accident, fender bender. And you walk in the courtroom, and the judge tells you, the first day you're here, you're to decide if that man sitting right there will live or die. Then we sent you down to the jury room and we asked you to fill out this piece of paper. And a lot of people put on here, wow, I thought about it before, but I've never really thought about it. I've never sat in a room 10, 15 feet away from a person knowing that I may be the one -- I may be one of those 12 people that votes to end this person's life three weeks from now.
>
> Everybody is real quiet and still. It's scary, isn't it?
>
> Good. Should be. ***He sits here having been convicted of taking the life of another human being himself. That is a verdict that was rendered by a jury, and you must accept it as true.***
>
> "MR. CHANEY: I'm going to object at this time as improper voir dire.
>
> "THE COURT: Overruled. Noted.
>
> "MS. BARHAM: That murder occurred, as found by the jury, during the course of a robbery, and the defendant was

found to have used a gun. . . ."

22 RT 3288-3289 (emphasis added).

B. The Prosecutor's Representation that the Guilt Phase Jury Had Convicted Mr. Jackson of "Taking the Life of Another Human Being Himself" Was Intentionally False.

The prosecutor's representation was not just false, but knowingly false, designed to gain an unfair advantage, and to distort the penalty phase process.

In fact, the guilt phase jury had ***not*** convicted Mr. Jackson "of taking the life of another human being himself."

The guilt phase instructions under which the jury decided the case make this clear. As shown above in Argument III (at pp. 93-94, *supra*), the guilt phase jury was specifically instructed on aider-and-abettor liability on the robbery-murder charge, at the prosecution's request (2 CT 546; 12 RT 1965), and was further instructed that it need not decide that Mr. Jackson was the actual killer to find the robbery-murder special circumstance true. 12 RT 1966-1967; 2 CT 0547-0548 (CALJIC No. 8.80.1, 1997 Rev.).

The guilt phase jury additionally found that Mr. Jackson personally used a firearm during the robbery-murder. 3 CT 0610. But, as noted in connection with Argument III, *supra*, the guilt phase jury was instructed,

> "The term 'personally used a firearm' as used in
> this instruction means that the defendant must have
> intentionally displayed a firearm in a menacing manner,
> intentionally fired it, or intentionally struck or hit a
> human being with it."

12 RT 1978; 2 CT 0573. This personal use finding is entirely consistent with a determination of guilt and a true finding of the special circumstance

on the factual theory that Mr. Jackson used a firearm in the course of the robbery, without a concurrent determination that Mr. Jackson shot the homicide victim. The guilt phase jury might have found that Jackson was a participant, but not the shooter of the homicide victim, and personally used a firearm in the commission of the offense but did not personally ("himself") shoot the victim.

But the jury was never called upon to resolve the issue. There was no jury finding that Mr. Jackson "himself" shot Monique Cleveland.

The prosecutor must be charged with personal knowledge of the verdicts in the case, which she tried at all stages. The prosecutor's representation to the jury was intentionally false.[23]

C. The Prosecutor's Misrepresentation Violated State and Federal Law.

The prosecutor's intentionally false statement that Mr. Jackson had been convicted of taking the life of another human being "himself" was improper voir dire. As this Court explained in *People v. Abilez* (2007) 41 Cal.4th 472, 492-493:

> "It is, of course, well settled that the examination of prospective jurors should not be used ' "to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." ' " (*People v. Fierro, supra,* 1 Cal.4th at p. 209, quoting *People v. Williams* (1981) 29 Cal.3d 392, 408.)"

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[23] This Court, however, does not require that the presentation or reliance on false evidence be intentional. *People v. Marshall* (1996) 13 Cal.4th 799, 830; *In re Roberts* (2003) 29 Cal.4th 726, 742.

The purpose of voir dire is to allow challenges for cause. Code of Civil Procedure section 223.[24] It is improper, and inconsistent with the purposes of voir dire, for a prosecutor – or any lawyer -- to assert "facts" that cannot come into evidence, or to misrepresent the results of prior proceedings in the case and claim those misrepresentations are binding – actions that are, and were in this case, plainly designed to prejudice the jury against a particular party.

In order to determine the applicable legal standards, it's helpful to briefly consider the nature of the misconduct at issue.

Although the prosecutor's misrepresentation concerned a legal event -- the prior jury's verdict -- at its core, it was a misrepresentation of an historical fact: that, when the prior jury had tried Mr. Jackson for the murder of Monique Cleveland, it had determined that Mr. Jackson "himself" took her life. Thus, the prosecutor's statement was a statement of a fact not in evidence.

Moreover, the "fact" that the prosecutor put before the penalty phase jury panel was not only "not in evidence," but was not a "fact" at all – it was a falsehood. As explained in the preceding subsection, contrary to the prosecutor's claim, the jury at the guilt phase simply did not make any determination that Mr. Jackson had "himself" taken the life of another human being. Thus, the prosecutor presented to the jurors a *false* "fact."

This misconduct violated the Due Process Clause, the Confrontation Clause of the Sixth Amendment, and the Eight Amendment's guarantee of

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[24] Federal law is no different. *United States v. Howell* (9th Cir. 2000) 231 F.3d 615, 627-628 (fundamental purpose of voir dire is to "ferret out prejudices in the venire" and "to remove partial jurors.").

a reliable penalty phase process, as well as constituting prosecutorial misconduct under state law.

1. Deceptive Or Reprehensible Methods – Misconduct Under State Law.

Prosecutors are not just lawyers.

> "Prosecutors . . . are held to an *elevated* standard of conduct. . . . 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 [79 L.Ed. 1314, 1321, 55 S.Ct. 629].)"

People v. Hill (1998) 17 Cal.4th 800, 819-820 (emphasis added.).

This Court stated in *People v. Ochoa*, 19 Cal.4th 353, 427:

> "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)"

In this case, both requirements are clearly met.

a. The prosecutor's misconduct was deceptive and reprehensible.

First, the prosecutor's misconduct was both deceptive and reprehensible. All lawyers may employ only those means consistent with

the truth. The prosecutor's conduct fails even this basic standard, not to mention the "elevated" standard applicable to prosecutors.

A prosecutor may commit misconduct by using deceptive or reprehensible methods during voir dire. See *People v. Price* (1991) 1 Cal.4th 324, 448-449. This Court has stated that voir dire is not to be used "to educate the jury panel to the particular facts of the case, . . . to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." *People v. Fierro* (1991) 1 Cal.4th 173, 209. These admonitions are necessary precisely because lawyers, acting as zealous partisans, routinely attempt to use the voir dire process for just these purposes – even in death penalty cases. In this case, there can be no doubt that the prosecutor's misstatement was a purposeful attempt to obtain a litigation advantage with the members of the penalty phase jury panel.

As discussed above at pages 118-119, the prosecutor's express representation to the penalty phase panel that the guilt phase jury had convicted Mr. Jackson of "taking the life of another human being himself" (22 RT 3289) was an outright falsehood -- and one that, given the prosecutor's personal knowledge of the first jury's actual findings, could only have been intentional. Thus, the prosecutor's misconduct was deceptive.

"Reprehensibility" is a normative judgment without apparent descriptive content. Certainly, for a prosecutor to deliberately lie about an important fact to potential jurors in a death penalty case is reprehensible under any standard, because it may lead jurors to a decision to extinguish a human life based on false factual premises.

b. It is more than reasonably likely the jurors understood or applied the prosecutor's statement in an improper manner.

> "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show *a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner*.' [Citation.]"

People v. Wilson (2005) 36 Cal.4th 309, 337 (emphasis added). This Court adapted this test from the United States Supreme Court's test for evaluating jury instructions. *People v. Clair* (1992) 2 Cal.4th 629, 663.

In assessing whether there is a reasonable likelihood the jurors understood or applied the improper comments in an injurious manner, the Court looks to how a reasonable jury would have reacted, in the context of the trial as a whole. See *Penry v. Johnson* (2001) 532 U.S. 782, 800 ("we will approach jury instructions in the same way a jury would -- with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'").

At least three members of the jury that sentenced Mr. Jackson to death were present in the courtroom as part of the jury panel at which the prosecutor's misconduct was targeted: Juror No. 2 (22 RT 3273, 3306, 4 CT 1002), Juror No. 3 (22 RT 3277, 4 CT 1077), and Juror No. 8 (22 RT 3239, 9 CT 2559).

In assessing the likely effect of the misconduct on the jury's deliberative process, it's helpful to review the misconduct:

> "[PROSECUTOR BARHAM:] . . . *He sits here having been convicted of taking the life of another human being himself. That is a verdict that was rendered by a jury, and you must accept it as true.*
>
> "MR. CHANEY: I'm going to object at this time as improper voir dire.

> "THE COURT: Overruled. Noted.
>
> "MS. BARHAM: That murder occurred, as found by the jury, during the course of a robbery, and the defendant was found to have used a gun. . . ."

22 RT 3289 (emphasis added.)

Several points are evident.

First, the misrepresentation was, as explained above, misrepresentation of a fact.

Second, the misrepresentation concerned a topic about which the jurors would reasonably expect the prosecutor to speak with some authority – the outcome of prior proceedings in this very case.[25]

Third, the trial court overruled defense counsel's objection – thereby, in the eyes of the jurors, ***ratifying the prosecutor's misrepresentation***. 22 RT 3289.

Fourth, immediately after the objection was overruled, the prosecutor reinforced the harm of her misconduct, stating "the defendant was found to have used a gun." 22 RT 3289.

In previous voir dire, the trial court had referred to a question on the juror questionnaire that explained that a killing during the course of a robbery was first-degree murder when the perpetrator had the specific intent to commit robbery, and that the penalty could be death or life without

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[25] The Supreme Court has stated:

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, *improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none*."

Berger v. United States (1935) 295 U.S. 78, 88 (emphasis added).

parole. 22 RT 3216-3217, 3220-3221. The trial court told the jurors that "you're still guilty of first-degree murder even though you just drive the get-away car or help break in or whatever[.]" 22 RT 3228, 3217.

Shortly after the misconduct, the prosecutor continued her voir dire of the same jury panel:

> "MS. BARHAM: So in California, felony murder -- first-degree felony murder during a robbery is sufficient in and of itself to justify imposition of the death penalty.
>
> "Does anybody disagree with that?
>
> "Now, he doesn't even have to be the one that pulled the trigger. Did you understand that part about what the judge was saying earlier? In the State of California, you are guilty of murder with special circumstances if you are one of the people that participates in the crime, and you can get the death penalty even if you didn't pull the trigger, even if you weren't there. And there has been at least one incident in this county where the death penalty was imposed where a person wasn't even there. Anybody disagree with that, you don't have to be the one to pull the trigger?"

22 RT 3296-3297.

Crucially, the prosecutor did not say anything to disabuse the jurors of the erroneous notion she had previously implanted -- that the prior jury had, indeed, made a determination that Mr. Jackson had been the actual killer "himself." Instead, the prosecutor merely informed the jurors that, under the law "you don't have to be the one to pull the trigger." Taken together with the prosecutor's representation that the guilt phase jury had determined that Mr. Jackson ***was***, indeed, "the one who pulled the trigger," the implication was that Mr. Jackson more than amply qualified for the death penalty.

Thus, based on the prosecutor's falsehood, defense counsel's objection, the trial court's prompt overruling of that objection, and the

prosecutor's words thereafter, the relevant jurors would have likely, and incorrectly, believed that Mr. Jackson had been found by the previous jury to have shot and killed Monique Cleveland "himself."

That erroneous belief would receive yet another apparent seal of approval. As explained in Argument III, *supra*, after general jury instructions, but before opening statements, the prosecutor requested that the court order the clerk to read the guilt phase jury's verdicts to the penalty phase jury. 24 RT 3672. The trial court ordered the clerk to read the verdicts, and the clerk did so, including the finding as to personal use of a firearm:

> "[THE CLERK:]
> "Finding: ***We, the jury in the above-entitled action, find the defendant, Jonathan Keith Jackson, in the commission of the offense charged under Count I of the Information [murder], did personally use a firearm, to wit, a handgun***, within the meaning of Penal Code Sections 12022.5(a) and 1192.7(c)(8).
> "Dated May 6th, 1999. Signed by foreperson."

24 RT 3673 (emphasis added).

But the court did ***not*** explain to the penalty phase jurors that "personal use of a firearm" in the commission of first-degree murder could mean something other than being the triggerman. Compare 12 RT 1978; 2 CT 0573 (guilt phase jury instructions).

The text read by the clerk – recited as a binding determination of the prior jury – strongly reinforced the mistaken belief, implanted by the prosecutor, that Mr. Jackson had, indeed, "been convicted of taking the life of another human being himself." 22 RT 3289.

Accordingly, when the evidence opened at Mr. Jackson's second penalty phase trial, the relevant jurors had every reason to believe that Mr. Jackson had been determined by the guilt phase jury to have "taken the life

of another human being himself," as the prosecutor falsely represented, and to have done so with a firearm.

At the close of the penalty phase evidence, the trial court instructed the jury again. 31 RT 4704-4723. But the trial court's final penalty phase instructions did nothing to correct the prosecutor's false representation that Mr. Jackson had been found guilty of being the actual killer.

Instead, the trial court's instructions further substantiated the prosecutor's false representation. The trial court told the jury that "[e]very person who *unlawfully kills* a human being during the commission or attempted commission of a robbery is guilty of the crime of murder," and then told the jury that the prior jury had found Mr. Jackson guilty of murder. 31 RT 4714-4715 (emphasis added). The clear meaning was that the prior jury had determined that Mr. Jackson had, himself, "unlawfully killed" the victim.

Accordingly, there is every reason to believe that, when this case went to the jury after the close of argument and instructions, at least three penalty phase jurors erroneously believed that the guilt phase jury had made a finding that Mr. Jackson had taken the life of Monique Cleveland "himself," with a gun. The prosecutor had said so, the judge had ratified it, the prior jury had specifically found Mr. Jackson had personally used a handgun in the murder, and the judge had again made clear the prior jury had found that Mr. Jackson had "unlawfully killed."

It is therefore more than reasonably likely that the jurors "understood the prosecutor's remarks in an objectionable manner."

Moreover, it is also more than reasonably likely that the jurors applied the prosecutor's statement in an objectionable manner. See *People v. Wilson* (2005) 36 Cal.4th 309, 337. The prosecutor materially misled

three penalty phase jurors by representing that the guilt phase jury had found that Jonathan Jackson had taken the life of Monique Cleveland "himself." It is, under these circumstances, more than reasonably likely – it is nearly certain – that these jurors not only understood but applied the prosecutor's intentionally-false statement in this case in an improper manner: to preclude any consideration by them of whether or not Mr. Jackson actually took the life of Monique Cleveland "himself."[26]

Because the prosecutor's false statement was both deceptive and reprehensible, and it is reasonably likely jurors both understood and applied the prosecutor's false statement in an improper manner, there was prosecutorial misconduct under California law.

2. Due Process – Sixth Amendment Violation.

The prosecutor referred to a supposed fact – an historical fact regarding the prior jury's findings, but a fact nonetheless -- not in evidence, as discussed above at pages 118-120. As this Court stated in *People v. Hill* (1998) 17 Cal.4th 800, 828, for a prosecutor to refer to facts not in evidence

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[26] This Court has stated, with respect to evidence of other convictions admitted at a penalty phase:

> "As long as penalty jurors are not materially misled about the nature and degree of the defendant's individual culpability, the prosecution may rely solely on a judgment of conviction to establish his involvement in a joint crime of violence."

People v. Ray (1996) 13 Cal.4th 313, 351. In this case, the prosecutor materially misled penalty phase jurors about the prior jury's determination of a material fact relating to the *underlying* murder – an even more serious error than materially misleading jurors about "other crimes."

> "is 'clearly ... misconduct' (*People v. Pinholster* (1992) 1 Cal.4th 865, 948), because such statements 'tend[] to make the prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]' (*Bolton, supra*, 23 Cal.3d at p. 213; *People v. Benson, supra,* 52 Cal. 3d at p. 794 ['a prosecutor may not go beyond the evidence in his argument to the jury']; *People v. Miranda* (1987) 44 Cal.3d 57,108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) 'Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal.'"

Indeed, a prosecutor is prohibited not only from stating but even from implying facts of which there is no evidence before the jury. *People v. Bain* (1971) 5 Cal.3d 839, 847.[27]

Because "the prosecutor, serving as his own unsworn witness, is beyond the reach of cross-examination," misconduct of this type violates a defendant's Sixth Amendment right to confrontation. *People v. Bolton, supra*, 23 Cal.3d at 214, fn. 4. As this Court stated in *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084:

> "*If a prosecutor's argument refers to extrajudicial statements not admitted at trial, the defendant may be denied his right under the Sixth Amendment to confrontation and cross-examination,* thus requiring reversal of the judgment unless the court is satisfied beyond a reasonable doubt that the misconduct did not affect the

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> [27] "The prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally. In essence, the prosecutor invited the jury to speculate about - and possibly base a verdict upon -'evidence' never presented at trial."

People v. Bolton (1979) 23 Cal.3d 208, 212.

> verdict. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, fn. 15 [40 L.Ed.2d 431, 437, 94 S.Ct. 1868]. See also *Douglas v. Alabama* (1965) 380 U.S. 415, 419-420 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *People v. Bolton, supra*, 23 Cal.3d 208, 213; *People v. Blackington* (1985) 167 Cal.App.3d 1216; *People v. Johnson* (1981) 121 Cal.App.3d 94, 104; *People v. Lo Cigno* (1961) 193 Cal.App.2d 360.)" (Emphasis added.)

Typically, prosecutorial references to facts not in evidence occur later in the trial process, such as in opening statements, in examination of witnesses, or in closing arguments. Here, the reference came during voir dire. This does not exclude the misconduct from the constitutional rule. The focus of the courts in determining whether the use of facts not in evidence constitutes error has not been on the stage at which the misconduct occurs, but upon the prosecutor's deviation from honest advocacy, and its likely effect on jurors. The taint arising from the prosecutor's use of facts not in evidence at the commencement of her penalty phase voir dire is just as real as the taint at a later stage of the process.

Here, the prosecutor told the jury panel that the prior jury, which had found Mr. Jackson guilty of murder and a special circumstance, had also found the Mr. Jackson had "taken the life of another human being himself," and that the prior jury's verdict had to be "accepted as true." 22 RT 3289.

This asserted "fact" was not in evidence, nor would it ever come into evidence.

The prosecutor put the authority of her office behind the assertion of this fact not in evidence, and was upheld by the trial court. Mr. Jackson had no opportunity to cross-examine the prosecutor as to her assertion of this historical fact. Because the prosecutor served as her own unsworn witness on this critical point, and Mr. Jackson had no opportunity to cross-

examine her, the misconduct violated Mr. Jackson's Confrontation Clause and Due Process rights.

3. Due Process – Use of a False "Fact."

As explained above, the prosecution's representation that the prior jury had determined that Mr. Jackson has "tak[en] the life of another human being himself" (22 RT 3289) was not just a fact outside the evidence – it was a *false* fact. The guilt phase jury had not determined that Mr. Jackson had taken the life of another person himself.

This Court stated in *People v. Sakarias* (2000) 22 Cal.4th 596, 633:

> "That a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process is well established. (See, e.g., *Miller v. Pate* (1967) 386 U.S. 1, 7 [87 S.Ct. 785, 17 L.Ed.2d 690]; *Napue v. Illinois* (1959) 360 U.S. 264, 269 [79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217]; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1015; *In re Jackson* (1992) 3 Cal.4th 578, 595-596.)"

In this case, the prosecutor went outside the parameters of proper voir dire to deliberately place before the jury panel a very serious falsehood.

This was not a mistake of any sort. This same prosecutor had tried the guilt phase, had proposed jury instructions, and had <u>specifically argued to the guilt phase jurors that they did not have to find Mr. Jackson was the actual killer in order to find him guilty of robbery-murder and to find the special circumstance true</u>. 12 RT 1988-1991.[28] The prosecutor knew very

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[28] The prosecutor argued to the guilt phase jurors:

"Who is responsible, under the felony murder doctrine, for the death of Monique Cleveland? Well, I'm

(footnote continued on next page)

well that the guilt phase jury had made no finding that Mr. Jackson had taken the victim's life "himself," yet she represented that it had.

Nor was this any slip of the tongue by this experienced homicide prosecutor.[29] When defense counsel objected, the prosecutor did not withdraw the remark, or "clarify" it in any way. The prosecutor intended to convey this factual falsehood to the jurors, knowing it was false.

> going to tell you right now, they all are guilty of the killing of Monique. . . . . [¶¶]
>
> "But it doesn't matter for purposes of the law whether he executed Monique or whether one of his homeboys executed Monique. The point is Monique Cleveland is executed during the course of a robbery, a jack. The defendant was a participant. He is guilty of murder. And ***you don't need to decide actually in your verdict whether he is the one who actually shot her or not.***"

12 RT 1988-1989 (emphasis supplied). Similarly, the prosecutor argued to the guilt phase jurors regarding special circumstances:

> "Also, the people that go along with the crime that aren't the actual killer are also guilty of felony murder special circumstance murder so long as they are a major participant in the crime, okay.
>
> . . . [¶¶]
>
> "***If for some reason you have a doubt in your mind that he is the one who actually stuck the gun to Monique's face and shot her, then you have to consider whether or not you think he was a major participant*** in the crime in order to determine whether or not he is guilty of the special circumstance, that is, that he was a major participant in a crime, and that his conduct showed that he acted with reckless indifference to human life."

12 RT 1989-1990 (emphasis added).

[29] See 31 RT 4726 ("I've been handling murder cases for many, many years.").

The prosecutor's falsehood regarding the guilt phase jury's alleged finding was not introduced into evidence during the evidentiary phase of the trial. But the Supreme Court has condemned, not just false evidence introduced at trial, but the prosecution's statements to the jurors based, as here, on evidence the prosecution knew was false or nonexistent.

Miller v. Pate (1967) 386 U.S. 1 is instructive. There, the Supreme Court reversed a murder conviction where the prosecutor made an argument to the jury that contradicted forensic evidence of which the prosecutor had actual knowledge.

In *Miller v. Pate*, the defendant was charged with the murder of an eight-year-old girl. At trial, the state introduced a pair of shorts belonging to the defendant. The garment had a large, reddish-brown stain on it. Although various witnesses described the underwear as being stained with blood, the prosecutor knew from a forensic report -- which he elected not to offer into evidence -- that the substance was paint, not blood. Nevertheless, in his closing argument the prosecutor told the jury that the stain on defendant's shorts was blood of the victim's type. In reversing defendant's murder conviction, a unanimous Supreme Court found the prosecutor had "deliberately misrepresented the truth." *Miller v. Pate, supra*, 386 U.S. at p. 6.

In this case no less than in *Miller v. Pate*, the prosecutor "deliberately misrepresented the truth." The guilt phase jury had not found that Mr. Jackson had taken the life of the victim "himself." But the prosecutor told the penalty phase jury panel that the guilt phase jurors *had* determined that Mr. Jackson had taken the life of the victim "himself." This was every bit as false as the misrepresentation of the prosecutor in *Miller v. Pate*.

Here, the falsehood was perpetrated by the prosecutor during voir dire, and not in closing argument, as in *Miller v. Pate*. But this is a difference without a constitutional distinction. What is material to the prosecutor's transgression is that it happened at all, and that it happened in the presence of jurors who later sentenced Mr. Jackson to death. The prosecutor's use of the false "fact" that Mr. Jackson had been found guilty of killing the victim "himself," in order to obtain the ultimately penalty, is no less a due process violation because this misconduct was perpetrated during the time the jurors were forming their initial impressions of the case, in voir dire, and not later.

> "It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."

Napue v. Illinois (1959) 360 U.S. 264, 269. This constitutional logic also applies to a penalty of death obtained through the use of false facts, known to be such by the representative of the State.

4. Due Process -- Fundamental Unfairness.

Prosecutorial misconduct rises to the level of a due process violation when the misconduct is so egregious it renders the trial fundamentally unfair. *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 645; *Darden v. Wainwright* (1986) 477 U.S. 168, 181.

In evaluating whether prosecutorial misconduct rises to the level of a constitutional violation of due process, the Supreme Court in *Donnelly* looked to several factors: (1) whether the misconduct infringes upon a right specifically protected by the Bill of Rights; (2) whether the trial court gave a curative instruction; and (3) whether the comments were isolated. *Donnelly*, *supra*, 416 U.S. at pp. 645-48. The Court has held that the

analysis should be guided by the particular circumstances of a case. See, e.g., *Darden, supra,* 477 U.S. at pp. 181-183. Thus, "the process of constitutional line drawing in this regard is necessarily imprecise." *Donnelly, supra,* 416 U.S. at p. 645. But the *Donnelly* factors are useful tools.

In this case, as the following analysis will demonstrate, each of the factors considered by the Court in *Donnelly* militates in favor of a conclusion the Mr. Jackson's second penalty phase trial was rendered fundamentally unfair by the prosecutor's intentional misconduct in employing a falsehood regarding the prior jury's findings.

(1) *Whether the misconduct infringes upon a right specifically protected by the Bill of Rights. Donnelly, supra,* 416 U.S. at pp. 645-648.

Yes. As shown above, the prosecutor's misconduct specifically denied the defendant his Sixth Amendment right to confrontation. See pp. 128-131, *supra*. It also infringed upon his Eighth Amendment right to a fair penalty phase. See pp. 140-142, *infra*.

(2) *Whether the trial court gave a curative instruction. Donnelly, supra,* 416 U.S. at pp. 645-648.

No. Not only did the trial court fail to give a curative instruction; the court overruled defense counsel's objection -- thereby ratifying the prosecutor's misconduct. 22 RT 3289. See *People v. Woods* (2006) 146 Cal.App.4th 106, 113-114 (overruling objection to prosecutor's misstatement implicitly approves the misstatement).

(3) *Whether the comments were isolated, or were part of a pattern of misconduct. Donnelly, supra,* 416 U.S. at 645-648.

The prosecutor's misconduct in intentionally misinforming jurors that the guilt phase jury had determined that Jonathan Jackson had "taken the life of another human being himself" (22 RT 3288-3289) was not the only example of prosecutorial misconduct in this case.

There are at least six other examples.

First, the prosecutor ***misstated the evidence*** in closing argument to gain an unfair advantage. The prosecutor misrepresented the testimony of star prosecution witness Kevin Jackson, so as to make it seem consistent with the testimony of prosecution expert Mayo.

As discussed *supra* at pp. 107-110, Kevin Jackson's testimony as to Jonathan Jackson's supposed confession to him conflicted with the physical evidence, as interpreted by prosecution experts, as to whether the victim was killed in the bathroom, as Kevin Jackson claimed, and not in the hallway. Prosecution expert Elissa Mayo testified that the victim was shot where she lay, in the hallway. 29 RT 4501. In her closing argument, the prosecutor argued to the jurors that "Kevin Jackson shows you how the defendant says he did it. Gets her out of the bathroom" and shoots her. 31 RT 4741 (emphasis added). She continued, repeating the point twice more, to drive it home to the jurors:

> "Well, the defendant says he gets her out of the bathroom. Now, remember too, the defendant's tone of voice while telling this story is very matter of fact. Not remorseful, not feeling bad that he's killed two people, just explaining what he's done.
>
> "He gets her out of the bathroom."

31 RT 4744 (emphasis added).

But the prosecutor's repeated statements directly contradict Kevin Jackson's testimony.

Not only did Kevin Jackson *not* testify that Jonathan Jackson "gets her out of the bathroom" – he testified the victim was *in* the bathroom when she was killed.

In Kevin Jackson's account, Jonathan Jackson, after shooting Robert Cleveland near the front door, then "ran in the bathroom to get Monique," and shot and killed her *while they were both in the bathroom.* 26 RT 3980. After he shot Monique, according to Kevin Jackson's story, "He came back out the bathroom". 26 RT 3980.

The prosecutor grossly misstated Kevin Jackson's testimony, in order to make it appear to conform to the testimony of prosecution expert Elissa Mayo and the photographic evidence that, in fact, directly contradict Kevin Jackson's testimony.

This misconduct is, itself, deceptive and reprehensible.

Second, the prosecutor committed further egregious misconduct in closing argument.

As noted, the victim was approximately one month pregnant when she died. 25 RT 3841. Despite the fact that, under American law, a fetus is not a "person" (*Roe v. Wade* (1973) 410 U.S. 113, 157-158), and despite the absence of evidence that the victim herself actually knew she was pregnant, or would have decided to carry the pregnancy to term if she knew she was pregnant, the prosecutor repeatedly referred to the first-trimester fetus as an "unborn child" (31 RT 4727, 4736), and as a "baby." 31 RT 4770.

> "[H]er baby was killed, and she did nothing but have a bad choice in a husband." 31 RT 4770 (emphasis added).

Even worse, to this inflammatory misconduct the prosecutor added the following capstone, placing behind it the authority of her office:

"*I think she wanted that baby to live*."

31 RT 4770 (emphasis added).

This was egregious misconduct. The prosecutor improperly referenced her personal belief. In referencing any personal belief regarding facts at trial, a prosecutor acts improperly. E.g., *People v. Medina* (1995) 11 Cal.4th 694, 776 ("prosecutors should not purport to rely in jury argument on their outside experience or personal beliefs based on facts not in evidence."). In so doing, the prosecutor effectively became her own witness, not subject to cross-examination, relying on "facts" not in evidence.

And, it almost goes without saying, this misconduct was also highly inflammatory -- *designed* to provoke a verdict based on emotion, and not a reasoned moral judgment, as the law requires. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251 (a prosecutor's remarks are improper when they are "inflammatory and principally aimed at arousing the passion or prejudice of the jury").

Third, the prosecutor deliberately misled the jury as to the consequences of a life verdict:

> "if he shanks a guard, shanks another inmate, what can you give him? He's already got life without parole. What are you going to do? Add something on? We're going to keep your body in the prison for ten days after you die? Take away the Super Bowl? Take away the World Series? No pudding for dessert? You give him life without parole, he can do whatever he wants in prison to anybody he wants to do it with no punishment."

31 RT 4759 (emphasis added). This argument was improper, because there were no facts in evidence about what privileges are available to LWOP prisoners in California.

Moreover, this argument is highly deceptive. Criminal sanctions, including the death penalty, are available for those who commit crimes while incarcerated. And even apart from the ultimate sanction that will likely face convicted murderers who then kill in prison, California prison officials have a range of effective disciplinary measures in their armamentarium, including transfer to ultra-maximum security facilities, such as at Pelican Bay, and prolonged solitary confinement, euphemistically referred to as "administrative segregation." See Cal. Code Regs., tit. 15, section 3315; *Lira v. Herrera* (9th Cir. 2005) 427 F.3d 1164, 1165-1166 & fn.1; *In re Calhoun* (2004) 121 Cal.App.4th 1315, 1326 fn.7. The prosecutor deliberately, and deceitfully, encouraged the jury to assume that prison discipline was not "punishment."

Fourth, the prosecutor repeatedly misled the jury on the law in voir dire and in closing argument, stating "It is clear in the law that the murder of one person with one special circumstance can in and of itself justify the imposition of the death penalty." 31 RT 4729 (closing argument; see 9 CT 2613, 23 RT 3360 (voir dire). This is a misstatement of California law, which provides that the imposition of the death penalty is only "justified" when the aggravating circumstances outweigh the mitigating circumstances. Penal Code section 190.3.

Fifth, as discussed *infra* in Argument V (pp. 152-168), the prosecutor also committed misconduct at the second penalty phase by impugning the credibility and character of Mr. Jackson's defense counsel, conveying to the jury that he had lied to a witness and attempted to suborn perjury. 26 RT 4027-4030; 9 CT 2648-2650.

Sixth, although post-crime evidence of lack of remorse is inadmissible as aggravating evidence (*People v. Gonzalez* (1990) 51 Cal.3d

1179, 1232), and despite the absence of evidence demonstrating a lack of remorse, the prosecutor improperly argued to the jury that it should consider Mr. Jackson's supposed lack of remorse. 24 RT 3700 (opening statement); 31 RT 4728 (closing argument); see discussion in Argument VI, *infra*.

Thus, the misconduct was not isolated; this prosecutor engaged in a pattern of misconduct.

The misconduct was egregious, as shown above. Each of the factors the Supreme Court in *Donnelly* considered in determining whether prosecutorial misconduct rendered a trial fundamentally unfair -- whether the misconduct infringes upon a right specifically protected by the Bill of Rights, whether the trial court gave a curative instruction, and whether the comments were isolated – are present here, and weigh heavily in favor of appellant. The prosecutor's misconduct rendered the second penalty phase trial unfair.

5. Due Process -- Eighth Amendment.

In capital cases, the Eighth Amendment prohibits arguments that have the effect of misleading the jury about its role in sentencing. It is

> "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

Caldwell v. Mississippi (1985) 472 U.S. 320, 328–329. The Court in *Caldwell* held that because of the danger from these statements – that the jury would minimize the importance of its role – such misconduct violates the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. The

Caldwell rule is specifically applicable to prosecutorial misconduct – indeed, it is a particular extension of the *Donnelly* rule.[30]

Romano v. Oklahoma (1994) 512 U.S. 1 is instructive. In *People v. Ledesma*, 39 Cal.4th 641, 733, this Court explained that in *Romano*:

> "the high court concluded that the admission of evidence in a death penalty case reflecting that the defendant had been convicted of a prior murder and sentenced to death for that murder did not require reversal of the death judgment. (*Romano v. Oklahoma* (1994) 512 U.S. 1 (*Romano*).) . . . . The court in *Romano* found *Caldwell* inapplicable, because "the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process." (Emphasis added.)

Here, the prosecutor's misconduct *did* affirmatively mislead jurors as to their role in the sentencing process. The prosecutor set before the jurors an intentional falsehood regarding the prior jury's verdict, and that falsehood pertained directly to the jurors' capital sentencing role.

Under California law, the jurors are instructed to consider the "circumstances of the crime" at the penalty phase. In the factual scenario of penalty phase trial arising from a felony-murder with more than one participant and a single homicide victim – such as in this case –

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[30] In *Sawyer v. Smith* (1990) 497 U.S. 227, 244, the Supreme Court explained:

> "*Caldwell* must therefore be read as providing an additional measure of protection against error, beyond that afforded by *Donnelly*, in the special context of capital sentencing. [Citation.] The *Caldwell* rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings."

consideration of the circumstances of the crime would typically include consideration of whether or not the capital defendant was the actual killer of the victim "himself."

In this case, the prosecutor falsely informed jurors that the defendant had been found guilty by the guilt phase jurors of taking the life of the victim "himself." The defense objection to this false representation was overruled. The trial judge gave no instructions that would indicate the first jury did not make such a finding, and the prior verdicts read to the penalty phase jury seemingly substantiated the prosecutor's falsehood. As discussed *supra*, it is reasonably likely that the jurors concluded that, in fact, the prior guilt phase jury had indeed found that Mr. Jackson had taken the life of Monique Cleveland "himself" -- and that as a consequence, they were precluded from considering that the prosecution had not proven the defendant to be the actual shooter "himself."

Thus, because the prosecutor's misconduct "affirmatively misled" jurors as to their role in the sentencing process, the misconduct violated Mr. Jackson's right to a fair penalty phase trial, in violation of the Eighth Amendment.

D. The Issue Was Not Waived.

Respondent frequently asserts that claims of prosecutorial misconduct have been waived on appeal. Here, there was no waiver.

Generally, a defendant may not complain of misconduct on appeal unless at trial the defendant made an adequate and timely objection, and requested the court admonish the jurors. That, however,

> "is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request

> the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citations.] Finally, *the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.'* [Citations.]"

People v. Hill, supra, 17 Cal.4th at p. 820.

In this case, trial counsel promptly objected to the prosecutor's improper statement regarding the guilt phase jury's supposed finding that Mr. Jackson took the life of the victim "himself." Trial counsel did not, however, request an admonition. 22 RT 3289.

But a request for an admonition would have been futile, because the trial court immediately overruled the objection (22 RT 3289); thus, "the defendant ha[d] no opportunity to make such a request." *People v. Hill, supra*, 17 Cal.4th at p. 820; see *People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19.

The objection was adequate. As this Court has made plain:

> "The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice. [Citation.]"

People v. Williams (1997) 16 Cal.4th 153, 254. Here, the trial court's immediate response to the defense objection to the prosecutor's improper voir dire – "Overruled. Noted." (22 RT 3289) – demonstrates that the trial court found the objection unmeritorious, and saw no need for further input from either counsel on the matter. Any further objection would have been futile, and therefore was not required. *People v. Hill, supra*, 17 Cal.4th at p. 820.

Moreover, the objection was adequate to preserve the constitutional issues. This Court has repeatedly explained that a state law objection is sufficient to preserve a federal constitutional issue "where the due process claim [is] merely 'an additional legal consequence of the asserted [state] error.'" *People v. Partida* (2005) 37 Cal.4th 428, 438; *People v. Geier* (2007) 41 Cal.4th 555, 610-611 (same).

Here, there was a timely objection from which the constitutional claims flowed. The constitutional claims herein -- that the improper voir dire by the prosecutor, representing that the guilt phase jury had found Mr. Jackson guilty of killing the victim "himself," violated his rights to a fair trial, to confront the witnesses against him, and to a reliable penalty phase adjudication – flow as additional legal consequences of the underlying claim of prosecutorial misconduct in the form of improper voir dire. No further facts needed to be explored at trial to make these determinations. Because the federal claims are merely additional legal consequences of the state law violation in this case, the federal claims are properly raised on appeal.

In any event, as to the Eighth Amendment (*Caldwell*) violation identified above, this Court has held that no objection is necessary to preserve the issue on appeal for cases, like this one, that were tried before the Court issued its opinion in *People v. Cleveland* (2004) 32 Cal.4th 704. See *People v. Moon* (2005) 37 Cal.4th 1, 17-18.

E. Reversal is Required.

More than one standard of prejudice is implicated.

First, when, as here, the prosecutor's misconduct has "affirmatively misled" jurors as to their role in the sentencing process, reversal of the

penalty phase judgment is required without more. *People v. Milner* (1988) 45 Cal.3d 227, 257-258; *Caldwell, supra*, 472 U.S. at pp. 340-341. For this reason alone, reversal is required here.

Second, the federal constitutional errors additionally require reversal under *Chapman v. California, supra*. As noted above, that standard for federal constitutional error demands that the prosecution show that, beyond a reasonable doubt, the error could not have contributed to the verdict. Under *Chapman*, the prosecution must "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Chapman v. California, supra*, 386 U.S. at p. 24.

Third, state law prosecutorial misconduct requires reversal under the state law "reasonable possibility" standard of *People v. Brown, supra*, 46 Cal.3d 432, 448. The *Brown* standard is the same in substance and effect as the standard of *Chapman v. California, supra,* 386 U.S. 18, 23-24; see *People v. Ashmus, supra*, 54 Cal.3d 932, 965.

Here, it is at least reasonably possible that the prosecutor's misconduct did contribute to the verdict, in violation of both the *Brown* and *Chapman* standards of prejudice. That is because the prosecutor's misconduct directly reinforced the central theme of the prosecutor's argument for death.

That Jonathan Jackson deserved to die because he had personally "executed" the pregnant Monique Cleveland was central to the prosecutor's closing argument.

First, the prosecutor reminded the jurors that Monique Cleveland – whom she referred to by the nickname "Nikki" – "won't ever speak again because of his choices and his violence and his senseless killing of an innocent victim." 31 RT 4726.

The prosecutor then commented on Mr. Jackson's clothing:

> "He sits here dressed up . . . [in] his nice suit. But that isn't what he looks like in real life, ladies and gentleman. That isn't what he looks like when he's out . . . ***executing pregnant women***."

31 RT 4726-4727 (emphasis added).

Referring to the penalty phase jury's verdict forms, the prosecutor continued:

> "The defendant imposed the death penalty, signed a verdict just like that on June 16, 1996, as to not one, not two, but three people. Did he weigh the aggravating circumstances against the mitigating circumstances when ***he, the judge, the jury, and the single-handed executioner of a 28-year-old pregnant woman*** -- did he reflect upon that decision as you're being asked to do in this courtroom?

31 RT 4727 (emphasis added).

The prosecutor then turned to factor (a), the circumstances of the crime:

> "Let me remind you of the murders in this case. The defendant is convicted of the murder of Niki. The special circumstance is that he murdered her during a robbery or attempted robbery and that he personally used a firearm."

31 RT 4731.

The prosecutor addressed factor (d), the presence or absence of extreme mental or emotional disturbance:

> "Clearly, that factor does not apply to this case. ***The defendant's execution of Niki*** was planned to carry out his goal of jacking Rob and eliminating witnesses . . . ."

31 RT 4732 (emphasis added).

Turning to factor (g), whether the defendant acted under extreme duress or substantial domination by another, the prosecutor argued:

> "That factor doesn't apply in this case. The defendant is the one who decided to jack Rob. The defendant is the one who shot Rob.

> ***The defendant is the one who killed Niki.***"

31 RT 4733 (emphasis supplied).

The prosecutor argued, by comparison to other, hypothetical "less aggravated" murders, that Mr. Jackson's acts were particularly aggravated:

> "In this case we have a situation of a gang member going to the home of his drug dealer, armed, not getting what he wants, deciding to jack him, as you know, or rob him. And as a result of that, shooting him multiple times, definitely intending and hoping to kill him, ***seeking out his helpless vulnerable 5 foot 3 inch wife, shooting at her, ultimately executing her, also resulting in the death of her unborn child.***"

31 RT 4736 (emphasis added).

After arguing, falsely, that Kevin Jackson's story of Jonathan Jackson's supposed confession to him "exactly matches up with what we know the physical evidence at the crime scene reveals" (31 RT 4740) and was credible, the prosecutor painted a vivid picture for the jury of Mr. Jackson "executing" Monique Cleveland:

> " . . . . [Mr. Jackson] can't let her live, because as far as he knows, he's already killed her husband, so she's a witness. But ***before he executes her,*** he says to her, "Where's the money?" You've got to assume she is laying on the ground looking up to him. We know from the evidence he's standing in the master bedroom. He's got her laying in this hallway, he's grabbed her hair and demanding money, .357 Magnum staring her in the face. ***She doesn't know where the money is, and so at that point he blows her brains out***, being sure he leans away so as not to get her blood and tissue on his person."

31 RT 4745 (emphasis added).

In conclusion, the prosecutor asked the jurors to "think about what the last few minutes of Monique Cleveland's life was like". 31 RT 4767. For the jury's benefit, the prosecutor imagined new details: "She has to be

crying. . . . [H]e's got to be screaming at her, where's the money? Where's the money? . . . . She probably doesn't know what he's talking about. She's panicking . . . ." 31 RT 4768. After focusing the jury on the terror the prosecutor claimed Monique Cleveland experienced at Mr. Jackson's hands, the prosecutor asked the jury for a verdict of death. 31 RT 4767-4770.

The prosecutor did address other matters in her closing argument for the death penalty, such as the other crimes evidence presented, victim impact evidence, and the evidence in mitigation. But the most important and recurrent theme of the prosecutor's argument was that because Jonathan Jackson "executed" the pregnant Monique Cleveland, death was the appropriate punishment.

Indeed, the prosecutor specifically argued that, even without regard to the other evidence,

> ***"in and of itself this crime, this death of Nikki, justifies a decision of death on defendant."***

31 RT 4745 (emphasis added).

Thus, the argument for death that the prosecutor made to the jury depended, as its central pillar of support, on the factual theory that Jonathan Jackson had taken the life of Monique Cleveland "himself."

Recall the relevant standard of prejudice under *Chapman v. California*, as summarized by this Court in *People v. Neal* (2003) 31 Cal.4th 63, 86:

> "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Chapman, supra,* 386 U.S. at p. 24.) '*To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury*

> *considered on the issue in question, as revealed in the record.*' (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L. Ed. 2d 432, 111 S. Ct. 1884].) Thus, ***the focus is what the jury actually decided and whether the error might have tainted its decision***. That is to say, *the issue is '**whether the ... verdict actually rendered in this trial was surely unattributable to the error**.*' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L. Ed. 2d 182, 113 S. Ct. 2078].)" (Emphasis added, ellipses in orig.)

In this case, in which the prosecutor made the "execution" theme central to her argument for death, can this Court confidently say that the prosecutor's misconduct in representing the prior jury had found Mr. Jackson to be the actual killer did not contribute to the ensuing verdict?

The previous jury in Mr. Jackson's first penalty phase trial had hung, after sending the trial court a note indicating that one or more jurors were troubled by questions of "lingering doubt." 3 CT 872.[31]

Indeed, the evidence that Jonathan Jackson had taken the life of the victim "himself" was quite weak. It rested on the purported confession to Kevin Jackson, a witness who had every motive to lie – and whose testimony was contradicted by the prosecution's own physical evidence and expert testimony. It is unlikely that the penalty phase jurors concluded, based on the evidence alone, that Jonathan Jackson had personally "executed" Monique Cleveland.

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[31] Before declaring itself unable to reach a penalty verdict, the first jury submitted this written question:

> "What wait [sic] if any should lingering doubt or any doubt pertaining to this case in the guilt phase and the penalty phase be considered in determining the punishment[?]"

3 CT 872.

At the second penalty phase trial, the prosecutor falsely informed jurors that the defendant had been found guilty by the guilt phase jurors of taking the life of the victim "himself."

The defense objection to this false representation was overruled – thereby, in the eyes of the jurors, placing the trial court's seal of approval upon the prosecutor's false statement.

The trial judge gave no instructions that would indicate the first jury did not make the purported finding.

The prior verdicts that the clerk read to the penalty phase jury seemingly substantiated the prosecutor's falsehood, telling the jurors that the first jury had, indeed, convicted Mr. Jackson of personally using a firearm in the felony-murder (24 RT 3673), without explaining that this did not mean the prior jury had found that Mr. Jackson had personally used a gun to kill Monique Cleveland.[32]

As demonstrated *supra* at pages 104-112, it is reasonably likely that the jurors concluded that, in fact, the prior guilt phase jury had indeed found that Mr. Jackson had taken the life of Monique Cleveland "himself" -- and that as a consequence, they were precluded from considering that the prosecution had not proven the defendant to be the actual shooter "himself."

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[32] As noted above, by contrast, the guilt phase jurors were correctly instructed that

> "The term 'personally used a firearm' as used in
> this instruction means that the defendant must have
> intentionally displayed a firearm in a menacing manner,
> intentionally fired it, or intentionally struck or hit a
> human being with it."

12 RT 1978; 2 CT 0573.

Only three of the twelve jurors who sentenced Mr. Jackson to death were targets of the prosecutor's misconduct – Jurors Nos. 2, 3 and 8, who were all members of panel no. 1. We do not know to what extent the incorrect belief the prosecutor had engendered regarding the prior jury's determinations contaminated the entire jury's deliberations. But if only a single juror believed what the prosecutor falsely stated -- that the prior jury had, in fact, determined that Mr. Jackson had taken the life of Monique Cleveland "himself" -- that would still operate to deny Mr. Jackson the fair and reliable penalty phase trial our laws and Constitution guarantee.

Accordingly, the penalty phase judgment should be reversed.

V. THE PENALTY JUDGMENT MUST BE REVERSED BECAUSE THE PROSECUTOR COMMITTED EGREGIOUS MISCONDUCT BY ELICITING TESTIMONY FROM A PROSECUTION WITNESS THAT MR. JACKSON'S DEFENSE COUNSEL HAD IMPROPERLY ATTEMPTED TO INFLUENCE HIS TESTIMONY, AND CONVEYING TO THE JURY THAT DEFENSE COUNSEL HAD LIED TO THE WITNESS ABOUT A THIRD PARTY'S SUPPOSED CONFESSION.

A. Introduction.

"[A] prosecutor commits misconduct by impugning the integrity of defense counsel." *People v. Cook* (2006) 39 Cal.4th 566, 613. In this case, the prosecutor committed misconduct by conveying to the jury, through the examination of prosecution witness Kevin Jackson, that in a pretrial interview Jonathan Jackson's defense lawyer had lied to this witness, stating that a third party had confessed to the victim's murder, in a failed effort to get the witness to change his testimony.

The prosecutor's misconduct unfairly fortified the otherwise-shaky credibility of Kevin Jackson, the prosecution's central witness supporting its "execution-style killing" scenario. And the prosecutor's misconduct came at the direct expense of the credibility of defense counsel, casting him as an unethical advocate who would deceive a witness, and destroying his credibility in penalty phase argument. As a consequence, Mr. Jackson did not receive a fair penalty phase trial, and the penalty phase judgment must be reversed.

B. Proceedings at Trial.

On cross-examination at the penalty phase retrial, defense counsel impeached the prosecution's most important witness, Kevin Jackson, with numerous inconsistencies between his previous accounts and his current account of Jonathan Jackson's alleged statements to him. When counsel confronted Kevin Jackson with his conflicting testimony from the previous trial, Kevin Jackson stated, "I was allowing you to put words in my mouth then." 26 RT 4026.

In the course of this cross-examination, defense counsel asked Kevin Jackson:

> "Q Do you remember me questioning you at the prior trial on this matter?
> "A Yes.
> "Q And do you recall that being around April 21st, 22nd of 1999, this year?
> "A Only time you questioned me was in trial."

26 RT 4005.

On re-direct examination, the prosecutor engaged in the following colloquy with prosecution witness Kevin Jackson:

> "Q And you said that the last time you talked to the defense attorney was in court when you testified before?
> "A Right.
> "Q Have you talked to him any other time?
> "A I talked to him I believe Saturday of this month. I'm not sure what the date was. I believe it was the 6th.
> "Q You're looking up at the calendar here in court. And you think it was last Saturday?
> "A The Saturday just past. November 6 of '99.
> "Q Where did you talk to the defense lawyer on the 6th?
> "A He came to visit me in jail at the old jail here in Riverside.
> "Q Did you meet with him?

"A Yes.

"Q ***Did he say anything to you to try to influence your testimony here?***

"A He just asked me a few questions about testimony I give today.

"Q I'm not asking you what he said. ***I'm just asking you if you felt he was trying to influence your testimony.***

"A ***Yeah. Yes.***

"Q Did he succeed in influencing your testimony?

"A No.

"MS. BARHAM: I don't have anything further."

26 RT 4027-4028 (emphasis added).

On re-cross examination of Kevin Jackson, defense counsel asked:

"Q What did I say to you to try to influence your testimony?

"A You asked me if -- if I say anything nice about Jonathan would the D.A. pull back the deal that they have for me. And you asked me was there anything nice that I could say about Jonathan. You told me that -- that Jonathan's co-defendant had confessed to the murder but the D.A. just wanted to put Jonathan away for the murder.

"Q Did I ask you whether or not if you changed your testimony that you were concerned that it might affect your deal with the district attorney?

"A Yes.

"Q Was I putting words in your mouth on that particular day?

"A No.

"Q Any way else I tried to influence your testimony?

"A Not that I can remember."

26 RT 4028-4029.

On further re-direct examination, Kevin Jackson testified:

"Q This defense attorney told you that someone other than Jonathan Jackson confessed to this murder?

"A Yes.

"Q Do you have any way of knowing if that's a lie?

"A No.

"Q Did you think that was intended to influence your testimony against Jonathan Jackson?

"A Yes.

"Q Did he also tell you that Jonathan was facing the death penalty in an effort to influence you against testifying here?

"A Yes."

26 RT 4030 (emphasis added).

On further re-cross examination, the witness testified, in part:

"Q And are you saying that now I was trying to get you to not say those things that you had said prior?

"A I believe you was trying to get me to try to change my story a little bit." 26 RT 4031.[33]

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[33] The entire further re-cross examination is as follows:

"Q Are you telling this jury now that you believe I was trying to stop you from testifying?

"A I don't want to say stop me from testifying.

"Q You had already told a story on a tape recording. Right?

"A Right.

"Q And you had testified in trial. Right?

"A Right.

"Q And are you saying that now I was trying to get you to not say those things that you had said prior?

"A I believe you was trying to get me to try to change my story a little bit.

"Q In what particular way was I trying to get you to change your story? Can you be specific?

"A No. Nothing specific.

"Q But I did ask you that you had a relationship with Jonathan. Right?

"A Right.

"Q And you had what you thought at one point in time a friendship. Right?

"A Right.

"Q And I asked you whether or not you knew positive things about Jonathan. Right?

(footnote continued on next page)

Thereafter, outside the presence of the jury, defense counsel moved for a mistrial, on the bases the prosecutor's questions to Kevin Jackson on re-direct examination were outside the scope of cross-examination, and "directly impugned" defense counsel's character and credibility. 26 RT 4051-4052.

Defense counsel made clear to the court that he had interviewed Kevin Jackson only with the permission of that witness's attorney. 26 RT 4052-4053. Counsel further stated:

> " . . . I can categorically deny I ever said anything to him to get him to change his testimony, intimidate him in any way. That was certainly not the nature, the tenor, or the flavor of that particular interview session. . . .
>
> . . . . [¶]
>
> "So for the prosecutor to elicit -- to put those kind of questions to Mr. Jackson in front of this jury and have him respond in a positive way I believe impugns my character, certainly is a cause of concern, or should be a cause of concern to Mr. Jonathan Jackson that this jury now has lost faith and credibility in me as his counsel. And as the Court is well aware, my credibility in this penalty phase of the trial is of the utmost importance."

26 RT 4053. Counsel expressly denied telling Kevin Jackson that someone else had confessed to the murder. 26 RT 4062.

> "A No. You asked me did -- was there anything good I could say about Jonathan.
>
> "Q I did ask you, are there good things you know about Jonathan?
>
> "A Yes.
>
> "Q Your answer was yeah, you know good things about Jonathan?
>
> "A My answer was no."

26 RT 4030-4031.

In response, the prosecutor argued her conduct was justified because defense counsel:

> "insinuated the existence of deals which he knows do not exist. He is trying to suggest to this jury that I have done something to get this witness to make up a story about the defendant confessing to a murder. And this is not true."

26 RT 4056. The prosecutor also claimed that the testimony was offered to show Kevin Jackson's state of mind. 26 RT 4057 ("if the witness takes it that the information that the defense attorney is gratuitously giving him is an effort to get him to change his testimony, that's offered for his state of mind. That's how it seemed to him. ").

The trial court denied the mistrial motion, though it did offer to give a curative instruction, which defense counsel declined. 26 RT 4061-4062.

C. The Prosecutor Committed Misconduct.

The standard governing prosecutorial misconduct comprising attacks on defense counsel is well-established:

> "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. (*People v. Wash* (1993) 6 Cal.4th 215, 265; *People v. Thompson* (1988) 45 Cal.3d 86, 112; *People v. Perry* (1972) 7 Cal.3d 756, 789-790, disapproved on other grounds, *Green, supra*, 27 Cal.3d at pp. 28-34; *People v. Bain, supra*, 5 Cal.3d at pp. 847-848.) *'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.'* (5 Witkin & Epstein, *supra*, Trial, § 2914, p. 3570.)"

People v. Hill (1998) 17 Cal.4th 800, 832 (emphasis added). In particular, it is

> "improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case."

People v. Sandoval (1992) 4 Cal.4th 155, 183. To commit misconduct, a prosecutor need not directly attack defense counsel:

> "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established."

People v. Cummings (1993) 4 Cal.4th 1233, 1302; *People v. Bell* (1989) 49 Cal.3d 502, 538.

In this case, the prosecutor initially attacked the integrity of defense counsel in her re-direct examination of her star witness, prisoner Kevin Jackson, by deliberately raising the topic of Kevin Jackson's meeting with defense counsel – which had not been disclosed on cross-examination by the witness – and eliciting evidence that, between the first trial and the current proceeding, defense counsel had, in a meeting with the witness, attempted to "influence" his testimony.

Kevin Jackson had tried to explain his inconsistent testimony at the first trial by blaming the defense counsel for "put[ting] words in [his] mouth" at the first trial. 26 RT 4026. But Kevin Jackson had not suggested that defense counsel had influenced his testimony *at the current trial.*

\+ Thus, the prosecutor brought up new matter, beyond the scope of cross, in her re-direct examination.

Moreover, the new matter the prosecutor raised had no purpose except to smear defense counsel in the eyes of the jurors.

> "Q Did he say anything to you to try to influence your testimony here?
>
> "A He just asked me a few questions about testimony I give today.
>
> "Q I'm not asking you what he said. *I'm just asking you if you felt he was trying to influence your testimony.*
>
> "A *Yeah. Yes.*
>
> "Q Did he succeed in influencing your testimony?

"A   No."

26 RT 4028 (emphasis added).

Thus, there was no reason to suppose that his meeting with defense counsel actually *had* influenced the testimony of Kevin Jackson in any way. The prosecutor's assertion that raising this matter was justified to show the witness's state of mind as to his current testimony was incorrect.

The prosecutor also argued to the trial court that she had not committed misconduct because defense counsel "is trying to suggest to this jury that I have done something to get this witness to make up a story about the defendant confessing to a murder. And this is not true." 26 RT 4056.

The prosecutor could not substantiate the truth of that claim. But even if this allegation had been true, it would, at most, allow the prosecutor to seek to establish, on re-direct examination, that *she* had not improperly attempted to influence the witness -- it would not grant license to the prosecution to elicit evidence that the defense attorney had attempted, unsuccessfully, to do so. There is no "rule of tit-for-tat" or "right of retaliation" for prosecutors.

Even if the prosecutor's accusations are arguably correct, it is nevertheless misconduct to make them in front of the jury. This Court has stated:

> "*Even if the accusations against [defendant's] counsel found some support in the record, the prosecution should not have made them.* 'The conviction of a defendant of the crime of which he is accused should rest not even slightly upon the dereliction (if any) of his counsel, but ordinarily should be grounded upon acts committed by the defendant . . . .' [Citation.]"

People v. Perry (1972) 7 Cal.3d 756, 790 (emphasis added) (ellipsis in orig.).

As defense counsel pointed out to the trial court, the prosecutor sprang the issue by raising it with the witness on re-direct examination, without asking that the matter be taken out of the presence of the jury first, or even informing the court ahead of time that there was going to be a "personal credibility attack" on defense counsel in re-direct. 26 RT 4058-4059. Trial counsel determined he was forced to respond, and when he did so, the prosecutor again retaliated in further re-direct, by pointedly conveying to the jurors that defense counsel lied to Kevin Jackson in an effort to get him to change his testimony. 26 RT 4030.[34]

This was further serious misconduct. The allegation by the prosecutor, the representative of the State, that a defense attorney in a death penalty case has attempted to "influence" a critical witness in a private meeting is highly damaging. This witness had testified previously at the first trial; the prosecutor's obvious implication was that defense counsel had tried to "influence" Kevin Jackson to change his testimony from the truth. Moreover, by confirming Kevin Jackson's accusation that defense counsel had told him someone else confessed to the murder, and specifically asking this witness if he "had any way of knowing if that's a

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[34] The prosecutor questioned Kevin Jackson as follows:

"Q This defense attorney told you that someone other than Jonathan Jackson confessed to this murder?

"A Yes.

"Q Do you have any way of knowing if that's a lie?

"A No.

"Q Did you think that was intended to influence your testimony against Jonathan Jackson?

"A Yes.

26 RT 4030 (emphasis added).

lie," (26 RT 4030), the prosecutor clearly suggested that defense counsel lied to this witness. From the jury's viewpoint, the fact that defense counsel had not put on any evidence of the murder confession of any third party would seemingly confirm the prosecutor's implicit accusation that defense counsel lied. By suggesting that defense counsel lied to this prosecution witness, in a futile attempt to get him to change his testimony, the prosecutor further greatly impugned the integrity of defense counsel. There is more than "a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury," by first deceiving this witness. *People v. Cummings, supra,* 4 Cal.4th at p. 1302.

The prosecutor's misconduct transgressed federal constitutional boundaries as well as state law.

First, it violated due process, for several reasons.

As part of her misconduct, the prosecutor intentionally introduced evidence that defense counsel had visited witness Kevin Jackson in jail and had attempted, in this witness's account, to "influence" his testimony. The prosecutor elicited testimony that the witness did not have any way of knowing whether the defense counsel had lied to him by saying someone else had confessed to the crime, and that the defense attorney's attempt to influence the witness had been unsuccessful – the prosecution witness had refused to be influenced in his testimony.

Whatever else this testimony was, it was irrelevant to any contested issue at trial. As seen above, Kevin Jackson testified that defense counsel's meeting with him had <u>not</u> influenced his testimony. 26 RT 4028. Thus, what defense counsel said, or did not say, to this witness was not relevant to his state of mind, and itself tended to prove nothing with respect to the

aggravating and mitigating factors the jury was charged with considering at this capital sentencing trial. The prosecutor's questions to Kevin Jackson about defense counsel's state of mind (26 RT 4028, 4030), and the answers, were also irrelevant.[35] The introduction of irrelevant evidence that is highly prejudicial violates due process. *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 887.

Moreover, as discussed above in connection with Argument IV, prosecutorial misconduct rises to the level of a due process violation if the conduct is so egregious it renders the trial fundamentally unfair. *Darden v. Wainwright,* 477 U.S. at 181; *Donnelly v. DeChristoforo, supra*, 416 U.S. 637, 645.

In determining whether prosecutorial misconduct violates the due process guarantee of a fair trial, the Supreme Court looks to several nonexclusive factors, among them whether the misconduct infringes upon a right specifically protected by the Bill of Rights; whether the trial court gave a curative instruction; and whether the misconduct was isolated. *Donnelly, supra*, 416 U.S. at pp. 645-48.

Here, the prosecutor's misconduct in suggesting to the jury, in her examination of her own witness, that the defense counsel had attempted to procure false testimony by lying to that witness in a private interview, meets all three of these factors.

First, the prosecutor's misconduct infringed on a right of Mr. Jackson's that is specifically protected by the Bill of Rights: the Sixth

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[35] In any event, even when a state of mind *is* relevant to some contested issue, a lay witness may not give an opinion as to another's state of mind. *People v. Chatman* (2006) 38 Cal. 4th 344, 397.

Amendment right to assistance of counsel, which means the right to effective assistance of counsel. *Strickland v. Washington* (1984) 466 U.S. 668, 686.

In the context of a penalty phase trial, effective assistance of counsel has an added dimension, due to the "essentially moral and normative" nature (*People v. Cook* (2007) 40 Cal.4th 1334, 1368) of the death penalty determination. At the end of the trial, the defense lawyer in the penalty phase of a death penalty case stands before the jury and asks the jury to spare his client's life. Unlike the prosecutor, he is not cloaked in the authority of the State, representing all of us – instead, the defense attorney is cloaked in no authority, and represents someone who has been convicted of murder. He must, to save his client's life, build a rapport with the jurors, establish a level of trust and comfort with him. His standing with the jury, in the larger sense, is critical. If the jury believes, on the prosecutor's clear suggestion, that the defense lawyer has attempted to tamper with the evidence – to lie to a witness, attempting to improperly influence his testimony – then defense counsel's standing with the jury will be destroyed, and his effectiveness, at the penalty phase, with it. In a case such as this one, in which the prosecution has strongly suggested that the defense attorney has attempted to interfere with the presentation of the truth, the risk of such a result is unacceptably high.

Second, a curative instruction was not given, although, as noted above, defense counsel declined the trial court's offer to give such an instruction. As discussed below, even if the proposed curative instruction had been given, it would have been inadequate to cure the harm.

Finally, as demonstrated above in connection with Argument IV, the prosecutor's misconduct in this instance was far from isolated – instead, the

prosecutor engaged in a pervasive pattern of misconduct aimed at denying Mr. Jackson a fair penalty phase trial. Argument IV sets forth no less than six occasions of serious misconduct by the prosecutor in the second penalty phase trial. *Supra*, at pp. 136-140.

The prosecutor's misconduct also violated the Eighth Amendment. Because death is, indeed, different from all other punishments – it is the most serious, and it is irrevocable – the Supreme Court has made clear that there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305. Here, the prosecutor's attack on defense counsel did serious damage to counsel's ability to function as an effective advocate for his client, rendering the outcome suspect, and constitutionally unreliable.

D. The Trial Court Abused Its Discretion by Failing to Grant a Mistrial.

The trial court abused its discretion, in violation of both California law and the Fifth, Sixth, Eighth and Fourteenth Amendments, in refusing to grant the defense motion for a mistrial.

The legal standard is clear. This Court reviews the trial court's ruling under state law for an abuse of discretion. "A trial court should grant a mistrial only if the defendant will suffer prejudice that is " ' "incurable by admonition or instruction." ' " *People v. Davis* (2005) 36 Cal.4th 510, 553-554.

Here, the trial court did offer to give the jury a cautionary instruction:

> "However, the Court is willing . . . to instruct the jury that the credibility of the -- of counsel for either side is simply not

> in issue, that counsel have a duty to represent their respective positions to the best of their ability and in any manner ethically proper for them to do, that there has been, in the opinion of the Court, no indication of any improper tactic or activity on the part of either counsel, and it shall not and must not enter into their deliberations by reason of questions which have been asked which the -- the answers to which have indicated that there has been no activity of that nature which has occurred."

26 RT 4061.

Defense counsel declined the instruction, and it was not given. 26 RT 4061-4062.

Even if the instruction had been given, it would have been inadequate to cure the harm of the prosecutor's misconduct.

First, and rather strikingly, the trial court's proposed instruction failed to admonish the prosecutor for her misconduct. Instead, the proposed instruction *absolved* the prosecutor of any misconduct. This, without more, renders the proposed instruction a mixed, confusing and defective message in response to serious prosecutorial misconduct at the penalty phase of a death penalty trial.

But if this perplexity were not enough, the proposed instruction appeared to fly in the face of the evidence the jury just heard. Improper tactics, the trial court proposed to instruct the jury, "shall not and must not enter into [the jury's] deliberations by reason of questions . . . <u>the answers to which have indicated that there has been no activity of that nature which has occurred</u>." 26 RT 4061 (emphasis added).

Yet the evidence that was the product of the prosecutorial misconduct in question – the answers of Kevin Jackson to questions about defense counsel's jailhouse interview with him – indicates that defense counsel was guilty of <u>exactly</u> the interference the prosecutor claimed:

"Q This defense attorney told you that someone other than Jonathan Jackson confessed to this murder?

"A Yes.

"Q Do you have any way of knowing if that's a lie?

"A No.

"Q Did you think that was intended to influence your testimony against Jonathan Jackson?

"A Yes."

26 RT 4030.

It may be that in some cases, improper prosecutorial comments in closing argument are effectively addressed by prompt and strong cautionary instructions. But this case involved not closing remarks, but testimony from the prosecution's most critical witness, and the clear meaning of that testimony was that the defense attorney had lied to the witness in order to get him to change his story. (Certainly, jurors would reason, if someone else had confessed to the murder, defense counsel would have brought this fact before the jury.) The jury heard what it heard, and informing the jury that there was no evidence of improper activity would not have changed that fact that the prosecutor effectively conveyed to the jury that the defense lawyer had lied to a critical witness. The prejudice from this misconduct at the penalty phase of this case was so serious that no cautionary instruction could have cured it.

The trial court's failure to grant a mistrial resulted in a penalty phase trial that violated the Fifth, Sixth, Eighth and Fourteenth Amendments, for the reasons set out above.

E. Mr. Jackson Suffered Prejudice.

The applicable standards of prejudice for penalty phase error – the reasonable possibility standard of *People v. Brown*, *supra*, 46 Cal.3d 432, 448, and the federal "beyond a reasonable doubt" standard of *Chapman v.*

California, *supra*, 386 U.S. 18, 24 – have been discussed above. They are the same in substance and effect. Under either standard, the death judgment must be reversed.

This was not a case in which death was a foregone conclusion. As noted above, the first jury penalty phase trial was unable to reach a verdict, and a mistrial was declared after the jurors had sent the trial court a note signaling that one or more jurors were troubled by questions of "lingering doubt." 3 CT 869, 872.

Assuming only for the purposes of analysis that, *contra* Arguments III and IV, *supra*, the jurors did not consider themselves foreclosed from considering relevant evidence because (as they had been led to believe) the prior jury had already determined that Mr. Jackson had personally killed the victim with a firearm, then the central contest of fact at the penalty phase was whether Kevin Jackson was telling the truth when he testified to Mr. Jackson's alleged admissions to him the day after the crimes. If Kevin Jackson was not telling the truth, then there was no evidence supporting the prosecution's theory that Jonathan Jackson had "executed" Monique Cleveland. The "execution" theory, as shown above, was central to the prosecution's argument for death. See discussion at pp. 145-148, *supra*.

Both counsel discussed Kevin Jackson's credibility in closing argument. 31 RT 4738-4742 (prosecution); 31 RT 4778-4791 (defense).

The prosecutor's misconduct was intended to, and did, valorize Kevin Jackson, her chief witness in support of the "execution" scenario, by eliciting that this was a witness who would not change his testimony even when a skilled defense attorney attempted to "influence" him with a lie about a confession.

It hardly needs emphasis that the trust and rapport that counsel has worked to establish with the jurors comes into play when defense counsel makes closing arguments to the jury. But when the prosecutor, cloaked with the authority of the state, elicits testimony that the defense attorney has attempted to influence a witness by raising the spectre that the defense attorney has materially lied to that witness, the basis of that trust counsel has sought to establish is dramatically eroded. The result is what likely happened in this case – the jury accepted the prosecution's version of the facts – the "execution" scenario of the prosecutor's closing argument – even though it was refuted by the testimony of the prosecution's own forensic experts. See discussion, *supra*, at pp. 104-112.

Moreover, as noted above, the death penalty determination is finally an "essentially moral and normative" one. *People v. Cook, supra,* 40 Cal.4th at p. 1368. Accordingly, counsel's role at the penalty phase differs, in that it encompasses a "moral and normative" appeal to the jury to spare the client's life. When, as in this case, the defense lawyer has been branded by the prosecutor as a lawyer who would lie to a critical witness in an attempt to get the witness to change his story, the defense lawyer stands in front of the jury not as an honest lawyer with things of importance to say about a very difficult decision, but as a deceitful lawyer who cannot be trusted. In the penalty phase of this capital case, this serious misconduct prevented a fair trial.

The penalty judgment should be reversed.

VI. THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING A POST-ARREST STATEMENT BY MR. JACKSON TO L.A.P.D. OFFICER AOKI THAT, THE PROSECUTOR CLAIMED, DEMONSTRATED A LACK OF REMORSE.

A. Background.

Monique Cleveland was killed on June 15, 1996 in Riverside County. More than a month later, on July 25, 1996, in Los Angeles, L.A.P.D. Officer Damon Aoki contacted Jonathan Jackson as part of his routine gang-suppression work. When, according to Aoki, Jackson gave a false name, the officer took him into custody for further investigation. Jackson did not resist arrest. While in police custody at Parker Center, and in handcuffs, Jackson reportedly told Officer Aoki that

> "if he had had a gun at the time that he stopped us [sic], he would have had to shoot it out with us due to the fact that he had two strikes."

26 RT 4106.

The admissibility of this statement was litigated twice.

Before the first penalty phase, the parties filed written briefs addressing the admissibility of the statement. The prosecution argued:

> "the defendant's statement to Officer Aoki regarding his intention to shoot police officers had he had a gun is admissible to demonstrate for the jury *the defendant's state of mind regarding his lack of remorse for the crime* he committed against Monique Cleveland and his failure to take responsibility for his actions."

3 CT 627 (emphasis added).

After a hearing to determine the admissibility of the evidence under Evidence Code section 402, the trial court at the first penalty phase ruled the evidence was inadmissible.

"[THE COURT:] . . . Those kind of statements that show lack

> of remorse are not admissible as an aggravating factor in this case."

14 RT 2127. The court further explained:

> "But my ruling is now that's just not admissible as an aggravating factor or to show lack of remorse or any other purpose, because it's not covered by -- I think it's -- the factors in aggravation and mitigation under Section 190.3."

14 RT 2130.

As noted above, the first penalty phase jury was unable to reach a decision, and the trial court declared a mistrial. 3 CT 869, 870.

Retrial of the penalty phase was before a different judge.

Again, the parties contested the admissibility of the alleged statement to Officer Aoki. Again, the prosecutor urged that the evidence was admissible in order to demonstrate Mr. Jackson's alleged lack of remorse. 24 RT 3625; see also 10 CT 3044-3045 (response to new trial motion). This time, a different trial judge agreed with the prosecution that the statement was, indeed,

> "admissible . . . [as] indicating that the defendant had a lack of consciousness of guilt; he had a lack of remorse."

24 RT 3626.

Thereafter, Officer Aoki testified to the statement, as quoted above. 26 RT 4106.

B. The Trial Court Erroneously Admitted the Statement.

The trial court erroneously admitted the evidence of the alleged statement to Officer Aoki at the second penalty phase.

In *People v. Boyd* (1985) 38 Cal.3d 762, this Court held that, under Penal Code section 190.3, the jury must "decide the question of penalty on

the basis of the specific factors listed in the statute," and, moreover, the evidence admitted at the penalty phase must be "relevant to those factors." *Id.*, at pp. 773-774.

While mitigating evidence is not so limited,

> "[e]vidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and [would] therefore [be] irrelevant to aggravation."

People v. Boyd, *supra*, 38 Cal.3d at p. 774. Thus, "[aggravating] evidence irrelevant to a listed factor is inadmissible," unless admitted to rebut mitigating evidence admitted under section 190.3, factor (k). *Id.,* at pp. 776; accord, e.g., *People v. Avena* (1996) 13 Cal.4th 394, 439.

In this case, the admission of Mr. Jackson's alleged statement to Officer Aoki at the second penalty phase was justified by the trial court because the statement demonstrated, in the court's view, Mr. Jackson's "lack of remorse." 24 RT 3626.

This Court has previously addressed the admissibility of evidence of the defendant's lack of remorse at the penalty phase of a capital trial. The Court has drawn a clear distinction between two types of evidence of lack of remorse:

> "Conduct or statements at the scene of the crime demonstrating lack of remorse may be considering in aggravation as a circumstance of the capital crime under section 190.3, factor (a)."

People v. Pollock (2004) 32 Cal.4th 1153, 1184, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.

> "On the other hand, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating."

People v. Gonzalez, supra, 51 Cal.3d at p. 1232 (orig. emphasis), citing *People v. Boyd, supra,* 38 Cal.3d at pp. 771-776; accord, *People v. Pollock, supra,* 32 Cal.4th at p. 1184.

We turn to the statement Jonathan Jackson allegedly made to Officer Aoki.

On its face, this statement is *not*, as the prosecutor argued and the trial court accepted, evidence of "lack of remorse" for the crimes for which Mr. Jackson was prosecuted. The statement did not even *refer to* the killing of Monique Cleveland, or the events in Riverside County, much less express a lack of remorse for those events. 26 RT 4106.

Moreover, at the section 402 hearing, Officer Aoki admitted that, at the time Jackson made the statement, he had probably not told Jackson there was a murder warrant out for him. 9 RT 1446-1447. Thus, not only is the statement entirely silent on its face about the crimes for which Mr. Jackson was tried -- there is no evidence that Mr. Jackson even knew there was a warrant out for his arrest on a murder charge when he made the statement.

Thus, even if evidence of postcrime "lack of remorse" were admiss+ible under Penal Code section 190.3, the statement attributed to Jackson would simply not qualify as admissible under that category.

But, as this Court has made clear, even evidence that may tend to prove a postcrime lack of remorse for the capital crime at issue is inadmissible as evidence in aggravation under our statute. *People v. Gonzalez, supra,* 51 Cal.3d at p. 1232; *People v. Pollock, supra,* 32 Cal.4th at p. 1184. Such evidence is "irrelevant to aggravation" under *Boyd. People v. Boyd, supra*, 38 Cal.3d at pp. 771-776;

Accordingly, the trial court plainly erred in ruling that the statement to Officer Aoki, which had been excluded at the first penalty phase, was admissible at the penalty phase retrial.

The admission of this irrelevant evidence in violation of California law also had the additional and necessary legal consequence of violating federal constitutional guarantees. The admission of evidence from which no legitimate inference can be drawn violates the federal constitutional guarantee of due process, especially when, as here, the evidence is of an "inflammatory quality". E.g., *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385, 1386. Similarly, error that renders a trial fundamentally unfair violates due process guarantees. *Donnelly v. DeChristophoro*, *supra*, 416 U.S. at p. 645. Furthermore, because death is indeed different, the Eighth Amendment demands a heightened degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. 280, 305. Here, the evidence of Mr. Jackson's alleged statement to Officer Aoki was not relevant to any legitimate disputed issue, and was, on its face, highly prejudicial, inflammatory evidence. Its erroneous admission rendered the penalty phase trial unreliable and fundamentally unfair, and violative of the Eighth and Fourteenth Amendments.

C. Mr. Jackson Was Prejudiced.

Analysis of whether the wrongful admission of the statement to Officer Aoki was prejudicial under state law is governed by the familiar standard of *People v. Brown,* which asks whether there was a reasonable possibility that the error contributed to the verdict of death; under federal

law, the applicable standard is set forth in *Chapman v. California*, inquiring whether the prosecution has shown, beyond a reasonable doubt, that the error did not affect the verdict. This Court has held the *Brown* standard is identical in substance and effect to the *Chapman* standard.

There are strong reasons to conclude the statement to Officer Aoki did affect the verdict.

First, the prosecutor highlighted the statement in her opening statement to the jury. Just before her final words about Monique Cleveland's pregnancy, she told the penalty phase jurors:

> "You're going to get another little piece of information about how the defendant feels about having committed what he believed to be a double homicide.
>
> "When Officer Aoki arrested the defendant in South Central Los Angeles and proceeded to book him on this murder warrant, the defendant tells uniformed Officer Aoki that if he had had a gun, he would have shot him because he's a third striker and he's not going back."

24 RT 3700. In her closing argument for death, the prosecutor explicitly reminded the jurors that they could consider lack of remorse as an aggrava+ting factor:

> "What the jury is asked to do is look at things we call aggravating circumstances and to compare the aggravating circumstances about the crime, the defendant's criminal history, ***his lack of remorse***, impact of the crimes on the victim's family against mitigating evidence, if any."

31 RT 4728 (emphasis added).

Finally, the trial court itself expressly recognized the substantial importance of Officer Aoki's statement in the trial for Jonathan Jackson's life. The defense raised the issue of the incorrect admission of Officer Aoki's testimony about Mr. Jackson's statement in a motion for a new trial.

In denying the new trial motion, the trial judge who presided over the second penalty phase trial stated:

> "[THE COURT:] It appears to the Court that ***the testimony of Officer Aoki was extremely important***, extremely relevant, and properly admitted.
>
> "And the motion based thereon is denied."

32 RT 4870 (emphasis added).

Under the applicable standard of prejudice, "[t]o say that an error did not contribute to the ensuing verdict is ... to find that error ***unimportant*** in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt* (1991) 500 U.S. 391, 403 (emphasis added).

The statement to Officer Aoki was correctly excluded by the trial court at the first penalty phase trial (14 RT 2130) – and that jury was unable to agree on a verdict of death. 3 CT 869. Under these circumstances, it is at least reasonably possible that, if the second penalty phase jury had not heard this "extremely important" evidence, the result would have been different. The prosecution will be unable to satisfy its burden to show, beyond a reasonable doubt, that this serious error did not affect the verdict.

VII. THE TRIAL COURT PREJUDICIALLY ERRED IN RULING, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS AND EVIDENCE CODE SECTION 352, THAT TESTIMONY THAT THE VICTIM WAS PREGNANT, AND AN AUTOPSY PHOTOGRAPH OF THE EMBRYO, BE ADMITTED AT THE SECOND PENALTY PHASE.

A. The Trial Court Erroneously Admitted Testimony that Monique Cleveland was One Month Pregnant at the Time of Her Death.

Prior to the second penalty phase trial, the trial court ruled, over defense objection, that the prosecution could introduce testimony that homicide victim Monique Cleveland was pregnant at the time of her death. 24 RT 3633; 9 CT 2637 (minute order stating, in part, "testimony will be allowed regarding the pregnancy and the embryo."). The prosecution introduced testimony that the victim was one month pregnant, and made repeated references to her pregnancy in closing argument. 25 RT 3840-3841 (testimony); 31 RT 4726, 4727, 4736, 4770 (argument).

The ruling was erroneous.

In *Payne v. Tennessee* (1991) 501 U.S. 808, the Supreme Court determined that victim impact testimony and arguments in capital cases served legitimate purposes that did not *per se* offend the Eighth Amendment. *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825. A state may choose to authorize the use of victim impact evidence which demonstrates "the specific harm" caused by the defendant's capital crimes, because this information may be relevant "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness . . . ." *Id.* The Eighth Amendment thus does not absolutely bar the admission of victim impact

evidence, including the personal characteristics of the victim and the impact of the crime on the victim's family. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* at p. 827.

Payne v. Tennessee permitted victim impact testimony and argument in capital sentencing, but did not lift all constitutional constraints on this type of evidence. The Court in *Payne* specified that victim impact evidence could be so prejudicial in a particular case that its admission would undermine the reliability required by the Eighth Amendment in capital sentencing. In addition, the *Payne* Court stated that the admission of sufficiently prejudicial victim impact evidence could result in a capital sentencing procedure that was "fundamentally unfair" thereby violating the Due Process Clause of the federal constitution. *Payne, supra*, 501 U.S. at p. 825. The Supreme Court did not consider in *Payne*, or in any subsequent case, precisely which types of victim impact evidence are constitutionally permissible.

Shortly after *Payne*, this Court decided *People v. Edwards* (1991) 54 Cal.3d 787, holding that victim impact evidence and argument could be properly admitted under factor (a) of Penal Code § 190.3 – which allows the jury to consider at sentencing the circumstances of the capital murder underlying the defendant's conviction in that case. *Id.* at pp. 835-836. This Court made clear, however, that even victim impact evidence falling within the statutory provision was subject to exclusion or limitation like any other proffered evidence. In *People v. Edwards*, this Court recognized the unacceptable risk of prejudice resulting from excessively emotional victim

impact evidence: "Our holding does not mean that there are no limits on emotional evidence and argument. . . . . 'In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial.'" 54 Cal.3d. at p. 836.

Thus, the scope of potential victim impact evidence is not a boundless universe. The mere fact that testimony or other evidence can be characterized as a circumstance of the crime in the nature of victim impact does not mean that, without more, the evidence is admissible. Instead, the evidence must be assessed to determine if it transgresses the bounds of admissibility, including those established by the rules of evidence. See *People v. Clair* (1992) 2 Cal.4th 629, 671.

This Court has recently considered the admissibility of evidence of a homicide victim's pregnancy in a capital case. In *People v. Jurado* (2006) 38 Cal.4th 72, 130-131, this Court upheld the introduction of evidence that the murder victim was 17 weeks' pregnant at the time she was killed.

This was the factual context for the Court's ruling:

> "In May 1991, during the autopsy of Teresa Holloway's body, she was found to have been pregnant. The fetus, which was around 17 weeks old, was too young and too small to have survived outside the womb, but it showed no evidence of traumatic injury or other condition that would have precluded its survival to full term and birth had Holloway not died. Some weeks before her death, Holloway had told defendant that she was pregnant, but defendant did not believe her. Holloway said she was planning to get a pregnancy test and that when she got the test result she would show it to defendant to prove she was pregnant."

People v. Jurado, supra, 38 Cal.4th 72, 90.

In *Jurado*, the appellant argued that evidence of the pregnancy was irrelevant because the evidence showed that although he was told of the pregnancy, he did not believe it. The Court rejected this argument, on the

basis that "facts concerning the victim that are admissible at the penalty phase of a capital trial as circumstances of the crime are not limited to those known to or reasonably foreseeable by the defendant at the time of the murder." *People v. Jurado, supra,* 38 Cal.4th at p. 131.

This case, however, is not governed by *Jurado*, because it arose from a materially different set of facts.

In this case, there is no substantial evidence that Jonathan Jackson – or anyone else, including Robert Cleveland, the victim's husband – actually knew that she was pregnant at the time of her death.

Monique Cleveland's pregnancy was discovered during the autopsy. Forensic pathologist Dr. Joseph Choi testified that she was about one month pregnant when she died. 25 RT 3841.

The only other testimony pertaining to the pregnancy was that of the victim's cousin and co-worker, Jeannette Burns. She testified that she "kind of figured" Monique Cleveland was pregnant because she had spent too long in the bathroom one day and had gagged. 28 RT 4285.

But when Burns asked Cleveland, "You pregnant, huh?", Cleveland "didn't confirm it." 28 RT 4285.[36]

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[36] Jeannette Burns testified as follows:

"Q Did you know that Nikki was pregnant?

"A I kind of figured it a little bit because when we was at work one day, she went to the bathroom, and I said -- she was in there too long. I said, 'Nikki, what you in there doing?' Then I heard her like gagging a little bit. I said, 'You pregnant, huh?' She just started smiling. Then I didn't say anything. I said, 'You want me to go get you some potato chips or crackers?' And she started laughing and smiling. I think she wanted to just tell everyone at one time or something. But *I kind of thought a little bit that she was,* because, you

(footnote continued on next page)

In other words, Burns *speculated* that the victim was pregnant, but the victim refused to confirm it.

Moreover, Burns's testimony was entirely non-specific as to the date this non-confirming conversation took place. Unless the conversation took place within days of the homicide – something the evidence does not establish – it is most likely that the victim did not know that she was pregnant. Another possibility is that the conversation did not take place at *any* time during the actual pregnancy.

The trial court noted that there was no obvious indication that Monique Cleveland was pregnant at the time of the murder. 24 RT 3626.

There was no testimony that either Monique Cleveland or her husband, Robert Cleveland, knew she was pregnant.[37] There was not even any evidence that they *planned* to have a child.

Though the Cleveland residence was exhaustively searched and inventoried by law enforcement, no items that might indicate knowledge – or even suspicion -- of pregnancy – such as home pregnancy detection kits, or appointment cards for medical visits to appropriate professionals – were introduced into evidence or found. No items that might indicate *planning* for pregnancy – such as baby-name books, or personal schedules that might

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> know, the things that women go through when they get pregnant.
> I thought that she was a little bit, *but she didn't confirm it.*
> So I didn't say anything." 28 RT 4285 (emphasis added).

Based on her unconfirmed speculation, Burns testified that for Nikki's parents, "this would have been their first grandchild." 28 RT 4275.

[37] Jeanette Burns' testimony that the victim *declined*, on a direct inquiry, to confirm she was pregnant (28 RT 4285) is, of course, not evidence that she knew she was pregnant.

reveal a plan to conceive, or diaries or letters stating a desire to become pregnant – were found or introduced into evidence.

Thus, the question before this Court is whether the evidence of a victim's pregnancy is admissible as a circumstance of the crime, and as legitimate victim impact evidence under *Payne,* when there is no evidence that the defendant, the victim, the victim's husband, any other member of the victim's family, or anyone else, actually knew that the victim was pregnant, there is no evidence that the victim planned to become pregnant, and the most that can be said is that a cousin of the victim *speculated* at some unspecified time prior to her death that she might be pregnant, but the victim refused to confirm the pregnancy.

The Court should answer the question, "no." As noted above, it is necessary to balance the probative value of the evidence against its potential for unfair prejudice in the circumstances.

No elaborate discussion is necessary to show that testimony that Monique Cleveland was pregnant was evidence freighted with emotional content.

Perhaps no other fact about the death of a young woman would have a more immediate, or compelling, impact on death penalty jurors than the fact that she was pregnant.

The trial court itself recognized that the testimony would be "highly prejudicial." 24 RT 3631.

At the same time, the evidence that Monique Cleveland was one month pregnant at the time of her death had no probative value in the context of this case.

There was no evidence that Jonathan Jackson knew of this non-observable pregnancy, so the fact of pregnancy cannot demonstrate anything about his mental state and, therefore, his moral culpability.

The Supreme Court has made clear that the impact of a capital crime on the survivors is a legitimate reason justifying the introduction of victim impact evidence. *Payne*, *supra*, 501 U.S. at p. 827.

But in this case, the impact on Robert Cleveland was speculative – because there is no evidence that the victim's husband knew, at any time through trial, that she was pregnant.

Moreover, even assuming, for the purpose of analysis only, that the victim knew she was pregnant, the evidence of her pregnancy would still be inadmissible to demonstrate the impact of her death on her family members.

There was no showing that the victim's pregnancy of one month would have resulted in the birth of a child. The incidence of spontaneous miscarriage in the first trimester is quite high – a study in the New England Journal of Medicine found that 25% of pregnancies result in miscarriages by the sixth week after the woman's last menstrual period.[38] A significant number of miscarriages occur later, as well.

Even apart from the risk of miscarriage, there was no evidence showing that Monique Cleveland, if she had learned she was pregnant, would have made the decision to carry the pregnancy to term. This pregnancy was quite early, in the first part of the first trimester. Many

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[38] Wilcox AJ, Baird DD, Weinberg CR (1999). "Time of implantation of the conceptus and loss of pregnancy." *New England Journal of Medicine* 340 (23): 1796–1799.

women make the decision to terminate pregnancies when the pregnancies are incompatible with other life goals. In 2000, according to the Guttmacher Institute, 26% of California women who became pregnant ended their pregnancies with induced abortions.[39]

The point, of course, is not that the evidence shows Monique Cleveland *would* have decided to terminate the pregnancy; rather, it is that the pregnancy would have required Monique Cleveland to *make* a decision. There is no way to know what decision she ultimately would have made. There is only speculation.

In sum, the possibility of prejudice from introduction of testimony that Monique Cleveland was pregnant was great, while the probative value of that evidence, in the context of assessing the impact on the victim's survivors, rested entirely on speculation. There was no showing that the pregnancy would have resulted in a live birth.

Under these specific circumstances, the admission of evidence that Monique Cleveland was pregnant was fundamentally unfair, in violation of the Eighth Amendment and the Due Process Clause, and their California constitutional correlatives. Because it was unfairly prejudicial, and far more prejudicial than probative, the admission of this evidence also violated Evidence Code section 352.

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[39] See http://www.guttmacher.org/statecenter/tablemaker/page4.mhtml (last accessed on July 1, 2008).

B. The Trial Court Erroneously Admitted a Photograph of Monique Cleveland's Embryo.

The trial court did not just rule that the prosecution could introduce evidence of Monique Cleveland's pregnancy at the second penalty phase. The trial court further ruled, also over defense objection, that the prosecution could introduce a photograph of the embryo taken during the autopsy of Monique Cleveland; the trial court ordered the photograph cropped so that only the embryo would be visible. 24 RT 3638-3639; 9 CT 2641. The photograph was admitted as People's Exhibit 211B. 30 RT 4657.

This ruling was also erroneous.

The prosecutor did not charge Jonathan Jackson with taking the life of two human beings, and could not have done so. Yet in her written brief supporting the admission of the autopsy photograph of the embryo, the prosecutor argued that "the defendant's conduct eliminated the life of a future person". 9 CT 2597. Thus, the express purpose for which the evidence was proffered was to obtain the benefit of an argument that the defendant deserved the penalty of death for killing both a person and "a future person."

But the argument, as shown above, rests on an entirely speculative factual predicate that the prosecutor never proved – that Monique Cleveland, in the then-present circumstances of her life, would have ultimately decided to continue the pregnancy to term.

Moreover, even assuming the prosecutor *had* introduced evidence that the victim and her husband had planned to have a child, the photographic evidence served no legitimate purpose.

The photograph added no legitimate information to the pathologist's testimony that, at the time of her death, the victim was about one month pregnant. 25 RT 3840-3841. This fact could effectively be communicated by the pathologist's testimony. As information, the photograph was inarguably cumulative.

The only purpose of this photographic evidence of a month-old embryo was to inflame the jury. The evidence of the pregnancy, presented in this manner, was unnecessarily inflammatory. Compare *People v. Jurado*, *supra,* 38 Cal.4th at p. 131 ("We note also that defendant does not challenge the *manner* in which the evidence was presented, and we conclude it was not presented in an unnecessarily inflammatory way.").

This Court has recognized the unique persuasive value of photographic evidence in court:

> "The Chinese proverb of old states it well: 'One picture is worth more than a thousand words.'"

People v. Kelly (1990) 51 Cal.3d 931, 963. While a photograph of an embryo adds nothing to the physician-imparted information that the victim was pregnant, a photograph of an embryo of a murder victim is inherently prejudicial; it is the sort of evidence that is not just likely, but virtually certain, to evoke a strong negative emotional reaction in most people.

Because the photograph of the embryo had no legitimate purpose, but was introduced solely to inflame the jury, its admission was fundamentally unfair, in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, and their California counterparts.

C. Prejudice Resulted.

The standards of prejudice are familiar. Because the errors described above occurred at the sentencing phase of a capital trial, reversal is warranted if there is any reasonable possibility that they affected the result. *People v. Brown, supra*, 46 Cal.3d 432, 448. And because there errors violated the Eighth Amendment and federal due process guarantees, reversal is required if the prosecution cannot show, beyond a reasonable doubt, that the errors did not affect the verdict. *Chapman v. California, supra*, 386 U.S. 18, 24. The *Brown* standard is the same in substance and effect as the *Chapman* test. *People v. Jones* (2003) 29 Cal.4th 1229, 1264 fn. 11.

Here, it is more than reasonably possible that the error in admitting the testimony that the victim was pregnant, as well as the error in admitting the autopsy photograph of the embryo, affected the verdict, and respondent will be unable to show the contrary.

The trial court itself stated that testimony about the pregnancy would be "highly prejudicial." 24 RT 3631.

The prosecutor drove the prejudice home. As discussed above in connection with the prosecutor's misconduct, the central thrust of the argument for death was that Jonathan Jackson deserved to die because he had executed a pregnant woman.

The prosecutor's final words in her opening statement to the jury, before the presentation of evidence, were these:

> "One final thing, ladies and gentlemen, I think you need to know about this case, at the time of her death, 28-year-old Monique Cleveland was pregnant. And you will see a photograph of the unborn embryo that was discovered during the autopsy. Thank you very much." 24 RT 3700.

In her closing argument, the prosecutor repeatedly reminded the penalty phase jurors that, when she was killed, Monique Cleveland was pregnant.

The prosecutor referred to Jonathan Jackson as "the single-handed executioner of a 28-year-old pregnant woman". 31 RT 4727. The prosecutor repeatedly referred to the embryo as an "unborn child." The prosecutor asked the jury to

> "see that justice is imposed on the defendant for his horrendous crimes against not only Niki, not only Rob, not only *their unborn child . . . .*"

31 RT 4726 (emphasis added). The prosecutor told the jurors:

> "I know you will take your task of deciding his fate much more seriously than he took the task of deciding the fate of Rob and Niki and *their unborn child*,"

31 RT 4728 (emphasis added). The prosecutor described the defendant as

> "seeking out [Robert Cleveland's] helpless vulnerable 5 foot 3 inch wife, shooting at her, *ultimately executing her, also resulting in the death of her unborn child. This is three lives we're talking about here.* This isn't a simple unaggravated homicide."

31 RT 4736 (emphasis added). The prosecutor speculated about victim impact:

> "I think that if her mother had had the opportunity to set two more places at her Thanksgiving table for Nikki and for her what would be now 2 1/2-year-old grandchild, then the day might have been a little bit happier for Rose and for Nikki's grandmother."

31 RT 4748.

Finally, the prosecutor turned to the autopsy photograph of the embryo, that singularly prejudicial piece of evidence:

> "To her -- you look at this picture of this little tiny fetus here, and you think, well, you know, she wasn't really that far along. Just a month pregnant. But, *like Dr. Choi said, you can see the baby there. You can see the little head and the little arms and stuff.* You know, to a mother, when you're pregnant, from the minute you find out you're pregnant, that's your child. She's 28, and this is her first pregnancy, her first marriage. And, you know, I think she wanted to live. *And I think that she wanted that baby to live.*"

31 RT 4769-4770 (emphasis added).

Thus, the prosecutor powerfully used the already potent photographic evidence, on top of the highly prejudicial testimony about the pregnancy itself, to make an emotionally-charged appeal to the jurors that was certain to have an inflammatory impact.

Even if evidence of the pregnancy had been admissible, the erroneous admission of the autopsy photograph alone was enough to inflame the jury. This evidence was so compelling ("like Dr. Choi said, you can see the baby there. You can see the little head and the little arms and stuff") – and, in light of the prosecutor's argument, had such a tendency to prejudice jurors, even on a subconscious level -- that it diverted the jury from a "reasoned moral response to the defendant's background, character and crime." *Penry v. Lynaugh, supra*, 492 U.S. at p. 328.

The judgment should be reversed.

VIII. THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENSE MOTION TO EXCLUDE AN AUTOPSY PHOTOGRAPH OF THE VICTIM WITH HER EYES OPEN.

A. Proceedings at Trial.

Before the second penalty phase trial commenced, trial counsel made a motion in limine to exclude one of a number of post-mortem photographs of the victim, a photograph labeled People's Exhibit 218. The photograph is a full-face picture of Monique Cleveland at or near the time of the autopsy. It is a close-up head-shot, and both the deceased's eyes are open, as is her mouth. 25 RT 3809. The prosecutor stated that a forensic pathologist would testify that the victim's eye was burned by the muzzle blast, and this would demonstrate the victim's eyes were opened at the time she was shot. 25 RT 3810.

Trial counsel argued this close-up, "eyes open, staring" photograph of the homicide victim was unduly prejudicial under Evidence Code section 352. 25 RT 3809. The trial court determined that, since this was, in its view, the only evidence "to show that she may well have been aware of the fact that she was about to die at the hands of the defendant," the motion would be denied. 25 RT 3811; 9 CT 2645.

Thereafter, Dr. Choi testified about the victim's injuries, and the photograph was admitted into evidence. 25 RT 3831-3832; 30 RT 4659.

B. The Trial Court Erred in Admitting the Photograph.

The trial court erred. The evidence should have been excluded as cumulative and unduly prejudicial under Evidence Code section 352, and as inflammatory and fundamentally unfair under the Fifth, Eighth and Fourteenth Amendments.

On direct examination by the prosecutor, forensic pathologist Dr. Joseph Choi testified that the photograph admitted as People's Exhibit 218 showed a powder burn in the left corner of the left eyeball, and explained that the eye would have to be open at the time of the shot so that the white area would be burned; if it was closed, the eyelid would show the gunpowder marks. 25 RT 3832.

Given this testimony, Exhibit 218 itself was redundant. Admitting this photograph into evidence told the jury nothing in addition to what it had learned from the testimony of Dr. Choi. The photograph itself was unquestionably cumulative to Dr. Choi's testimony.

As with other photographic evidence (see Argument VII, *supra*), the only purpose of the evidence was to incite the jury. Since the photograph had no additional probative value, and since the photograph of the face of the victim with her eyes and mouth open was clearly prejudicial, it was an abuse of discretion to admit the evidence. Moreover, since there was no legitimate purpose for the admission of the inflammatory eyes-open autopsy photograph, its admission also violated the federal due process guarantee of fundamental fairness, and rendered the resultant verdict unreliable and unable to survive Eighth Amendment scrutiny.

The admission of the photograph also violated the Sixth, Eighth, and Fourteenth Amendment rights of appellant, as well as his rights, guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding. Although as a general rule violations of state evidentiary principles do not implicate the federal and state constitutions, in this case the admission of the photographs prevented appellant from getting a fair trial and thus violated his constitutional rights. See *Lisbena v. California* (1941) 314 U.S. 219, 228

[recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law].

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee* (1991) 501 U.S. 808, 825. Admitting a photograph as graphic as the one in this case under circumstances where it bears little probative value to the issues rendered it unduly prejudicial resulting in a fundamentally unfair trial.

Moreover, the admission of the photograph violated appellant's right to a reliable capital-sentencing determination. See *Woodson v. North Carolina, supra,* 428 U.S. 280, 305 [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. The admission of the photograph targeted the jurors' emotions, rather than their reason, thus improperly affecting their deliberations and verdict.

C. The Error Was Prejudicial.

The admission of the photograph was prejudicial. 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, there is reason to believe that a penalty phase jury – particularly one, as in this case, whose only task is to determine penalty -- would be more likely to return a death verdict when shown the photographs than it would be if not shown the photographs.

Jurors' decisions at the penalty phase are 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 a victim's corpse 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].

Under these circumstances, it is reasonably possible that, absent the admission of this inflammatory autopsy photograph, at least one juror would not have been convinced death was the appropriate penalty. Moreover, respondent will be unable to meet its burden to demonstrate, beyond a reasonable doubt, as *Chapman v. California* demands, that the error did not affect the verdict.

IX. THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENSE MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE OF UNRELATED CRIMES IN AGGRAVATION.

Before the second penalty phase trial, the defense moved to exclude victim impact evidence relating to two specific crimes in aggravation, a robbery of the Empire Drug Store and the robbery of Joseph Canada. These crimes were transactionally unrelated to the crimes in this case. The trial court denied the motion. 24 RT 3644-3648, 9 CT 2636. Thereafter, at trial, the prosecution introduced "victim impact" evidence regarding the victims of these unrelated offenses. E.g., 27 RT 4186-4187, 28 RT 4400.

The ruling was erroneous. As this brief will show, victim impact evidence of unrelated crimes in aggravation should not be admissible under Penal Code section 190.3, subdivision (b). This Court should revisit this issue and interpret subdivision (b) in a manner that conforms to its plain language and the Court's interpretation of subdivision (a). And regardless of its admissibility under state law, admission of such evidence violates the federal constitution in any event, because it is irrelevant to any legitimate inquiry at the sentencing stage of a capital case.

A. Under the Plain Language of Section 190.3, Subdivision (b), Victim Impact Evidence of Unrelated Crimes in Aggravation is Not Admissible.

The evidence of the impact of a capital defendant's unrelated non-capital offenses upon the victims of those unrelated crimes is not admissible under Penal Code section 190.3, subdivision (a), because the facts are not circumstances of the underlying capital offense.

This Court has held, however, that

> "the circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)."

People v. Demetrulias (2006) 39 Cal.4th 1, 39-40, citing *People v. Holloway* (2004) 33 Cal.4th 96, 143 and *People v. Mendoza* (2000) 24 Cal.4th 130, 185–186.

Appellant respectfully suggests that these decisions are in error, and the Court should overrule them on this point, and hold that victim impact evidence of crimes in aggravation is not admissible under Penal Code section 190.3, subdivision (b).

In *People v. Edwards* (1991) 54 Cal.3d 787, this Court considered whether Penal Code section 190.3 authorized victim impact evidence regarding the family of a capital crimes victim:

> "Defendant now contends that . . . victim impact evidence is inadmissible in California because it does not come within any of the aggravating factors listed in section 190.3. [Citation.] One of the statutory aggravating factors is the 'circumstances of the crime of which the defendant was convicted in the present proceeding . . . .' (§ 190.3, factor (a).) The issue is thus whether "evidence of the specific harm caused by the defendant" (*Payne, supra*, 501 U.S. at p. ___) is a circumstance of the crime admissible under factor (a). We think it generally is.
>
> "In construing statutes, ***we apply the usual, ordinary import of the language used.*** (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) ***The word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime.*** (3 Oxford English Dict. (2d ed. 1989) p. 240, 'circumstance,' first definition.) ***The specific harm caused by the defendant does surround the crime 'materially, morally, or logically.'***"

People v. Edwards, supra, 54 Cal.3d 787, 833 (emphasis added). That is, victim impact evidence is admissible because the impact of the crime on the

victim's survivors "surrounds materially, morally, or logically" the crime, and is therefore a "circumstance" of the crime; as a "circumstance," the evidence is admissible in accordance with the plain meaning of subdivision (a) of the statute's language. *Id.*

By contrast, Penal Code section 190.3, subdivision (b) does not, by its plain language, authorize the capital sentencing jury to take into account the "circumstances" of the defendant's unrelated prior crimes.

Instead, the statute specifies the jury shall consider:

> "(b) *The presence or absence of criminal activity by the defendant* which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Emphasis added.)

On its face, the focus of subdivision (b) is much narrower than the focus of subdivision (a). This is reflected in the standard jury instruction given in the present case, CALJIC 8.85. 9 CT 2701. The jury instruction tells the jury that it must consider

> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. [and]
> "(b) The presence or absence of criminal activity by the defendant, other than the crimes[s] for which defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

9 CT 2701.

The focus of subdivision (b) is on the "activity by the defendant" that involved force or violence. It is not on "*the circumstances of* the prior criminal activity by the defendant."

This Court should adhere to the standards of statutory interpretation employed in *People v. Edwards, supra.*

As seen above, under *Edwards*, victim impact evidence relating directly to the capital crimes is admissible because victim impact is a "circumstance" of the crime, and the statute expressly authorizes evidence of the "circumstances" of the capital crime. Evidence of victim impact may demonstrate something about the circumstances of a crime, but does not itself show "the presence of criminal activity by the defendant." Subdivision (a) is drafted broadly; subdivision (b) is not. The distinction should mean something, and two non-parallel provisions of a statute should not be construed as if they had been drafted in a parallel fashion. Since subdivision (b) is not drafted so broadly as to encompass the circumstances of the unrelated criminal activity by the defendant, victim impact evidence regarding such unrelated crimes is inadmissible under factor (b).

B. Because Victim Impact Evidence of Unrelated Crimes is Irrelevant to the Legitimate Considerations in a Death Penalty Procedure, Its Admission is Barred By the Eighth and Fourteenth Amendments.

The United States Constitution requires that, at the penalty phase of a capital trial, the trier of fact must make an individualized determination of whether the defendant should be executed that is based on two fundamental considerations, or meta-factors: (1) the defendant's character as an individual; and (2) the circumstances of the crime.

For example, in *Tuilaepa v. California* (1994) 512 U.S. 967, 972-973, the Supreme Court stated:

> "We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. '***What is important at the selection stage is an individualized***

> ***determination on the basis of the character of the individual and the circumstances of the crime.*** ' *Zant, supra*, at 879; see also *Woodson v. North Carolina*, 428 U.S. 280, 303-304, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) (plurality opinion). That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. [Citation.]" (Emphasis added.)

Accord, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 41 ("'[w]hat is important … is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'")

Thus, to be admissible at the penalty phase of a capital trial in the United States, evidence must be relevant to either the character of the individual, or the circumstances of the crime.

Courts of last resort in a number of states have held that the impact of a capital defendant's unrelated crimes on the victims is irrelevant to either the character of the individual, or the circumstances of the crimes for which he faces the death penalty.

The leading case is *People v. Hope* (Ill. 1998) 702 N.E.2d 1282. There, the Illinois Supreme Court held that evidence of the victim impact of unrelated crimes was irrelevant at a capital sentencing hearing, and so unfairly prejudicial that it was fundamentally unfair under the federal Constitution.

The *Hope* court looked to *Payne v. Tennessee, supra*, 501 U.S. 808, in which the Supreme Court held that the Eighth Amendment permitted the introduction of victim impact evidence. In *Payne*, the Supreme Court had described victim-impact evidence as evidence "'designed to portray for the sentencing authority the actual harm caused by *a particular crime'*". *Payne, supra,* 501 U.S. at pp. 821-22, quoted in *People v. Hope, supra*, 702 N.E.2d at p. 1288 (orig. emphasis).

> "Indeed, the *Payne* court defined 'victim impact evidence' as 'simply another form or method of informing the sentencing authority about the specific harm caused by *the crime in question.*'"

Hope, supra, 702 N.E.2d at p. 1288 (orig. emphasis), quoting *Payne, supra*, 501 U.S. at p. 825. Thus,

> "*Payne* clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried."

Hope, supra, 702 N.E.2d at p. 1288. Victim impact evidence of unrelated crimes is, quite simply, irrelevant. "The jury's determination of the appropriateness of the death penalty for Officer Doyle's murder would not be assisted by the introduction of victim impact evidence concerning the unrelated murder of Lloyd Wyckliffe." *Id.* This is because "what [the unrelated-crimes victim] and her family have suffered due to their loss does not make defendant more morally blameworthy in the murder of Officer Doyle." *Id.* at p. 1289. Because victim impact evidence is highly prejudicial as well as irrelevant at the sentencing phase of a capital case, its admission violates the fundamental fairness guaranteed by the federal constitution. *Id.*

The Nevada Supreme Court reached the same conclusion in *Sherman v. State* (Nev. 1998) 965 P.2d 903, 914, holding "that the impact of a prior murder is not relevant . . . and is therefore inadmissible during the penalty phase." The court explained that "evidence of the impact which a previous murder had upon the previous victim is not relevant to show" the damage done by the current capital offense. (*Ibid.*)

In *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 745, *cert denied*, 528 U.S. 893 (1999) the Colorado Supreme Court held:

> "Evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes, however, is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced. See *Payne*, 501 U.S. at 821."

Thus, the Colorado court followed *Hope* in determining that, under *Payne v. Tennessee*, evidence of "the perceptions of the victims" of defendant's prior crimes was not admissible at the penalty phase, and requiring the exclusion of evidence describing the previous victims' fear and nervousness during those crimes, and a victim's emotional state following a previous aggravated robbery. *Id.*

In *State v. Jacobs* (La. 2004) 880 So.2d 1, the Louisiana Supreme Court followed *People v. Dunlap,* holding that unrelated-crimes victim impact testimony was impermissible "because it does not 'inform[] the sentencing authority about the specific harm caused by the crime in question . . . necessary to determine the proper punishment for a first degree murder,' *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991), and does not relate to the defendant's character and propensities, as otherwise revealed by his actions in committing those crimes for which he has been convicted. See *People v. Dunlap*, 975 P.2d 723, 745 (Colo.)." *Id.* at p. 1.

These cases apply well-established Supreme Court precedent mandating that the trier of fact at a death penalty sentencing must consider (1) the defendant's character as an individual; and (2) the circumstances of the crime. Victim-impact evidence of unrelated crimes, whether reasonably foreseeable or not, is unrelated to the defendant's moral culpability for the present crime in question, and sheds no light on the defendant's character; it is therefore irrelevant, and outside the permissible scope of victim impact

evidence under the Eighth and Fourteenth Amendments. Moreover, evidence of victim impact is always prejudicial, by its nature. "[I]mproper admission of . . . irrelevant victim impact evidence deprived defendant of a fair capital sentencing hearing." *Hope, supra*, 702 N.E.2d at p. 1289.

C. Prejudice.

At the second penalty phase, several victims of unrelated prior violent crimes testified as to the impact of the crimes on them.

Witness Joseph Canada testified that, after he was robbed at gunpoint by appellant and others, he became fearful. He had never carried a weapon before, but started carrying a handgun. This caused him to lose his job about a month after the robbery. Canada further testified to several incidents that troubled him. Driving on the freeway, he saw a car behind him, and "buried the speedometer," going 95 mph. The car kept up. He was "ready to shoot," but it was a false alarm. 27 RT 4186. Further, Canada testified, "every time I get approached behind me, I'm swinging. I had a guy approach me in the supermarket that knew me. He grabbed me from behind. I hit him in the face." 27 RT 4187.

Witness Daila Llamas, a clerk at the Empire Drugstore when it was robbed by appellant and others, also testified as to the impact of the crime on her. Llama testified that, years after the crime, she still suffered. "I fear all the time," Llamas told the jury, by which she meant she still feared for her life. 28 RT 4400.

This erroneously admitted victim impact testimony in this trial was emotionally potent. The prosecutor in closing argument expressly reminded the jurors they could consider it in determining whether the sentence Mr. Jackson to death. 31 RT 4746. It was irrelevant, but

inflammatory, and its admission rendered the penalty phase trial fundamentally unfair. The trial court's error in admitting the evidence cannot be regarded as harmless under either the *Chapman* or *Brown* standards, and consequently appellant's death sentence must be reversed.

X. BECAUSE THE TRIAL COURT IMPROPERLY GRANTED THE PROSECUTION'S FOR-CAUSE CHALLENGE OF PROSPECTIVE JUROR JACQUÉ CARTER, THE JUDGMENT OF DEATH MUST BE REVERSED.

A. Introduction.

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the Supreme Court held that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments prohibited the exclusion of venire members

> "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

391 U.S. at p. 522. The Court reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *Id.* at p. 522, fn. 21.

In *Wainwright v. Witt* (1985) 469 U.S. 412, 424, the Court clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment. The Court held that the controlling inquiry is *"whether 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.'"* (Emphasis added.)

This Court stated in *People v. Heard* (2003) 31 Cal.4th 946, 958-959:

> "The real question is 'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford* (1997) 15

> Cal.4th 1229, 1318, quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003.) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [119 L.Ed.2d 492, 112 S.Ct. 2222]), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror. (*People v. Cash* (2002) 28 Cal.4th 703, 719-720; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [['A prospective juror who would *invariably vote either for or against the death penalty* because of one or more circumstances likely to be present in the case being tried, *without regard to the strength of aggravating and mitigating circumstances,* is therefore *subject to challenge for cause*, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document" (italics added)].)' (Orig. emphasis.)

In this case, the trial court violated the standards set forth in the controlling cases, by excusing for cause prospective juror Jacqué Carter.

B. Prospective Juror Jacqué Carter.

Prospective juror Jacqué Carter was a 44-year old African-American woman who worked as a credit counselor. Her deceased husband had served for thirteen years as a State of California correctional officer. 7 CT 2004, 2006-2007.

In her responses to the 15-page juror questionnaire, Ms. Carter answered that she would not automatically vote either for the death penalty or for life imprisonment, and could follow the law as explained by the court. On a scale of 1 through 10, "with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against the death penalty," Carter rated herself a "5." 7 CT 2011. Although Carter did indicate that in her view the death penalty was imposed too often against

African-American males, she also made clear that if she were selected as foreperson, and the evidence justified it, she could personally sign the verdict of death form. 7 CT 2013.

Carter's juror questionnaire did pose a problem for the prosecution, however. In response to the question whether she would automatically disregard the testimony of a person "if you disapprove of their lifestyle," Carter wrote: "If they are known crim[inals] looking to get out of jail/trouble, I would find their testimony hard to believe." 7 CT 2014. This was a significant warning sign for the prosecution, because, as explained in Argument III, the prosecution's "execution-style" killing theory justifying the penalty of death depended almost entirely on the testimony of inmate and informant-for-consideration Kevin Jackson.

The court began its voir dire examination of Ms. Carter by inquiring into her brother's problems with drugs, which she had disclosed; such problems were, the court noted, "rampant throughout many of these questionnaires." 23 RT 3488. Prospective juror Carter explained that when her brother started on drugs, "I disassociated myself with him." 23 RT 3488.

The court then raised the subject of the death penalty.

"THE COURT: All right.
Now, one of the questions you answered in question
No. 40 indicated that you feel that the death sentence is
imposed too often against African-American males. And the
defendant is African-American. And would that feeling make
you say that -- to yourself, well, then I can't impose the
death penalty because it hasn't been imposed properly in
my -- equally, in a balanced fashion as to African-American
males in the past? Would that affect your thinking in the
jury deliberation room?
"PROSPECTIVE JUROR CARTER: That's a possibility.
And, again, the reason for that is just that statistics have

shown that a high proportion of African-Americans have been convicted and even either given the death penalty or life in prison without parole.

"Right or wrong, you have to understand the circumstances of what they did and why it came about. But to me, a disproportionate number happened.

"THE COURT: But you understand also that we can't -- you may or may not be right. And it's productive of no real benefit for us to get into a dialogue on that at this point to the initiative I'd like to have. But this is not the time and place, necessarily, to balance the scales by saying, well, I feel that there are too many, and therefore I'm going to vote in the opposite direction just so that I can balance the scale.

Would you -- you wouldn't do that, would you?

"PROSPECTIVE JUROR CARTER: No.
I mean, if someone is wrong, they're wrong. I wouldn't say I'd be the first one to jump up and say give him the death penalty, no. You have to weigh options. But I don't think I would be very likely to vote definitely for the death penalty.

"THE COURT: You're not saying that you're decidedly pro-death penalty?

"PROSPECTIVE JUROR CARTER: I am not pro-death penalty, no.

"THE COURT: Thank you. Appreciate it, ma'am."

23 RT 3488-3490.

Defense counsel's questioning of prospective juror Carter concerned her response to a question on the questionnaire asking whether too much or too little blame for a person's wrongdoing is placed on his or her parents or the social setting; Carter had written that too little blame was placed on parents and the social setting. 7 CT 2013; see 23 RT 3536-3537. Defense counsel did not inquire into Carter's views on the death penalty.

The prosecutor then continued her voir dire:

"[PROSECUTOR]: Now, is there anybody here, having heard all the questions of the judge, of defense, myself, who has really

thought about it, who does not feel that they could in fact be a person who could participate in a verdict that will result in the death of Mr. Jackson?

Okay. There's a hand in the front row. That's Miss Carter. Your questionnaire itself expressed some severe reservations about capital punishment. Right?
"PROSPECTIVE JUROR CARTER: Right.
"MS. BARHAM: Now that you've thought about it, can you try to express for me in your own words what your feelings are about your ability to be a juror in this case and to actually impose capital punishment?
"PROSPECTIVE JUROR CARTER: I'm a widow. I'm a recent widow. 17 months ago I buried my husband. My husband died in my arms. I just can't deal with death that well. No disrespect. I don't want anything to do with this.
"MS. BARHAM: It would be a personal hardship for you?
"JUROR CARTER: Very much so.
"MS. BARHAM: Like Mr. Maas? [[40]]
"PROSPECTIVE JUROR CARTER: Very much so.
"MS. BARHAM: Thank you very much."

23 RT 3555-3556. The prosecutor then questioned other prospective jurors about their views on capital punishment. 23 RT 3556.

Thereafter, the prosecutor moved that Ms. Carter be excused for cause, and without discussion the Court excused her. 23 RT 3571.

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[40] Prospective juror Maas's cousin had been shot several times by a gang "for no reason," and died at the hospital five months previously. 7 CT 2143, 2144. Maas stated in his questionnaire responses that he was so strongly in favor of death as a punishment that he would always vote for death, indicated that he would not follow laws he disagreed with, and wrote that he could not be a fair and impartial juror because of "prejudice," which meant "prejudice too [sic] non-whites." 7 CT 2147-2149. Maas was excused. 23 RT 3554.

C. The Trial Court Wrongly Granted the Prosecution's For-Cause Challenge of Prospective Juror Carter.

After questioning prospective juror Carter about her "severe reservations about capital punishment," and her ability "to actually impose capital punishment," the prosecutor challenged this juror for cause. 23 RT 3555, 3571. The ultimate question for the court in deciding a for-cause challenge to a prospective juror under the *Witherspoon-Witt* doctrine is

> ""whether the juror's ***views about capital punishment*** would prevent or impair the juror's ability to return a verdict of death . . . ."

People v. Heard, supra, 31 Cal.4th at p. 958 (emphasis added).

The trial court's dismissal of prospective juror Carter does not comport with the constitutional rule. While it is true that prospective juror Carter did express a reservation abut capital punishment, Ms. Carter's views on capital punishment were insufficient to disqualify her on a for-cause challenge. Although she expressed the view that the death penalty was imposed too often on African-American males, she also made plain her willingness to follow the law and vote for death if justified. 7 CT 2013. While she was not "pro-death penalty," Ms. Carter explained that she would not vote for life in order to correct a societal imbalance, and would "weigh options." 23 RT 3489-3490. These voir dire answers were consistent with her questionnaire responses showing she would faithfully apply the court's instructions. 7 CT 2011-2013.

The prosecutor challenged prospective juror Carter only after this critical colloquy:

> "MS. BARHAM: Now that you've thought about it, can you try to express for me in your own words what your feelings are about your ability to be a juror in this case and to actually impose capital punishment?
> "PROSPECTIVE JUROR CARTER: I'm a widow. I'm a recent

> widow. 17 months ago I buried my husband. My husband died in my arms. I just can't deal with death that well. No disrespect. I don't want anything to do with this."

23 RT 3556.

The loss of a spouse is, unquestionably, a tragic event, just as is the loss of any family member or loved one.

But the loss of a family member – an experience widely shared among humanity -- no matter how deeply felt, simply is not the same thing as an individual's "views about capital punishment" that might, or might not, disqualify that individual from sitting on a death penalty jury. Although the prosecutor questioned this juror so as to reveal anti-death-penalty bias that would render her excludable under *Witherspoon-Witt*, what this prospective juror's response actually revealed was not her inability to set aside her views on the death penalty, but her belief that service on a death penalty jury would be uncomfortable for her because her husband had died. The record does not show the necessary nexus between Ms. Carter's "views about capital punishment," on the one hand, and the death of her husband, on the other. As stated in *Gray v. Mississippi* (1987) 481 U.S. 648, 658-659:

> "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes ***by not following their oaths***.' *Wainwright v. Witt*, 469 U.S., at 423." (Emphasis added.)

The death of her husband seventeen months prior may have made it more difficult for this juror to serve on a death penalty case. But that is simply not enough to justify the exclusion of the juror under the *Witherspoon-Witt* doctrine.

D. Conclusion.

The erroneous excusal of even a single juror for cause is not subject to harmless-error analysis. The trial court's unconstitutional excusal of prospective juror Jacqué Carter requires reversal of appellant's death sentence. *Gray v. Mississippi, supra*, 481 U.S. 648, 666-668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.

XI. THE TRIAL COURT REVERSIBLY ERRED IN DENYING THE AUTOMATIC MOTION TO MODIFY THE VERDICT.

Penal Code section 190.4, subdivision (e) states that in ruling on an automatic application for modification of a verdict of death,

> "the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall 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. The judge shall state on the record the reasons for his findings."

The trial judge who presided over the penalty phase and decided the motion, but had not presided at the guilt phase, appeared to be under a misunderstanding as to Mr. Jackson's convictions. In addition to noting that Mr. Jackson had been found guilty on a felony-murder theory, the trial court stated:

> "The Court further finds that the evidence supports, by proof beyond any reasonable doubt, the conclusion that the murder was of the first degree in that there was overwhelming evidence of premeditation and deliberation."

32 RT 4879.

However, Mr. Jackson had <u>not</u> been convicted of deliberate and premeditated murder. He had been convicted on a felony murder theory only, and the sole special circumstance was felony-murder. 3 CT 607-610.

The trial court erred in at least two ways.

First, the trial court found that some of the violent acts the prosecution presented as evidence under factor (b) were not proven beyond a reasonable doubt. Then, paradoxically, the trial court went on to consider the acts as aggravating anyway:

> "The prosecution has presented evidence of multiple

> acts of violence on the part of the defendant while he was in prison or jail. The Court is not convinced that the evidence as to these acts rises to the level of proof beyond a reasonable doubt. Nevertheless, he was certainly a ready and willing participant in violent confrontations in custodial settings and tended to be very much in the 'thick of things' in such activities. . . ."

32 RT 4882 (emphasis added).

This was clearly error. As this Court has long held, evidence of violent criminal activity under factor (b) must be proven beyond a reasonable doubt. See, e.g., *People v. Robertson* (1982) 33 Cal. 3rd 21, 53-55 (each juror must find the crime true beyond a reasonable doubt before that juror can consider it as a factor in aggravation); *People v. Bacigalupo* (1991) 1 Cal.4th 103, 135 (1991) (jurors who do not find other violent crimes proven beyond a reasonable doubt are not allowed to consider such evidence in the weighing process). If not proven beyond a reasonable doubt, the evidence of other violent activity cannot be considered.

Second, the trial court committed *Davenport* error: it improperly considered factor (h) evidence, which can only be mitigating, as aggravating. Reading its statement of reasons for decision into the record, the trial court stated:

> "H. Capacity of Defendant to Appreciate the Criminality of His Conduct.
>
> "There was none. There is no doubt that the defendant was able to and did understand the criminal wrongfulness of his conduct. ***Not only that, the defendant bragged the next day to Kevin Jackson that he had killed the two victims the previous day."***

32 RT 4884 (emphasis added).

This was also clearly erroneous. As this Court stated in facing a similar situation in *People v. Kaurish* (1990) 52 Cal.3d 648, 717, cert. denied, 502 U.S. 837 (1991):

> "The judge committed *Davenport* error, however, in making her third finding of aggravation. She appears to have treated the absence of a particular mitigating factor as an aggravating factor. As we stated in *People v. Davenport, supra*, 41 Cal.3d 247, 289, the fact that while committing the crime the defendant did not have a mental impairment within the meaning of section 190.3, factor (h), does not constitute an aggravation of that crime."

Reversal is required when there is a reasonable possibility that the error affected the decision to grant or deny the motion. *People v. Nakahara* (2003) 30 Cal.4th 705, 724.

Here, the trial court itself provided critical guidance on the importance of the factors it discussed. Before reading into the record the portions of the statement quoted above, the trial court prefaced its comments with the observation:

> "this will be a recital of <u>the principal factors which most powerfully inform and influence the Court</u> in ruling on the automatic motion to modify the sentence of death reached by the jury."

32 RT 4880 (emphasis added).

When the trial court has identified inadmissible matters as among those that "powerfully inform and influence the Court," it is apparent that there is a reasonable possibility those matters affected the decision on the motion, particularly in view of the express finding of mitigation relating to the circumstances of Mr. Jackson's childhood under factor (k).

Moreover, the trial court's consideration of improper factors in aggravation deprived Mr. Jackson of a reliable penalty determination and of due process of law under the Eighth and Fourteenth Amendments to the

United States Constitution. The prosecution will be unable to show these constitutional errors are harmless beyond a reasonable doubt.

XII. THE TRIAL COURT ERRED IN DENYING MR. JACKSON'S MOTION TO BAR THE DEATH PENALTY DUE TO INTRA-CASE PROPORTIONALITY.

A. Background.

After the second penalty phase, Mr. Jackson filed a motion that the trial court bar the death penalty "due to intra-case proportionality principles and in the interest of justice," under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution, and Article I section 17 of the state constitution. 10 CT 2801.

Mr. Jackson argued that the federal and state constitutions prohibit the imposition of punishments "including sentences which are grossly disproportionate to the offenses as defined or committed, and/or to the individual culpability of the offender. *In re Lynch*, 8 Cal.3d 410, 423-425 (1972); *People v. Dillon*, 34 Cal.3d at 477-78." 10 CT 2804.

In determining whether a particular punishment is so grossly disproportionate to the individual offense and offender as to be unconstitutional, the case law looks first to the circumstances of the offense. *People v. Steele, supra,* 27 Cal.4th at p. 1269. On this factor, the motion argued:

> "the Defense urges this court to reject the Prosecution's theory of Jonathan Jackson as the killer of Monique Cleveland. The only evidence that supports this theory is the testimony of Kevin Jackson, who . . . was in custody facing criminal charges, and his brother Donald Proffit, a known Mead Valley Gangsta Crip whose testimony was contradictory to that of Kevin Jackson.
>
> "The Defense contends Monique Cleveland was killed by Leon West. In support of that theory the Defense points to the recorded statement of co-defendant Carl Bishop, who clearly points out that Leon West is the killer of Monique Cleveland, having been an eye witness to the murder, and to the statement of Henry Jones,

> also a co-defendant and an eyewitness to the events surrounding the death of Monique Cleveland."

10 CT 2805. Bishop and Jones were "currently in trial" before Judge Webster – the guilt phase judge here – and the prosecutor was Alison Barham as well. 10 CT 2803.

The motion stated that Leon West, Carl Bishop and Henry Jones were also "[a]rrested and charged" in the death of Monique Cleveland. 10 CT 2806. Carl Bishop was interviewed by law enforcement on May 31, 1997, and admitted he was present at the time. According to Bishop, Leon West was the ringleader, calling the shots.

> "Carl Bishop clearly tells Investigator Gill that he saw the woman (Monique Cleveland) shot in the hallway with a magnum .357 and that magnum .357 was in the hand of Leon West."

10 CT 2807.

Henry Jones was also interviewed by investigators and confirmed that Leon West was in charge and controlled the .357 magnum; "it is the prosecution's theory that Monique Cleveland was killed with the .357 magnum." 10 CT 2807.

Copies of a polygraph examiner's narrative report of an interview with Bishop, a ballistics test report, a 195-page transcript of the interview with Bishop,[41] and an investigator's narrative report of an interview with Jones were all attached as exhibits to the motion. 10 CT 2809-3027.

The case law also considers the nature of the offender. *People v. Steele, supra,* 27 Cal.4th 1230, 1269. The motion argued that defendant

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[41] The polygraph examiner interviewed Bishop; she was later joined in the interview by the chief investigator, Detective Gill, and then by Prosecutor Barham. Apparently no polygraph exam was actually administered to Bishop on the date of the interview.

was psychologically abused, neglected and deprived in early childhood, and that he had witnessed violence, had an absent father and criminal parental figures, and suffered from the "transient nature of his early living arrangements," and an early induction into the gang lifestyle. 10 CT 2806.

The motion observed that the prosecution was not seeking the death penalty against Jones or Bishop. 10 CT 2807-2808.

Thereafter, the prosecution filed its response to the motion. 10 CT 3028. As to the codefendants, the prosecution stated:

> "the three accomplices who participated in the Cleveland homicide with the defendant have been identified as Carl Bishop, Henry Jones and Leon West. Carl Bishop and Henry Jones are facing trial for murder with special circumstances. Leon West is at large. . . . "

10 CT 3030.

In contrast to its position at trial, the prosecution did <u>not</u> state that Jonathan Jackson was the actual killer of Monique Cleveland. Rather, the prosecution memo stated:

> "The evidence further showed that defendant Jonathan Jackson was in the hallway with Monique Cleveland at the time of her execution, and that he bragged to Kevin Jackson that he had 'shot the bitch' because she was a witness."

10 CT 3032.

Thereafter, the trial court held a hearing on the motion. 10 CT 3050. The trial court denied the motion, stating:

> "THE COURT: The Court concurs with the prosecution that it is inappropriate for this Court to assume the ramblings of Carl Bishop -- and they can only be, in the opinion of the Court, properly characterized as ramblings because he takes so many different positions at different times during that interview or the series of interviews, however you wish to term it -- that it would be folly on the part of this Court to say these are the facts and Carl Bishop is eminently believable.

> "In the opinion of this Court, Carl Bishop is eminently unbelievable in much of what he says. And even if the Court were to believe that he is a credible co-conspirator in this matter, it is not the opinion of this Court that it is appropriate to engage in this type of intra-case proportionality. And I concur that our Supreme Court has pretty well clearly indicated that it should not be the position of this state's courts to engage in the same. And I decline to do so."

32 RT 4875-4876.

B. The Legal Standard.

The denial of a motion to bar the death penalty as grossly disproportionate to the defendant's culpability is cognizable on appeal. E.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1246 (reviewing a trial court's denial of a "Motion to Bar/Strike the Death Penalty as Disproportionate"). The trial court's ruling is subject to independent review. *People v. Marshall* (1990) 50 Cal. 3d 907, 938.

The legal standard is set forth in *People v. Steele, supra,* 27 Cal.4th 1230, 1269:

> "we do undertake intracase proportionality review to determine whether the penalty is disproportionate to defendant's personal culpability. [Citations.] 'To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine *the circumstances of the offense*, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider *the personal characteristics of the defendant,* including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ' " 'shocks the conscience and offends fundamental notions of human dignity' " ' [citation], the court must invalidate the sentence as unconstitutional." (Emphasis added.)

Accord, *People v. Tafoya*, *supra*, 42 Cal.4th at p. 198.

C. The Circumstances of the Offense and the Bishop Statement.

The most important factor in determining whether the punishment is grossly disproportionate to the offense is the circumstances of the offense. See, e.g., *People v. Lenart* (2004) 32 Cal.4th 1107, 1131; *People v. Riel* (2000) 22 Cal.4th 1153, 1223-1224; *People v. Jackson, supra,* 13 Cal.4th 1164, 1246.

Here, the trial court rejected Carl Bishop's account, characterizing his account as "ramblings because he takes so many different positions at different times during that interview or the series of interviews, however you wish to term it", and finding Bishop, therefore, "eminently unbelievable in much of what he says." 32 RT 4876.

However, a close look at the transcript of Carl Bishop's interview shows he did not take "many different positions at different times," but was remarkably consistent during a long series of continuous interviews.

The transcript of the law enforcement interview with Bishop on May 31, 1997 comprises 196 single-spaced pages. 10 CT 2820-3012. His interrogators – first the polygraph examiner, then joined by the lead detective, and later by the prosecutor – take Bishop through (and around) the scenario of the crime numerous times.

In the interview, Bishop was consistent in his account that Leon West – also referred to as "Jun" or "June" – shot the person in the hallway later identified as Monique Cleveland. The scene was pitch-dark and illuminated by the muzzle-flash. 10 CT 2963. Bishop admitted that the lighting was poor, and said he did not know until later that the person West shot was a woman. 10 CT 2988. But <u>Bishop repeatedly identified West as</u>

the shooter of the woman. 10 CT 2843, 2961-2962, 2964, 2988-2989, 2990. At no time did Bishop identify any other person as the shooter.

Thus, the trial court's reason for rejecting Bishop's account – that he took "different positions at different times" in the interview and was therefore entirely unreliable – is simply not supported by the evidence. On the central question of the shooter's identity, Bishop was consistent in his account.

D. The Personal Characteristics of the Defendant.

In addition to considering the circumstances of the offense in determining whether a penalty is disproportionate, the court considers the personal characteristics of the defendant. *People v. Steele*, *supra*, 27 Cal.4th 1230, 1269.

Here, there is no indication that the trial court actually considered Mr. Jackson's personal characteristics in deciding the motion. 32 CT 4875-4876. Because the trial court failed to consider the personal characteristics of the defendant in deciding the motion, the trial court erred.

E. Federal Constitutional Error.

The trial court's erroneous decision also violated the United States Constitution. The Supreme Court has made clear that, under the Eighth and Fourteenth Amendments, a death sentence imposed by a decision-maker who has relied on "materially inaccurate" information in reaching that decision may not stand. *Tuggle v. Netherland* (1995) 516 U.S. 10, 14; *Johnson v. Mississippi* (1988) 486 U.S. 578, 590. In this case, the trial court, in denying the motion to bar the death penalty and then imposing the sentence, erroneously disregarded the evidence, in the form of Carl

Bishop's statements, revealing the prosecution's factual assertion that Mr. Jackson had fired the fatal bullet to be materially inaccurate.

F. Reversal is Required.

The trial court's failure to consider the Bishop statement because the court erroneously believed Bishop had contradicted himself when he was, in fact, consistent in identifying West as the shooter in his interview, and the court's failure to consider any of the personal characteristics of Mr. Jackson, mean that this Court can have no confidence in the trial court's decision. Had the trial court credited Carl Bishop's statements, and considered Mr. Jackson's mitigating personal characteristics – notably, the psychological abuse, neglect and deprivation he suffered as a child – it is reasonably possible the trial court would have reached a different result. In any event, respondent will be unable to show that the errors discussed above, beyond a reasonable doubt, did not affect the outcome.

XIII. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF INCIDENTS IN AGGRAVATION NOT COMING WITHIN PENAL CODE SECTION 190.3.

Penal Code section 190.3, subdivision (b) allows the trier of fact to consider, in determining the penalty, "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Here, the prosecution improperly introduced evidence of numerous incidents that simply did not qualify as admissible aggravating evidence under section 190.3, subdivision (b).

First, the prosecution introduced evidence of an incident at Mule Creek State Prison on August 8, 1995. An officer identified Jackson as among those who disobeyed an order to get down on the ground. 28 RT 4362. He was in the company of two other inmates. 28 RT 4363. One of the three said, "Fuck you. We don't have to get down." Nichols did not know which prisoner said it. 28 RT 4363-4364.

This clearly does not amount to proof that Mr. Jackson committed a crime involving violence or the threat of violence.

Second, correctional officers testified as to a melee at Mule Creek State Prison on June 29, 1995. One officer recognized Jonathan Jackson among the Crips who were attacked, but not as one of the fighters. 28 RT 4431.

This also does not comprise proof that Mr. Jackson committed a crime of the type contemplated by section 190.3, subdivision (b).

Third, the prosecution introduced evidence of yet another incident at Mule Creek State Prison, on November 11, 1995. A correctional officer testified that he saw Mr. Jackson and another inmate fighting, and stopped

the fight. But the officer also testified that he did not know whether Mr. Jackson was merely defending himself, and that he did not follow up on the investigation to learn whether Jackson was at fault. 28 RT 4349.

This evidence also does not show criminal activity by defendant.

Fourth, a Riverside police officer testified that, on September 7, 1994, he pulled over a car traveling at a high speed; Mr. Jackson was a passenger, and when he got out the officer saw a loaded firearm on his seat. Mr. Jackson was arrested for being an ex-felon in possession of a firearm. 27 RT 4257-4263.

This incident did not involve "the use or attempted use of force or violence or the express or implied threat to use force or violence," as required by section 190, subdivision (c).

The admission of evidence of these four incidents violated not just section 190.3, but the federal constitution as well. When, as here, a state engages in conduct that is prohibited under an established discretionary state sentencing scheme, the failure of the state to abide by its own rules violates a defendant's constitutional right to due process under the Fourteenth Amendment. See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346. As the Ninth Circuit has stated:

> "[W]here a state has provided a specific method for the determination of whether the death penalty shall be imposed, 'it is not correct to say that the defendant's interest' in having the method adhered to 'is merely a matter of state procedural law'. . . .
>
> "Moreover, when we deal with matters involving aggravating and mitigating circumstances, we are at the very core of the Supreme Court's mandate that the death penalty be determined based on the character of the offender as well as circumstances of the offense."

Fetterly v. Paskett (9th Cir. 1991) 997 F.2d 1295, 1300, *cert denied* 513 U.S. 914 (1994).

In this case – in which a previous jury had been unable to reach a decision as to penalty – it is at least reasonably possible that, without the introduction of this inadmissible evidence, Mr. Jackson would have received a more favorable result. Moreover, as to federal constitutional error, respondent will be unable to meet its burden to show, beyond a reasonable doubt, that the errors in admission of this improper evidence did not affect the outcome.

XIV. THE TRIAL COURT ERRED IN REFUSING APPELLANT'S PROPOSED PENALTY PHASE INSTRUCTIONS.

A. Introduction.

The trial court refused a number of specially tailored instructions that appellant requested and that would have addressed various aspects of the penalty determination. 30 RT 4692-4696; 9 CT 2667; see 9 CT 2724-2745. A criminal defendant is entitled upon request to instructions that 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* (1970) 2 Cal.3d 180, 190; see also *Penry v. Lynaugh* (1989) 492 U.S. 302. In addition, "in considering instructions to the jury, [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of . . . CALJIC . . . ." Cal. Stds. Jud. Admin., § 5.

The special instructions addressed herein were neither cumulative nor argumentative, and none of the requested instructions contained incorrect statements of law. See *People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697. They were offered to address particular aspects of appellant's theory of the case, and were thus not inappropriate. See *People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Andrian* (1982) 135 Cal.App.3d 335, 338.

The trial court's refusal to read appellant's requested instructions violated his right to present a defense because it led the jury to give insufficient weight to appellant's mitigation evidence. U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi*,

supra, 410 U.S. 284. It denied his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638), and his right to a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503. The error denied appellant his right to a jury which deliberated with a full understanding of its responsibility for the decision. U.S. Const., Amends. 8th & 14th; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320. In addition, the error violated appellant's right to trial by a properly instructed jury. U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145. Finally, the failure to instruct violated appellant's right to due process by arbitrarily depriving appellant of his state right to the delivery of requested instructions supported by the evidence. U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346-347; *Fetterly v. Paskett*, *supra*, 997 F.2d 1295, 1300.

This Court has previously rejected similar arguments. Appellant urges the Court to reconsider those opinions, particularly in light of recent empirical studies of capital juries showing repeatedly that jurors do not understand concepts necessary to perform their functions at penalty phase.

B. The Trial Court Erred In Refusing To Instruct The Jury That It Would Be Misconduct To Regard Death as A Less Severe Penalty Than Life In Prison Without Possibility of Parole.

Appellant's Proposed Penalty Phase Instruction No. 4 would have informed the jury that it was required to regard a death sentence as a more

severe penalty than a sentence of life in prison without possibility of parole. 9 CT 2729. The instruction stated:

> "Some of you expressed the view during jury selection that the punishment of life in prison without possibility of parole was actually worse than the death penalty.
>
> "You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without possibility of parole.
>
> "It would be a violation of your duty as jurors if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties."

Proposed Penalty Phase Instruction No.4, 9 CT 2729.

The trial court refused the requested instruction. 30 RT 4692-4693. It was error to do so.

Death is qualitatively different from all other punishments and is the most severe penalty the law can impose. See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305. In *People v. Hernandez* (1988) 47 Cal.3d 315, 362-363, the prosecutor argued that life without the possibility of parole could be found to be the ultimate penalty. This Court found that the prosecutor's remarks could not have persuaded any juror and implied that it would have been improper for a juror to vote for the death penalty because the juror considered it a less severe penalty than life without parole. *People v. Hernandez*, *supra*, 47 Cal.3d at pp. 362-363. The proposed instruction only clarified the principle that the jury was to regard death as the most severe penalty. This Court has recognized that it is not uncommon for jurors to think that life without the possibility of parole is a more serious penalty than death. See, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 963. The requested instruction was not inconsistent with the principle that jurors

should accord whatever weight they deemed appropriate to the aggravating and mitigating circumstances. The proposed instruction did not even address the issue of what weight should be accorded to particular circumstances. The requested instruction was entirely consistent with CALJIC 8.88. 9 CT 2705-2706. If a juror were to vote for the death penalty because he or she regarded it as a less severe punishment than life without parole, that juror would in effect be voting for the death penalty because mitigation outweighed aggravation. The requested instruction clarified the principle that a juror could not properly vote for the death penalty as an act of mercy. The trial court erred in refusing the instruction requested.

C. The Trial Court Erred in Refusing the Proposed Penalty Phase Instructions Regarding the Prohibition Against the Double Counting Of Aggravating Facts.

Appellant sought an instruction that would have instructed the jury against double-counting of aggravating factors. Proposed Penalty Phase Instruction No. 5 read:

> "You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors."

9 CT 2730. The trial court erred in refusing the instruction. 30 RT 4693.

The instruction was based on *People v. Melton* (1988) 44 Cal.3d 713, 768. In *Melton*, this Court recognized a problem arising from section 190.3, factor (a), because it directs the jury to consider both "the circumstances of the crimes" and "the existence of any special circumstances." This Court noted: "Since the latter are a subset of the

former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' On defendant's request, the trial court should admonish the jury not to do so." *Id.*

The trial court's refusal to give Proposed Penalty Phase Instruction No. 5 violated the United States Supreme Court's mandate that the state "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia* (1980) 446 U.S. 420, 428. A capital-sentencing procedure must be one that "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Jurek v. Texas* (1976) 428 U.S. 262, 273- 274. That requirement is not met where the jury considers the same act or an indivisible course of conduct to be more than one aggravating circumstance. By refusing to give Proposed Penalty Phase Instruction No. 5, the trial court invited the jury to violate that principle and to impose a sentence of death in an arbitrary and capricious manner.

D. The Court Erred in Not Reading Instructions Informing the Jury that Its Task at Penalty, as Moral and Normative, Was Significantly Different from the Factfinding Task in the Guilt Phase.

1. The Requested Instructions.

Appellant's trial attorney requested, but was refused, an instruction which would have informed the jury that it had a much different task at penalty phase than a jury has in trying a case at the guilt phase. The instruction read, in pertinent part:

> "Your responsibility in the penalty phase is not merely to find facts, but also – and *most important – to render an individualized moral determination about the penalty appropriate for the particular defendant – that is, whether he should live or die*."

9 CT 2724 [Proposed Penalty Instruction No. 1] [italics added]. This instruction would have clarified two important aspects of the jury's penalty phase deliberations, which made penalty phase deliberation distinctively different from guilt phase deliberation. First, the instruction would have reminded each juror that he or she must use individual judgment in determining whether appellant should live or die. Second, it would have reminded the jurors that the decision about whether evidence was aggravating or mitigating and the ultimate decision about whether death or life was the appropriate punishment was not simply a matter of factfinding. Rather, it required moral and normative judgment.

Further, the defense proposed instructions that would have explicitly connected that concept of mitigation with mercy, compassion and sympathy, informing the jury that if such feelings were aroused, then it could use such feelings as a grounds for not imposing the death penalty. 9 CT 2732; [Proposed Penalty Instruction No. 7][42]

2. The Trial Court Erred in Not Giving the Requested Instructions.

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[42] Proposed Penalty Phase Instruction No. 7 read: "A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense or the defendant which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense." 9 CT 2732.

The guilt phase and penalty phase tasks of a jury are different. Guilt phase jurors are expected to find facts and apply the law to the facts without injecting their personal feelings or sense of justice. They are explicitly so instructed. See CALJIC No. 1.00. Penalty phase jurors, by contrast, are expected not only to find facts, but also to bring their own values into play. Perhaps uniquely in American law, penalty phase jurors, as both the United States Supreme Court and this Court have recognized, represent the "conscience of the community." *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 519; *People v. Thompson* (1990) 50 Cal.3d 134, 185; *McCleskey v. Kemp* (1987) 481 U.S. 279, 311 [it is the death penalty jury's function to "make the difficult and uniquely human judgments that defy codification"]. The jury is charged with the "truly awesome responsibility of decreeing death for a fellow human." *McGautha v. California* (1971) 402 U.S. 183, 208. In exercising that responsibility, jurors can express their own sense of mercy and must express their own values. *California v. Brown* (1987) 479 U.S. 538, 562-563 (dis. opn. of Blackmun, J.); *Caldwell v. Mississippi*, *supra*, 472 U.S. 320 at p. 331 ["The [mercy] plea is made directly to the jury as only they may impose the death sentence."]; *People v. Andrews* (1989) 49 Cal.3d 200, 237 (dis. opn. of Mosk, J. [A penalty phase juror has "the power to choose life over death - whether or not the defendant deserves sympathy - simply because life is desirable and death is not."]. As this Court has emphasized: "the sentencing function is inherently moral and normative [citation] and therefore the weight or importance to be assigned to any particular factor or item of evidence involves a moral judgment to be made by each juror individually." *People v. Crandell* (1988) 46 Cal.3d 833, 882-883.

Each juror must express his or her own sense of sympathy, compassion, and morality. *People v. Easley* (1983) 34 Cal.3d 858, 875-876 [sympathy]; *Woodson v. North Carolina, supra*, 428 U.S. 280, 304 (opn. of Stewart, Powell & Stevens, JJ. [compassion]; *California v. Brown, supra*, 479 U.S. at p. 545 (conc. opn. of O'Connor, J. [morality]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 261 (conc. opn. of Marshall, J. ["[T]he question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime."]; *People v. Haskett* (1982) 30 Cal.3d 841, 863 [a penalty phase jury "decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death"]. The death sentence "is the one punishment that cannot be prescribed by a rule of law as judges normally understand rules." *Spaziano v. Florida* (1984) 486 U.S. 476, 468-469 (conc. & dis. opn. of Stevens, J.). This is something that is beyond strict legal definition. See Higginbotham, *Juries and the Death Penalty* (1991) 41 Case W. Res. L.Rev. 1047, 1048-49 [asserting that death penalty "decision must occur past the point to which legalistic reasoning can carry"].

Therefore, while the jurors are not to be influenced by prejudice (see CALJIC No. 8.84.1) nor by mere emotion (*California v. Brown, supra*, 479 U.S. at p. 543), the death penalty decision may include "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina, supra*, 428 U.S. at p. 304 (opn. of Stewart, Powell & Stevens, JJ.). The death penalty decision necessarily involves subjective elements not present when a jury decides the question of guilt. *Caldwell v. Mississippi, supra*, 472 U.S. at p. 333; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 254-255 (dis. opn. of Marshall, J.) ["The

capital sentencing jury is asked to make a moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the jurors' discretion, theirs is largely a subjective judgment."].

The jury in appellant's case was misled about its normative responsibilities at penalty phase. This was in part because it was read a number of instructions which incorrectly suggested that its task was primarily factual - just like it had been at guilt. For instance, the court instructed the jury with CALJIC No. 8.84.1, which provided: "You must determine what *the facts are from the evidence* received during the entire trial unless you are instructed otherwise." 9 CT 2700; 31 RT 4715 [italics added]. The court also instructed the jury with CALJIC No. 8.85, which told the jury that "[i]n determining which penalty is to be imposed on defendant, you shall *consider all of the evidence which has been received during the trial of this case*." 9 CT 2701; 31 RT 4715-4716 [italics added]. The jury also heard instructions emphasizing the manner in which it should use the evidence to determine "facts." For instance, the jury was instructed with CALJIC No. 2.00, informing it that: "[e]vidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a *fact*." 9 CT 2676; 24 RT 3664 [italics added]. They were instructed with CALJIC No. 2.27, which told the jury that it could rely on the testimony of a single witness "for proof of [a] *fact*." 9 CT 2685; 31 RT 4710 [italics added]. Without the counter-balancing instruction proposed by appellant, the jury surely believed that its task at penalty was no different than the task of a jury adjudicating guilt.

Appellant's proposed instructions were an accurate statement of the California law on this matter. In fact, one of the instructions proposed by appellant, Proposed Penalty Instruction No. 1, quoted the same language this Court has previously used regarding the distinctive moral quality of penalty phase judgment. This Court first recognized that evidence in penalty phase matters must be individually morally evaluated in *People v. Brown* (1988) 46 Cal.3d 432, 448, using precisely the language proposed by appellant.

No other instruction read to the jury conveyed the information appellant sought to communicate. Although this Court has held that the jury is adequately informed of its penalty phase tasks with instructions CALJIC Nos. 8.85 and 8.88 (see, e.g., *People v. Monterrosso* (2004) 34 Cal.4th 743, 793; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054), recent empirical evidence has shown that this is untrue.

Recent studies show that capital juries instructed with pattern penalty phase instructions do not understand that their task at penalty phase as in any way different from the factfinding task at guilt. Interviews with California capital jurors show that pattern penalty instructions as currently crafted "fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake." Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) 70 Ind. L.J. 1043, 1077. As perceived by jurors, the instructions on the sentencing decision had little or nothing to do with a moral decision by the jurors. Rather, capital jurors instructed with nothing more than the pattern instructions believe that a death penalty decision "involves nothing more than simple accounting, an adding up of the pluses and minuses, aggravation against mitigation, on the balance sheet of

someone's life." Haney, Sontag & Constanzo, *Deciding to take a Life: Capital Juries, Sentencing Instructions and the Jurisprudence of Death* (1994) J. Soc. Issues 149, 172 [hereafter "Deciding to Take a Life"].

Additional empirical evidence shows that jurors who believe that the sentencing decision was a "amoral task" of simply a matter of counting up mitigating factors and aggravating factors, were likely to assume that the decision to impose death was not a matter of his or her individual judgment; rather, saw the instructions as dictating a "legally correct" outcome, for which the "law" or the "judge" had responsibility, rather than the jury. Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1484 [hereafter "Violence and the Capital Jury"]; Hoffman, *Where's the Buck?--Juror Misperception of Sentencing Responsibility in Death Penalty Cases* (1995) 70 Ind. L.J. 1137, 1138, fn. 11. Jurors who saw the penalty phase as analogous to guilt were more likely to assume that the law required that the death penalty be imposed. Deciding to Take a Life, *supra*, at p. 172; Violence and the Capital Jury, *supra*, at p. 1482.

The Eighth and Fourteenth Amendments were implicated by penalty phase instructions emphasizing the jury's factfinding function, without also informing the jury that it must make individualized normative judgments. Under the Eighth Amendment right to a reliable penalty verdict, appellant was entitled to a jury who deliberated with accurate information about its responsibility for a decision to sentence him to death. *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 333 ["[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."];

People v. Farmer (1989) 47 Cal.3d 888, 931. A right to a jury that deliberates with a clear view about its responsibilities is also guaranteed by the Fourteenth Amendment right to a fair trial. *McGautha v. California*, *supra*, 402 U.S. 183, 221; see also *State v. Rose* (N.J. 1988) 548 A.2d 1058, 1087 [" In no other determination in the criminal law is it more important to make absolutely certain the jury is aware, not simply of the consequences of its actions, but of its total responsibility for the judgment."]. It is also reversible error for a jury to deliberate a sentence of death under the mistaken belief that a sentence is mandatory. See *People v. Farmer*, *supra*, 47 Cal.3d at p. 931; *United States v. Tucker* (1972) 404 U.S. 443, 446 [defendant may not be sentenced on the basis of misinformation of "constitutional magnitude"].

Without the instructions proposed by appellant, it is likely that the jury was misled into believing that its only or primary role was to find facts, when, in fact, the factfinding plays a limited role in a penalty phase. Since appellant's jury believed that its essential role was to find facts, it was likely to misunderstand and neglect its normative role, *i.e.*, its role as the voice of the "conscience of the community." *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519.

E. The Court Erred in Failing to Give Appellant's Instructions Defining Mitigation.

1. The Requested Instructions.

The defense was refused instructions which would have elaborated on the meaning of "mitigation" in a death penalty trial. First, appellant asked that the court give instructions explaining precisely what evidence

presented by the defense at penalty phase could be counted as mitigation. 9 CT 2731 [Proposed Penalty Phase Instruction No. 6].[43]

A second set of instructions pointed out that mitigation evidence was unlimited. One instruction would have told the jury that mitigation is unlimited and that any evidence could be viewed as mitigation. 9 CT 2733 [Proposed Penalty Phase Instruction No. 8][44]. The defense also proposed a follow-up instruction pointing out that the mitigation evidence presented at penalty phase was only an example of the things that could be considered in mitigation. 9 CT 2735 [Proposed Penalty Phase Instruction No. 10][45].

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[43] Proposed Penalty Phase Instruction No. 6 read:

> "Evidence has been produced concerning the following: defendant's deprived childhood; the fact that he was subjected to the physical abuse of his mother and cruelty during his formative years; his incarceration in juvenile institutions and prisons from age 16 on; and the lack of treatment for identified problems concerning aggression. Any or all of the above may be considered as mitigating factors."

9 CT 2731.

[44] Proposed Penalty Phase Instruction No. 8 read: "Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without the possibility of parole." 9 CT 2733.

[45] Proposed Penalty Phase Instruction No. 10 read: "Mitigating factors are not necessarily limited to those adduced from specific evidence offered at the sentencing hearing such as character testimony. A juror might be disposed to grant mercy based on other factors, such as a humane perception of the defendant developed during trial." 9 CT 2735.

2. Appellant Was Entitled to An Instruction Explaining in Detail What Evidence Was Offered in Mitigation.

The instruction appellant asked for pointed out that he suffered a deprived childhood, and was subjected to physical abused and cruelty as a child. 9 CT 2731.

The court's refusal of this instruction was, first of all, an error of state law. Under California law, a defendant is entitled upon request to instructions which relate particular facts to a legal issue or pinpoint the crux of the defendant's case. Pinpoint instructions "are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." *People v. Saille*, *supra*, 54 Cal.3d 1103, 1119; see *People v. Sears*, *supra*, 2 Cal.3d 180, 190. Appellant requested the pinpoint instructions here at issue and the trial court was obliged to deliver them. *Id.* at p. 1119. Appellant had the right to have the jury given illustrative examples of the types of evidence that could be considered as factors in mitigation beyond those specified by statute. The proposed instructions at issue here would have focused the jury's attention on particular theories of mitigation on which the defense was relying. The instructions therefore clarified and illustrated in a non-argumentative manner the application of the general principle to appellant's case.

Appellant's proposed instruction was a correct statement of the law. In prior opinions of this Court, similar language has been cited with approval as insuring that the jury fully understood the concept of mitigation. See *People v. Hunter* (1989) 49 Cal.3d 957, 988 [considering a instruction pointing out defense evidence of childhood abuse and cruelty]. Appellant's entitlement to legally correct pinpoint instructions is

particularly clear where, as here, the instruction would have balanced out the standard CALJIC No. 8.85 which specifically pointed out the prosecution's aggravation evidence, i.e., the circumstances of the crime, appellant's prior violent acts and his prior felony conviction. *See* CALJIC No. 8.85. In that light, appellant request was nothing more than a request for balanced instructions. *People v. Moore* (1954) 43 Cal.2d 517, 526-529.

Appellant's jury was given no other instruction that would have clearly explained to the jury that it could consider the matters offered in mitigation. Appellant's jury was only instructed with CALJIC No. 8.85, which, in relevant part, told the jury that it could consider: "Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record] [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." 9 CT 2702; 31 RT 4717. However, much of the penalty phase testimony in support of appellant did not relate to his character, and instead concerned events from his life that may have led him down a tragic path. Similarly, the word "record" did not necessarily encompass appellant's background, as that word suggests that the jury is expected to consider the criminal record, which does not cover background information. Appellant's evidence would also not necessarily have "extenuate[d] the gravity of the crime" although it did perhaps provide some context for understanding it.

Studies of California capital juries confirm that the pattern instruction does not adequately inform the jury that it can – indeed it must – consider appellant's background evidence as mitigation. Studies show that jurors who were given California pattern instructions are likely to misunderstand factor (k), the so-called "catch all" factor that included the

evidence from appellant's childhood and background. Far from understanding that background should be considered as mitigation, a substantial minority of California capital jurors who had been read the pattern instruction identified background evidence as an aggravator, rather than as mitigation. Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law & Hum. Beh. 575, 581 [hereafter "Clarifying Life and Death Matters"; see also Butler & Moran, *The Role of Death Qualification in Venirepersons' Evaluation of Aggravating and Mitigating Circumstances in Capital Trials* (2002) 26 L. & Hum. Behv. 175, 175-176 [death qualified jurors less likely to consider non-statutory mitigation.]. Because jurors using only the pattern instruction did not understand that background evidence was mitigation, they systematically undervalued defendant's mitigation, and, as such, were much less likely to use a defendant's background as part of penalty phase deliberations. *Clarifying Life and Death Matters*, *supra*, at p. 583; Haney & Lynch, C*omprehending Life and Death Matters* (1994) 18 Law & Hum. Behav. 411, 420-22) [in a study on the comprehensibility of jury instructions, 45 percent of subjects focused exclusively on nature and circumstances of the crime rather than the character and background of defendant][hereafter "*Comprehending Life and Death Matters*"].

As such, the error in failing to read appellant's requested background instruction has constitutional dimensions. Instructions that fail "to tell the jury that any aspect of the defendant's character or *background* [can] be considered mitigating, and [can] be a basis for rejecting death even though it did not necessarily lessen culpability . . . [are] constitutionally inadequate." *People v. Lanphear* (1984) 36 Cal.3d 163, 167-168, italics

added. When the court instructs the jury that it may consider a background of abuse as a child, this is in fact highly likely to influence the jury in the defendant's favor. See *Williams v. Taylor* (2000) 529 U.S. 362 [evidence of a childhood filled with "abuse and privation" can influence the jury's appraisal of the defendant's moral culpability]; *In re Lucas* (2004) 33 Cal.4th 682, 731-732 [weighty history of childhood abuse, rejection and juvenile institutionalization could be a basis for concluding that defendant's relative moral culpability is less than the aggravation would suggest]; see also Deciding to Take a Life, *supra*, at p. 163 [social science study of capital jurors found that "it was clear from the interviews that all of the . . . juries [sparing the defendant's life] took the defendant's background somehow into account."]. The instructions here did not so inform the jury adequately about the critical background evidence offered for appellant and therefore were constitutionally inadequate.

Failure to tailor the instructions prejudicially misled the jury into disregarding pertinent evidence so that it failed to give consideration and full effect to constitutionally relevant mitigation. *Lockett v. Ohio*, *supra*, 438 U.S. 586. Appellant was deprived of his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5. The pattern instructions alone unfairly skewed the verdict toward death, in violation of the Eighth and Fourteenth Amendments.

3. The Trial Court Erred in Failing to Instruct the Jury that Mitigation Evidence is Unlimited.

Appellant was also entitled to his proposed instructions which told the jury that mitigating factors are unlimited. Proposed Penalty Phase

Instruction No. 8, 9 CT 2733; Proposed Penalty Phase Instruction No. 10, 9 CT 2735:

These instructions clarified, also in a non-argumentative manner, the wide scope of mitigation. As with appellant's other instructions, they were a correct statement of the law. See *People v. Mayfield* (1997) 14 Cal.4th 668, 807 [approving instruction that mitigating factors are unlimited and that mitigating factors listed in the instruction are just examples of possible mitigation]; *People v. Raley* (1992) 2 Cal.4th 870, 918 [same].

Nevertheless, the trial court refused them because the pattern instructions supposedly were sufficient. 30 RT 4693. This is not so. Studies show that a substantial minority of jurors do not understand that they can consider *any* factor in mitigation as they deliberate. Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided* (1995) 70 Ind. L.J. 1161, 1167 [only 59 percent understood that they could consider any evidence as constituting a mitigating factor]; Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L.Rev. 1, 10 [less than a third of the jurors understood that a mitigating circumstance must be proven only to the juror's satisfaction]. In one important study including California jurors who had been read only the pattern instructions, it was shown that only a quarter of the jurors understood that they could consider any and all evidence as factors in mitigation. Bowers & Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* (2003) 39 Crim. Law Bull. 51, 67-68.

A jury that does not understand the broad scope of mitigation is constitutionally unacceptable. As noted, it is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a

less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605. The failure to adequately instruct the jury on the scope of mitigation impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.

4. The Court Erred in Failing to Inform the Jury That It Could Always Return a Verdict of Life Without Parole Regardless of the Evidence.

Appellant requested instructions that would have told the jury that it always had the discretion to return a verdict of life without the possibility of parole. 9 CT 2737 [Proposed Penalty Phase Instruction No. 12].

These proposed instruction were a correct statement of the law. See *People v. Duncan* (1991) 53 Cal.3d 955, 978-379 ["our statute . . . give[s] the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.]. This Court has found that instructions informing the jury that it can return a verdict of life, even if it failed to find mitigation is not required (even upon request) because the instruction is implicit in CALJIC No. 8.88.

This Court in *People v. Johnson* (1993) 6 Cal.4th 1, 52 has held that by reading what is now CALJIC No. 8.88, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist." Since *Johnson*, the Court has never revisited the

grounds for its holding. See, e.g., *People v. Snow*, *supra*, 30 Cal.4th 43, 124 [citing *Johnson* without analysis]; *People v. Anderson* (2001) 25 Cal.4th 543, 600 fn. 20 [same].

Yet the Court's analysis in *Johnson* should be revisited. Its finding begs the real question, which is whether a reasonable juror would believe that options were restricted in some fashion when considering the appropriate punishment. This question is critical because if the instruction conveyed the impression that the jurors' sentencing options were restricted, then appellant has been denied his right to an individualized sentencing determination. As such, the proper question is not whether a juror would assume that death had to be imposed even if there were insubstantial aggravating circumstances, but whether a juror would feel free to return a verdict of life imprisonment without parole in the face of aggravating circumstances and no mitigating circumstances. That is what is implicit in appellant's requested instructions. The pattern instructions do not clearly tell the jury what to do in this situation.

This Court's assumption that jurors understand that the death penalty is not mandatory once aggravation is found is incorrect. Far from understanding that the life without parole is always an option, even if aggravation is found, a substantial minority of jurors given the pattern instructions believe that once they find any aggravation *at all* then the death penalty is required. Bentele & Bowers, *How Jurors Decide on Death,* 66 Brook. L.Rev. 1011, 1031-1041 (2001); Bowers, Steiner & Antonio, *supra*, at p. 440 [presence of an aggravating factor, which should merely make a defendant eligible for a death sentence, operates as a mandate for the death penalty]; see also Eisenberg & Wells, *supra*, at p. 2; Clarifying Life and Death Matters, *supra*, at p. 582.

This Court has maintained that the phrase that aggravation is "so substantial" in comparison with mitigation is the language that conveys to a jury that it may choose life without the possibility of parole even when aggravation outweighs mitigation. *People v. Boyette* (2002) 29 Cal.4th 381, 465. In reality, as the studies show, the instruction is "too vague and nonspecific to be applied evenly by a jury" (see *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 392[46] [holding that a "substantial" history of conviction is unconstitutionally vague]) and fails to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." *Id.* at p. 391. The words "so substantial" are too amorphous to guide a jury in deciding whether to impose a death sentence. See *Stringer v. Black* (1992) 503 U.S. 222.

Without the aid of appellant's requested instructions, the jurors were not able to fully engage in the type of individualized consideration the Eighth Amendment requires in a capital case (*Zant v. Stephens*, *supra*, 462 U.S. 862, 879), creating the risk that the death penalty would be imposed in spite of factors calling for a less severe sentence. *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605. Instruction without appellant's proposed modifications also made the penalty determination unreliable. U.S. Const., 8th & 14th Amends.

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[46] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. See *Gregg v. Georgia*, *supra*, 428 U.S.153, 202.

5. It Was Error to Fail to Instruct That If Mitigation Outweighed Aggravation Then Life Without Parole is Required.

The trial court reversibly erred in failing to inform the jury that if it found that mitigation outweighed aggravation then it must return a verdict of life without the possibility of parole.

Although appellant did not request it, the court had a *sua sponte* duty to give such an instruction, because it expressed a legal principle that was necessary for the jury to decide the penalty in accordance with law.

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." This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the 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 "so substantial" even if they were outweighed by mitigating circumstances.

Although the pattern instruction does not have this mandatory language, this Court has repeatedly held that an instruction explicitly requiring life without parole when mitigation outweighs aggravation is not necessary. In *People v. Duncan*, *supra*, 53 Cal.3d at p. 978, this Court

found the formulation in CALJIC No. 8.88 without additional language 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." 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; moreover, the proposition conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. See *People v. Moore*, *supra*, 43 Cal.2d at pp. 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; 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. Additionally, the instruction, as given in this case, did not clearly state that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed the mitigating. 9 CT 2705-2706.

The studies appellant cited above show that this Court's assumption that jurors understand that life without parole is mandatory when mitigation outweighs aggravation is unfounded. Bentele & Bowers, *supra*, at pp. 1031-1041; Bowers, Steiner & Antonio, *supra*, at pp. 438-440; Eisenberg & Wells, *supra*, at p. 2. In fact, many jurors instructed with the language of CALJIC No. 8.88 thought that the death penalty was required if there was any aggravation, regardless of whether mitigation outweighed such aggravation. Barely half of the jurors understood that life was mandatory if mitigation outweighed aggravation, with about a fifth of the jurors

believing that either life or death could be the verdict, and with another fifth believing that the instruction gave them no guidance on this issue at all. Clarifying Life and Death Matters, *supra*, at p. 582.

Without the proposed instructions, appellant's rights under the Eighth and Fourteenth Amendments to a reliable penalty verdict by a jury which considered all his mitigation evidence, and which understood its sentencing responsibilities, was violated. *Mills v. Maryland*, *supra*, 486 U.S. 367, 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.

F. This Court's Reliance on Pattern Instructions to Convey Adequately the Meaning of Penalty Phase Law Must be Revisited.

The above arguments illustrate the many ways in which aspects of the penalty phase process are routinely misunderstood by juries, and show the necessity for appellant's proposed modifications. However, this Court has routinely held that there is no need to further define mitigation or define the weighing process because the terms are ordinary words that do not have to be defined. See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1036. The Court's unexamined assumption that the word "mitigate" is a commonly used and commonly understood word must be reexamined. In actuality, "mitigate" is an obscure word that few people understand – at least in the death penalty context. Justice Thurgood Marshall noted that "'mitigating evidence' is a term of art with a constitutional meaning that is unlikely to be apparent to a lay jury." *Watkins v. Murray* (1989) 493 U.S. 907, 910 (Marshall, J., dissenting from denial of certiorari); see also *Dix v. Kemp* (11th Cir. 1985) 763 F.2d 1207, 1209 ["The words 'mitigating

circumstances,' while they have meaning to most jurors, still do not adequately communicate the precise nature or function of that concept in the context of a sentencing trial."]. Similarly, the Seventh Circuit has observed that "words such as 'mitigating' . . . are foreign to jurors' daily discourse." *Welborn v. Gacy* (7th Cir. 1993) 994 F.2d 305, 314.

This Court held that "mitigation" is a term an average citizen would understand without further elaboration in *People v. Malone* (1988) 47 Cal.3d 1, 55. In that case, this Court did not analyze the legal meaning of mitigation, holding without elaboration that statutory language is presumed to be clear. *Ibid.*, citing *People v. Page* (1980) 104 Cal.App.3d 569, 577. However, this Court's own death penalty opinions post-dating *Malone* show that this presumption is false. Whatever meaning "mitigation" has in day-to-day language, jurors simply do not understand the meaning of "mitigation" in the death penalty context. In this state there have been a disturbing number of death penalty cases where during penalty phase deliberations the jury either sent a note to the trial judge asking for further definition of the term "mitigation," or resorted to a dictionary to figure out for itself the meaning of "mitigation."[47] Perhaps the most telling of these

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[47] See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114 1202 [jury sought court's guidance on meaning of terms "extenuate," "mitigate" and "aggravate"]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1191 [jury sent trial court a note asking for a dictionary to obtain definitions of the terms "aggravating" and "mitigating."]; *People v. Lucero* (2003) 23 Cal.4th 692, 723-725 [jury asked for meaning of aggravation and mitigation]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017-1018 [Jury sent out a note asking for "the legal definitions for aggravating and mitigating circumstances as they apply to the instructions in making the determination of this sentence."]; *People v. Montiel* (1993) 5 Cal.4th 877, 940 [jury on second day of deliberation asked for written definitions of

(footnote continued on next page)

cases is *People v. Hamilton* (1988) 46 Cal.3d. 123, 148, where the jury asked to have the instructions on aggravation and mitigation read three times and then finally sent out a note: "Please read all of the instructions again explaining mitigating and aggravating circumstances. Can you give us additional definitions of these words in layman's terms?"

Nor has the addition of the language in CALJIC No. 8.88 that mitigating factors are "extenuating" increased capital jurors's understanding of "mitigation." The word is at least as confusing to ordinary citizens as "mitigation." So, for example, in *People v. Smith* (2003) 30 Cal.4th 581, 636-637, the jury sent a note to the asked for definition of "extenuating circumstances." See also *People v. Harris* (2005) 37 Cal.4th 310, 362 [Juror asked: "Please explain to me mitigating and extenuating circumstances and how it fits in with factor (k) extenuating circumstances. Does that mean what positive (mitigating) things you can argue for [*sic*]

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aggravation and mitigation]; *People v. Mincey* (1992) 2 Cal.4th 408, 469 [the jury asked the trial court for either a legal dictionary or a legal definition of the terms mitigation and aggravation]; *People v. Marshall, supra*, 50 Cal.3d 907, 936 [trial court asked to define aggravating and mitigating circumstances]; *People v. Lang*, *supra*, 49 Cal.3d 991, 1035 [same]; *People v. Adcox* (1988) 47 Cal.3d 207, 269 [same]; *People v. McCain* (1988) 46 Cal.3d 97, 117 [jury sent out a note: "being unfamiliar with the term of mitigation we would like the dictionary meaning of both mitigation and aggravation, please"]; *People v. Poggi* (1988) 45 Cal.3d 306, 345 [jury asked for definition of phrases "aggravating circumstances" and "mitigating circumstances"]; *People v. Karis* (1988) 46 Cal.3d 612, 642 [jurors used a dictionary to define mitigation]; see also, *People v. Friend* (1957) 54 Cal.2d 749, 762 [in response to court question, foreman replied: "I am not certain how the law defines mitigating and I don't know what Webster says on it frankly"]; see Tiesma, *Dictionaries and Death: Do Capital Juries Understand Mitigation?* (1995) Utah L.Rev. 1, 13.

what has happened [*sic*] to the victim [*sic*] to not give him the death penalty."]. In an empirical study of subjects who were read California penalty instructions and then asked to explain them, less than a quarter of subjects understood the word "extenuation." Clarifying Life and Death Matters, *supra,* at p. 579.

These cases show "mitigation" in the death penalty context has a meaning remote from everyday usage, which jurors do not understand. If a word or phrase is used in a technical sense, differing from its commonly understood meaning, clarifying instructions should be given. *People v. Bland* (2002) 28 Cal.4th 313, 334; *People v. Smithey* (1999) 20 Cal.4th 936, 981. The terms "mitigation" and "weighing" have a "technical sense peculiar to the law," that is, a "statutory definition differ[ing] from the meaning that might be ascribed to the same terms in common parlance." *People v. Estrada* (1995) 11 Cal.4th 568, 574-575. Thus, the trial court in appellant's case had an obligation to instruct on the definitions of this phrase.

Each of the instructions discussed above was designed to address the multiple shortcomings of California pattern instructions. None of the instructions was an incorrect statement of the law or improper in its manner of presentation. All of the principles embraced by the instructions have been endorsed by this Court. In short, these instructions presented to the jurors information that is an accepted part of death penalty jurisprudence in this state. Yet this Court continues to permit jurors to deliberate without the help of any instructions clarifying the law. This Court's practice of finding that pattern instructions are sufficient because a reasonable juror might just be able to divine what the instructions really mean, regardless of how inaptly they may be phrased, is constitutionally inadequate.

The rules for death penalty deliberation are too complex for these pattern instructions. As one court recently put it, courts have "established a set of increasingly reticulated rules for capital sentencing, including shifting burdens, unanimity on some issues but not on others, and consideration of mitigating factors that do not appear in state statues." *Welborn v. Gacey* (7th Cir. 1993) 994 F.2d 305, 312. Even justices of the United States Supreme Court sometimes complain that the rules are too complex. See *Graham v. Collins* (1993) 506 U.S. 461, 483-495 (conc. opin. of Thomas, J.; *Walton v. Arizona* (1990) 497 U.S. 639, 656-674 (conc. opin of Scalia, J.. The high reversal rates of capital convictions on grounds of instructional error indicates the same. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June, 2000), p. 137 <http://www.ccjr.policy.net/cjedfund/ jpreport/finrep.pdf> (as of November 14, 2005) [three quarters of death penalty cases reversed for instructional error].

However, the issue is not simply of the jury misunderstanding, as bad as that is. Rather, the evidence shows that pattern instructions systematically miscommunicate core penalty phase concepts in a way which creates a bias toward death. The nature of the juror's misunderstandings of mitigation and weighing is such that they virtually always skew the process in favor of death. See Luginbuhl & Howe, *supra*, at pp. 1176-1177; *Comprehending Life and Death Matters*, *supra*, at p. 428. As one study summed up, "if the final penalty decision is death, there is a high probability [i.e., not just a "reasonable likelihood"] that this final penalty verdict is partially a product of the faulty interpretation of the law." Luginbuhl & Howe, *supra*, at p. 1180. Far from providing a "helpful framework" with which citizens can understand the concepts of capital

decision-making (*People v. Steele, supra,* 27 Cal.4th 1230, 1258; *People v. Dyer* (1988) 54 Cal.3d 26, 82), California's pattern instructions confuse many jurors, who misunderstand and misapply the concepts. See *Clarifying Life and Death Matters*, *supra*, at p. 582. Appellant urges this Court to reconsider its decisions holding otherwise.

Had the jury been properly instructed there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. *Wiggins v. Smith* (2003) 539 U.S. 510, 536. It certainly cannot be established that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341. Accordingly, the judgment of death must be reversed. Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde* v. *California*, *supra*, 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.

G. Prejudice.

As set forth above, the trial court's refusal to give the requested instructions addressed herein violated appellant's federal constitutional rights and reversal is required unless the prosecution can establish beyond a reasonable doubt that the error was harmless. *Chapman v. California, supra,* 386 U.S. 18, 24. Further, the state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman v. California supra*, 386 U.S. at p. 24. *People v. Ashmus* (1991) 54 Cal.3d 932, 965. In

practical terms, any differences between the two standards is academic, for whether viewed as a "miscarriage of justice," or as an error that contributed to the death verdict (*Chapman v. California*, *supra*, 386 U.S. at p. 24), the trial court's failure to give the instructions set forth above requires reversal of the death sentence.

XIV. THE TRIAL COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION PROPERLY DEFINING THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE.

The failure to define for the jury "life without possibility of parole" violated principles of due process and fair trial by failing to inform the jury accurately of the meaning of the sentencing options. U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. *See Caldwell v. Mississippi*, *supra*, 472 U.S. 320.

A. The Requested Instruction

Appellant proposed this instruction:

> "You are instructed that life without possibility of parole means exactly what it says. The defendant will be imprisoned for the rest of his life.
>
> "You are instructed that the death penalty means exactly what it says: That the defendant will be executed.
>
> "For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors."

9 CT 2728 [Proposed Penalty Phase Instruction No. 3]. The trial court refused to give this instruction. 30 RT 4692.

B. The Trial Court Had an Obligation to Instruct on the Meaning of Life Without Parole Because the Term is Widely Misunderstood.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where a defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." *Id.* at pp. 169-170 and fn. 9, citing Paduano & Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty* (1987) 18 Colum. Human Rights L.Rev. 211, 222- 225; Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing* (1993) 75 Va.L.Rev. 1605, 1624; Eisenberg & Wells, *supra*, 79 Cornell L.Rev. 1; Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions* (1993) 27 Law & Society 157, 169-170.

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

whether a life sentence carries with it the possibility of parole.'" *Id.* at p. 52, citation omitted. Most recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the Supreme Court again reversed a South Carolina death sentence due to the trial court's failure to instruct on a defendant's ineligibility for parole, even though the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." *Id.* at p. 256.

In *Simmons*, the State had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow petitioner's release. *Simmons*, *supra*, 512 U.S. at p. 166. In rejecting this argument, the United States Supreme Court stated that, while it was possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading than instructing the jury. *Id.* at pp. 166-168.

This Court has concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is instructed that one of the sentencing choices is "life without parole," and this phrase is a common language phrase requiring no further definition. *People v. Wilson supra*, 36 Cal.4th 309, 352-353. In so holding, the Court relied upon *People v. Bonin* (1988) 46 Cal.3d 659, 698, which held that life without the possibility of parole was not a "technical term," requiring definition. The *Wilson* court also found that the appellant was not entitled to an instruction

on the meaning of life without the possibility of parole because he had failed to demonstrate that the perception that life without the possibility of parole did not mean the defendant would never be paroled was "common and widespread," within the defendant's jury. *People v. Wilson*, *supra*, 36 Cal.4th at pp. 352-353.

This Court's conclusions in *Wilson* should be reconsidered in light of empirical evidence demonstrating that the majority of prospective jurors in California believe that a defendant who has been sentenced to life without the possibility of parole will in fact be paroled. One study revealed that in a cross-section of 330 death-qualified Sacramento County potential venire persons, 77.8 percent disbelieved the literal language of life without parole. (Ramos, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45. In another study, 68.2 percent of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45. The results of a telephone poll commissioned by the Sacramento Bee showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." Sacramento Bee (March 29, 1988) at pp. 1, 13. Another study showed that fewer than one in five jurors in California believe that a defendant sentenced to death will spend the remainder of his or her life in prison. Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170.

Obviously the colloquial meaning of "life without parole" is at odds with the technical meaning the phrase has in a death penalty trial. A court has a duty to define terms used in the jury instructions which have a "technical meaning" peculiar to the legal field. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779. The duty to define technical terms includes terms whose legal meaning differs from ordinary usage. For example, before 1985 CALJIC No. 10.30.1 advised the jury that the use of "force" was an element of a lewd and lascivious act on a child. However, the term "force" was not defined in the instruction. Because the term "force" had a specific meaning unknown to the layperson, it was error for the trial court to fail to define the term. *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52. Such terms as "assault," "accident," "dangerous," and "explosive" have all been determined to be "technical terms," requiring definition for the jury, although these terms also have a common meaning. *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393; *People v. Jininez* (1992) 11 Cal.App.4th 1611, 1628; *People v. Kirk* (1975) 49 Cal.App.3d 765, 769; *People v. Clark* (1990) 50 Cal.3d 583, 599-606 . The term "life without possibility of parole" is similar. The term has a meaning which, for the majority of citizens, includes the possibility that someone could be paroled at some time. Because the legal meaning of the term is different, the trial judge was required to instruct on its meaning.

Moreover, even assuming that "life without the possibility of parole" was not a technical term requiring definition, in *Wilson*, this Court erroneously required that the defendant show that the misunderstanding of the term was "widespread" or "common" in the pool of prospective jurors before he or she was entitled to an instruction on the meaning of that term. *People v. Wilson, supra*, 36 Cal.4th at pp. 352-353. First, this Court's rule

that the appellant must demonstrate that the misunderstanding of the term is "widespread" places an unconstitutional burden upon the defendant in violation of the Due Process Clause and the prohibition against cruel and unusual punishment. U.S. Const., 8th & 14th Amends. Empirical studies have shown that those jurors who believe that a capital defendant not sentenced to death will eventually get out of prison, are much more likely to sentence a defendant to death. So, in a recent study of the death penalty in Texas, researchers found that "[u]nderestimating the death penalty alternative evidently encourages a pro-death stand on punishment, more so as the trial progresses." Bowers & Steiner, *Death by Default: an Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L.Rev. 605, 655. California jury surveys show that the single most important reason for life versus death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real or perceived consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole did not really mean that the defendant will never be released. Haney, Sontag, & Costanzo, *supra*. 50 J. Soc. Issues at pp. 170-171; accord, Ramos, et al., *Fatal Misconceptions*, *supra*, at p. 45. The federal Constitution will not countenance a false perception, whether resulting from incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence. *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 164-165, *Gardner v. Florida*, *supra*, 430 U.S. 349, 362; see *Skipper v. South Carolina*, *supra*, 476 U.S. 1, 4, 5 [the failure of the State to permit the defendant to rebut aggravating evidence violated the Eighth and Fourteenth

Amendment]; *People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080 [due process is violated when a judge's sentencing decision is based on incorrect information.]. In addition, the failure of the trial court to correct inaccurate beliefs about parole can result in the imposition of the death penalty based upon emotional reasons, rather than as the result of a "reasoned moral response" to the defendant's background, character and crime in violation of the Eighth Amendment. *Penry v. Lynaugh*, *supra*, 492 U.S. 302, 319; see also *State v. Kelly* (2001) S.C. 540 S.E.2d 851, 863-864 (conc. & dis. opn. of Pleicones, J. ["Without the knowledge that, if aggravators are found, a life sentence is not subject to being reduced by parole, or any other method of early release, the jury is likely to speculate unnecessarily on the possibility of early release, and impose a sentence of death based upon 'fear rather than reason.'"].

This Court's requirement that a defendant show a widespread misunderstanding of a term critical to the jury's proper deliberation at penalty before the trial court must instruct on the term is inconsistent with United States Supreme Court precedent in *Simmons*. In *Simmons*, the Supreme Court concluded that jurors must be instructed on the possibility of parole, where it was "reasonably" possible that the jury could have believed that the defendant might be released on parole. *Simmons v. South Carolina*, *supra*, 512 U.S. at p. 161. The *Simmons* Court also held that an instruction on the meaning of life without the possibility of parole was required whenever the jury "might not know whether a life sentences carries with it the possibility of parole." *Id.*, at pp. 177-178. In *Simmons*, there was no requirement that the defense show that even a single juror actually believed that there was a chance that the defendant would be released, much less a requirement that he show that such a belief was

widespread, as this Court requires. Rather, if there was a possibility that the jurors misunderstood the term, then the instruction was mandatory.

As such, assuming that the phrase "life without the possibility of parole" is not a technical term, to get an instruction on the phrase the appellant must only show that there is the possibility that the phrase was misunderstood. Appellant can easily meet this burden. Appellant has cited above statistics which show that there is a wide-spread perception that life without the possibility of parole means that a defendant will someday get out of prison. In the present case, appellant's jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were not informed that life without possibility of parole means that defendant will not be released. The bare words "life without possibility of parole" simply did not respond to the common misunderstanding that defendants sentenced to life without the possibility of parole are eligible for release from prison.

In *Kelly*, the Supreme Court acknowledged that counsel argued that the State would actually carry out the sentence and stressed that Kelly would be in prison for the rest of his life. The Supreme Court also recognized that the trial court told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. *Kelly v. South Carolina*, *supra*, 534 U.S. at p. 257. Nevertheless, these efforts did not serve to explain adequately the defendant's parole ineligibility. Similarly, in *Shafer*, the defense argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed that "life imprisonment means until the death of the defendant." *Shafer v. South Carolina*, *supra*, 532 U.S. at p. 52. Again, the Supreme Court found these statements inadequate to convey a clear understanding of parole

ineligibility. *Id.* at pp. 52-54. Moreover, in *Simmons*, the Supreme Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." *Simmons v. South Carolina, supra*, 512 U.S. at p. 170. In this case, the instruction that the sentencing alternative to death was life without possibility of parole (and any argument about that sentence) did not adequately inform appellant's jurors that a life sentence would make him ineligible for release on parole from prison.

The trial court's refusal to give appellant's requested instruction violated his right to present a defense (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7 & 15; *Chambers v. Mississippi, supra*, 410 U.S. 284), his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, § 17; *Beck v. Alabama, supra*, 447 U.S. 625, 638), and right to fair trial secured by due process of law (U.S. Const., 14th amend.; Cal. Const., art. 1, §§ 7 & 15; *Estelle v. Williams, supra*, 425 U.S. 501, 503). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., 14th Amends.; Cal. Const., art. 1, § 16; *Carter v. Kentucky, supra*, 450 U.S. 288, 302; *Duncan v. Louisiana, supra*, 391 U.S. 145), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const., 14th amend.; *Hicks v. Oklahoma, supra*, 447 U.S. 343, 346-347; *Fetterly v. Paskett, supra*, 997 F.2d 1295, 1300).

C. The Failure to Instruct Was Prejudicial

The prejudicial effect of the instruction's failure to clarify the sentencing options is clear. Here, there is a substantial likelihood that at

least one of appellant's jurors concluded that the non-death option offered was neither real nor sufficiently severe and chose a death sentence because of the fear that appellant would someday be released if he received any other sentence. See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ["In a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence"].

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, *supra*, 438 U.S. 586, 605. Had the jury been instructed concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. *Wiggins v. Smith*, *supra*, 539 U.S. 510, 536; *Chapman v. California*, *supra*, 386 U.S. 18, 24. It certainly cannot be established that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341. Accordingly, the judgment of death must be reversed.

XV. THE TRIAL COURT ERRED IN FAILING TO GIVE INSTRUCTIONS EXPLAINING THE ROLE MERCY COULD PLAY IN DETERMINING THE APPROPRIATE SENTENCE FOR THE DEFENDANT.

The trial court's refusal accurately to instruct the jurors that they were empowered to exercise mercy on behalf of the defendant when determining the appropriate sentence and its refusal to explain the role mercy plays in mitigation denied appellant his constitutional right to jury consideration of mitigating evidence warranting their mercy.

A. Trial Counsel Requested Mercy Instructions.

In a session on penalty phase instructions, defense counsel requested four instructions dealing with mercy. Three of the instructions told the jury that it could be influenced by mercy in deciding what penalty to give appellant, and in deciding how to weigh mitigation. One read: ". . . in this part of the trial the law permits you to be influenced by mercy, sympathy, compassion or pity for the defendant or his family in arriving at a proper penalty in this case." 9 CT 2726 [Proposed Penalty Phase Instruction No. 2]. The defense also requested the court read:

> "In determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."

9 CT 2738 [Proposed Penalty Phase Instruction No. 13]. It also asked for an instruction reading, in part:

> "A mitigating circumstance is a fact about the offense or the defendant which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense."

9 CT 2732 [Proposed Penalty Phase Instruction No. 7]. Another proposed instruction explicitly informed the jurors of their power to grant appellant mercy:

> "If a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence arouses mercy, sympathy, empathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a sentence of life without the possibility of parole."

9 CT 2736 [Proposed Penalty Phase Instruction No. 11]. An additional requested instruction told the jurors:

> ". . . you may decide that a sentence of life without possibility of parole is appropriate for the defendant based upon the sympathy, pity, compassion, and mercy you felt as a result of the evidence adduced during the penalty phase."

9 CT 2739, Proposed Penalty Phase Instruction No. 14.

The trial court refused to give all of these instructions. 30 RT 4693-4696.

B. A Mercy Instruction was Required.

When the Supreme Court struck down the death penalty in the United States, juries exercised unbridled discretion in their sentencing decisions, such that the penalty could be, and in fact was, imposed in an arbitrary and capricious manner. See *Furman v. Georgia* (1972) 408 U.S. 238. When the Supreme Court approved a revised death penalty scheme, the plurality required that jurors must be guided in their discretion to determine the appropriate sentence and acknowledged that such discretion included a determination of those cases fit for mercy: " the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that

does not create a substantial risk of arbitrariness or caprice." *Gregg* v. *Georgia*, *supra*, 428 U.S. 153, 203. In *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604, the Supreme Court subsequently held that states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." See also *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394. The unfettered mitigation inquiry has been defended on grounds that it preserves the defendant's right, and the jury's prerogative, to mercy. By freeing mitigation evidence from any strict requirement of legal relevance, the *Lockett* principle reinforces the entitlement of the sentencer to exercise "discretion to grant mercy in a particular case." See *Callins v. Collins* (1993) 510 U.S. 1141, 1144 (dis. opn. of Blackmun, J.).

This Court has also acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. Trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." *People* v. *Haskett*, *supra*, 30 Cal. 3d. 841, 864; see *People v. Lewis* (1990) 50 Cal.3d 262, 284. This statement implicitly recognizes that mercy plays a role in a jury's decision not to impose the ultimate penalty. As such, the capacity to show mercy is part of a "reasoned moral response" (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328) to mitigating evidence through the imposition of a penalty that is less than what is perceived to be deserved in light of the balance between aggravation and mitigation.

In this sense, mercy is an evidence-based consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate

penalty notwithstanding the defendant's culpability in the commission of the murder, and not withstanding what a jury thinks the defendant deserves. See *People* v. *Lanphear, supra,* 36 Cal.3d 163, 169 [trial counsel's plea for "mercy" and "compassion" relevant to whether death was an appropriate penalty notwithstanding the defendant's culpability]. However, without instructional guidance there is a substantial likelihood the jury excluded any consideration of mercy – even when the concept was implicated by the evidence and arguments of counsel. The jury could have been misled into believing mitigating evidence relating to mercy must be ignored, which belief conflicts with a capital jury's "obligation to consider all of the mitigating evidence introduced by the defendant." *California* v. *Brown, supra,* 479 U.S. 538, 542-543, 546.

The idea that mercy offers a vehicle for the jury to deliver a just verdict even if it fails to find any mitigating factors is implicit in the concept of "weighing" mitigation against aggravation. "Weighing" without more is a "mere mechanical counting of factors on each side of a mechanical scale." *People v. Brown* (1985) 40 Cal.3d 512, 541. "'Weighing' in this sense of the word won't do. What is required is the juror's personal view as to the appropriate sentence." *People v. Allen, supra,* 42 Cal.3d 1222, 1277. The crux of it is that if the juror does not personally believe that death is the appropriate sentence under all the circumstances, a death sentence should not be imposed, even if aggravation outweighs mitigation. *People v. Allen* (1986) 42 Cal.3d 1222, 1277. Hence, this Court has consistently recognized that a jury may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances. See *People* v. *Duncan, supra,* 53 Cal.3d 955, 978 [jury may

decide that aggravating evidence not comparatively substantial enough to warrant death].

Mercy holds a unique position in the sentencer's decisional process. Mercy can be defined as "compassion or forbearance shown especially to an offender," and sympathy as "an inclination to think or feel alike, the act or capacity of entering into or sharing the feelings or interests of another." *Webster's Collegiate Dictionary*, 727, 1195 (10th ed. 1981). Mercy is "a virtue that tempers or 'seasons' justice--something one adds to justice (the primary virtue) to dilute it and perhaps, if one takes the metallurgical metaphor of tempering seriously, to make it stronger." Murphy & Hampton, Mercy and Legal Justice, *Forgiveness and Mercy* (1988) p. 166. There are reasons not to give someone convicted of murder the death penalty because he does not deserve it; for example, that the defendant was impaired by drugs at the time might be viewed as indicating the ultimate penalty is not deserved. This is a reason the death penalty would not be just. However, other reasons not to sentence someone to death have nothing to do with whether or not the penalty is just, but involve grounds for mercy. For example, if the defendant is loved by others, this may be a basis for mercy. The two areas are different. See Garvey, *As the Gentle Rain From Heaven: Mercy in Capital Proceedings* (1990) 81 Cornell L.Rev. 989, 1017 [drawing a distinction between kinds of mitigation].

So, while much of the evidence introduced pursuant to Penal Code section 190.3, subdivision (k) may evoke sympathy from jurors, significant aspects of appellant's background and character can be said to have no sympathetic value, nor do they extenuate the gravity of the crime.

Jurors must be provided with a vehicle for evaluating all mitigating evidence relevant to mercy, so they may express their "reasoned moral

response" in a sentencing decision. If the jury is not told that it has the power to consider mercy, in the same way that it must consider all the statutory mitigation offered by the defendant, it may falsely believe that the sentencing process involves merely a calculated weighing of factors, leaving them no means of effecting a moral response to evidence falling outside the enumerated factors.

This Court has held that no instruction defining mercy is required. *People v. Hughes*, *supra*, 27 Cal.4th 287, 403. This conclusion should be reconsidered. First, this Court has erroneously treated the concept of "mercy" as equivalent to that of "sympathy." In *People v. Andrews*, *supra*, 49 Cal.3d 200, 227, the Court held because capital juries are read CALJIC No. 8.85, informing them that they must consider any "sympathetic or other aspect of the defendant's character or record," no mercy instruction is required, as the instruction "could not have left the jury with any ambiguity regarding its power to consider mercy in its penalty determination." *Ibid.* However, as shown above, the two ideas of "mercy" and "sympathy" are distinct. As such, standard penalty phase instructions fail to guide juror discretion to consider mercy.

This Court has also held that a mercy instruction erroneously suggests that a jury may "indulge in sympathy unrelated to any of the evidence adduced at trial." *People v. Williams* (1988) 45 Cal.3d 1268, 1322-1323. This holding does not apply here. The mercy instructions proposed by appellant did not invite the jury to grant mercy without consideration of evidence. Rather, they specifically tied the notion of mercy to the notion of "mitigation" and to the manner in which the jury should weigh the defendant's evidence. 9 CT 2732 [Proposed Penalty

Phase Instruction No. 7]; 9 CT 2736 [Proposed Penalty Phase Instruction No. 11].

Trial counsel in his closing argument urged the jury to exercise mercy. 31 RT 4818. It was perfectly legitimate for a juror to decide that even if aggravation outweighed mitigation, appellant should be sentenced to life because the juror did not wish to add another name to the list of the dead. However, this reason for voting against death was not something based in sympathy for the defendant. Such a ground for sentencing appellant to life is grounded in the juror's personal considered view that he or she should act out of mercy. However, because the court refused instruction on the role of mercy, the jury did not know that mercy could be a reason to sentence appellant to life without the possibility of parole, even if the aggravating factors outweighed the mitigating factors. Absent an instruction to guide their reasoned moral impulse to grant mercy, however, trial counsel's argument for mercy became irrelevant.

C. The Error Requires Reversal.

At the penalty phase, jury instructions must eliminate any ambiguity concerning the factors actually considered by the sentencing body in imposing a judgment of death. *People* v. *Easley, supra*, 34 Cal. 3d 858, 878-879. However, based on the instructions given, the jury had no idea what role mercy could and should play in its deliberations. It would have believed only sympathetic evidence was relevant to a determination of the appropriate sentence. *See* CALJIC No. 8.85. The State may "not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan* v. *Angelone, supra,* 522 U.S. 269, 276 (citations omitted). However, because the trial court's charge to the jury omitted appellant's requested

instructions on the role of mercy, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Penry v. Lynaugh*, *supra*, 492 U.S. p. at 328.

The trial court's refusal to give appellant's requested instructions on mercy violated his right to present a defense (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi*, *supra*, 410 U.S. 28), his right to a fair and reliable capital trial (U.S. Const. 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638), and right to fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Estelle v. Williams*, *supra*, 425 U.S. 501, 503). In addition, the error violated appellant's right to trial by a properly instructed jury (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky*, *supra*, 450 U.S. 288, 302; *Duncan v. Louisiana*, *supra*, 391 U.S. 145), and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested instructions supported by the evidence (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346-347; *Fetterly v. Paskett*, *supra*, 997 F.2d 1295, 1300).

Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde* v. *California*, *supra*, 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605. The prosecution cannot shown that the error was harmless beyond a reasonable doubt. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth

Amendments." *Chapman v. California*, *supra*, 386 U.S. 18, 24. Appellant's judgment of death must be reversed.

XVII. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON LINGERING DOUBT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant requested the following instruction at the penalty phase retrial:

> "Although a proof of guilt beyond a reasonable doubt has been found you may demand a greater degree of certainty for imposition of the death penalty. The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that sometime in the future, facts may come to light which have not been discovered."

9 CT 2740, Proposed Penalty Phase Instruction No. 15.

The trial court refused to give this instruction, stating it did not want to "venture into that muddy water." 30 RT 4696.

Appellant was entitled to the instruction. The trial court's failure to give any such instruction was prejudicial and not only violated state law, but also denied appellant's state and federal constitutional rights, and resulted in preclusion of the jury's ability to give effect to all available factors in mitigation and resulted in fundamentally unfair penalty phase proceedings. Appellant's proposed instruction appropriately explained the concept of lingering doubt of guilt which the jurors could consider in expressing their "reasoned moral response" to mitigating evidence presented at the penalty phase. See *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, quoting *California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.); accord, *Brewer v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1706, 1709-1710. The trial court's refusal to give appellant's proposed lingering doubt instructions violated appellant's right to present a defense (U.S. Const., 6th, 14th Amends.; Cal. Const., art. I, §§ 7, 15;

California v. Trombetta (1984) 467 U.S. 479, 485; *Chambers v. Mississippi supra*, 410 U.S. 284, 302-303; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099); his right to a fair and reliable determination of penalty (U.S. Const., 8th, 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra*, 447 U.S. 625, 638); and right to a fundamentally fair trial secured by due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Estelle v. Williams* (1976) 425 U.S. 501, 503). The court's refusal to give the proposed instruction also violated appellant's right to trial by a properly instructed jury (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302) and violated federal due process by arbitrarily depriving him of his state right to requested instructions supported by the evidence (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300). The error requires reversal of the penalty judgment.

This Court has recognized that lingering doubt as to guilt can play a part in the jury's assessment of penalty and that defense counsel has a right to argue lingering doubt as a consideration in determining punishment. See *People v. Cox, supra,* 53 Cal. 3d 618, 677-678. Although this Court has held that a lingering doubt instruction is not required by either the state or federal constitutions, it has recognized that such instruction may be required by the evidence in any given case. See *People v. Fauber* (1992) 2 Cal.4th 792, 863-865; *People v. Cox*, *supra*, 53 Cal.3d. at p. 678, fn. 20. Appellant respectfully contends that this Court is incorrect in holding that a lingering doubt instruction is not constitutionally required.

This Court's position that there is no constitutional right to an instruction on lingering doubt is based on the perception that CALJIC No.

8.85 adequately alerts the jury that it can consider lingering doubt in its determination of penalty. *People v. Lawley* (2002) 27 Cal.4th 102, 166; *People v. Osband* (1996) 13 Cal.4th 622, 716. Specifically, this Court has held that factors (a) and (k), set forth in CALJIC No. 8.85, are adequate for a jury to give effect to lingering doubt. *People v. Osband*, *supra*, 13 Cal.4th at p. 716. This holding should be reconsidered as neither factor provides any direction for the jury to address residual doubts as to the defendant's guilt.

Factor (a) concerns the circumstances of the crime and the special circumstances found to be true. CALJIC No. 8.85. Factor (a) directs a juror to take into account and be guided by the crime itself. It does not direct the juror to consider residual doubt about the person convicted. In addition, it does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any circumstance which may extenuate the gravity of the crime even if it not a legal excuse for the crime. CALJIC No. 8.85. Like factor (a), factor (k) does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any aspect of the defendant's character or record, but this does not relate to residual doubt of guilt. Instead, it leads the jury to other considerations, since an aspect of the defendant's character or record, by its own terms, has nothing to do with the crime. Pursuant to factor (k), appellant presented mitigating evidence regarding his childhood. Because that evidence focused on appellant's character and background, it is unlikely the jury would have interpreted the relevant portion of CALJIC No. 8.85 (factor (k)) as an instruction allowing them to consider residual doubt they may have had as to appellant's participation in the crime.

The specific instruction proposed by appellant would have provided a method for the jury to give effect to any such lingering doubt. Because California's "standard" instructions do not adequately permit or direct the jury to consider lingering doubt, the failure to give any such instruction, such as the ones proposed by appellant, is a violation of appellant's due process and Eighth Amendment rights. *Boyde v. California* (1990) 494 U.S.370, 377 [Eighth Amendment requires that jury be able to consider and give effect to all of a capital defendant's mitigating evidence]; *Penry v. Johnson* (2001) 532 U.S. 782, 797 [it is constitutionally insufficient merely to tell the jury it may "consider" mitigating circumstances]. In *Lockett v. Ohio*, *supra*, 438 U.S. 586, 604, the Supreme Court held that states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." See *Brewer v. Quarterman, supra,* ___U.S. ___, 127 S.Ct. 1706, 1709-1710; *Abul-Kabir v. Quarterman* (2007) ___U.S. ___, 127 S.Ct. 1654, 1672-1674; *Penry v. Lynaugh*, *supra*, 492 U.S. 323; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399.

Here, the instruction requested were appropriately phrased, unlike instructions on lingering doubt which have been rejected by this Court. See *People v. Thompson*, *supra*, 45 Cal.3d at p.134. Unlike those in *People v. Thompson*, *supra*, appellant's proposed instruction did not "invit[e] readjudication of matters resolved at the guilt phase." *Id.* at p. 135. Instead, appellant's proposed instruction properly called the jury's attention to the issue of residual doubt, and merely permitted them to consider any such doubt they may have had. The requested instruction was neutrally phrased.

Appellant was prejudiced by the failure to provide this instruction. The penalty phase case against appellant was tried twice. The evidence

presented at the guilt phase and first penalty phase was substantially the same as the evidence presented at the second penalty phase. The first jury, in the midst of deliberations on penalty, sent this note:

> "What wait (sic) if any should lingering doubt or any doubt pertaining to this case in the guilt phase and the penalty phase be considered in determining the punishment?"

3 CT 872. The trial court read the following instruction to the jury:

> "It is appropriate for the jury to consider in mitigation any lingering doubt it may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of the mind between a reasonable doubt and beyond all possible doubt."

18 RT 2933. After receiving this instruction on lingering doubt, the jury reported that it was unable to agree on a verdict, and the trial court declared a mistrial. 3 CT 870, 869.

Under these circumstances, the trial court's error in failing to give the requested instruction cannot be deemed harmless under either federal or state standards of prejudice.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." *Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.[48] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every

[48] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." 548 U.S. at p. 178.

constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who

are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Sentence is Invalid Because Penal Code Section 190.2 is Impermissibly Broad.

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)' "

People v. Edelbacher (1989) 47 Cal.3d 983, 1023.

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. *People v Bacigalupo* (1993) 6 Cal.4th 457, 468.

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged

against appellant the statute contained thirty-three special circumstances[49] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. *People v. Dillon, supra,* 34 Cal.3d 441. Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. See *People v. Hillhouse, supra,* 27 Cal.4th 469, 500-501, 512-515. These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to

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[49] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797.

guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. Appellant's Death Penalty is Invalid Because Penal Code Section 190.3, Subdivision (a) As Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[50] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

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[50] *People v. Dyer, supra,* 45 Cal.3d 26, 78; *People v. Adcox, supra,* 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

weeks after the crime,[51] or having had a "hatred of religion,"[52] or threatened witnesses after his arrest,[53] or disposed of the victim's body in a manner that precluded its recovery.[54] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California supra*, 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. *Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J. Factor (a) is used to embrace facts which are inevitably present in every homicide. *Ibid.* As a consequence, from case to case, prosecutors have been

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[51] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[52] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[53] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[54] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420]. Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

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

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable

doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California, supra,* 549 U.S. 270 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. *Id.* at p. 478.

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Id., at 593. The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona, supra,* 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. Id., at 598. The court found that in light of *Apprendi*, *Walton* no longer controlled. Any

factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." *Blakely v. Washington, supra*, 542 U.S. at 299. The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. *Ibid.* The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. *Id.* at 313.

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 304; italics in original.

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is

necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker, supra,* 543 U.S. at 244.

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III. In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. *People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

outweigh any and all mitigating factors.[55] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (31 RT 4720), an aggravating factor is "*any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" CALJIC No. 8.88; emphasis added.

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[56] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is

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[55] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." *People v. Brown, supra,* 46 Cal.3d 432, 448.

[56] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" *Id.*, at p. 460

the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[57]

This Court has repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *People v. Demetroulias, supra,* 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow, supra,* 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275. It has applied precisely the same analysis regarding *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." 35 Cal.4th at 1254.

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[58] In *Cunningham* the principle that any fact which exposes a

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[57] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. *People v. Allen, supra,* 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra,* 40 Cal.3d 512, 541.

[58] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black:* "Nothing in the high court's majority opinions in *Apprendi, Blakely,* and *Booker* suggests that the

(footnote continued on next page)

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. *Id.*, at pp. 6-7. That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *Cunningham, supra*, p. 13.

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." *Id.*, p. 14.

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating,

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constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" *Black*, 35 Cal.4th at p. 1253; *Cunningham, supra,* at p.8.

> remarkably, that '[t]he high court precedents do not draw a bright line')." *Cunningham, supra,* at p. 13.

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In response to the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2, subd. (a)), *Apprendi* does not apply. *People v. Anderson* (2001) 25 Cal.4th 543, 589. After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.

This holding is incorrect. As section 190, subd. (a)[59] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds

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[59] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." *Cunningham, supra*, at p. 6.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151."

Ring, 536 U.S. at p. 604.

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *Ring*, *supra*, 536 U.S. at 604. Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating

circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. Section 190.3; CALJIC 8.88 (7th ed., 2003). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 530 U.S. at 604. In *Blakely*, the high court made it clear that, as Justice Breyer observed in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." 542 U.S. at p. 328, emphasis in original. The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. See *State v. Ring* (Az. 2003) 65 P.3d

915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State, supra*, 59 P.3d 450.[60]

No greater interest is ever at stake than in the penalty phase of a capital case. *Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"]. [61] As the high court stated in *Ring, supra*, 536 U.S. at p. 589:

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one.

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[60] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[61] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" *Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).

This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall* (1958) 357 U.S. 513, 520-521.

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. *In re Winship, supra,* 397 U.S. 358, 364. In capital cases "the sentencing process, as well as the trial itself,

must satisfy the requirements of the Due Process Clause." *Gardner v. Florida, supra,* 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14. Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. *Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the

> State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the "weight and gravity" of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'"

455 U.S. at p. 755.

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Santosky*, *supra*, 455 U.S. at p. 763. Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, *supra*, 397 U.S. at p. 363.

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, *supra*, 428 U.S. at p. 305. The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to

capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979). " *Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added). The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. *California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195. Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. *People v. Fauber, supra,* 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893. Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. *In re Sturm* (1974) 11 Cal.3d 258. The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." *Id.*, 11 Cal.3d at p. 267. [62] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. Penal Code section 1170, subd. (c). Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. *Harmelin v. Michigan* (1991) 501 U.S. 957, 994. Since providing more protection to a

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[62] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. See *Mills v. Maryland, supra,* 486 U.S. 367, 383, fn. 15. Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. See Section C.1, *ante*.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors]. The failure to

require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had

"greatly expanded" the list of special circumstances. *Harris*, 465 U.S. at p. 52, fn. 14. That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. See Section A of this Argument, *ante*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253. The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. See, e.g., *People v. Marshall, supra,* 50 Cal.3d 907, 946-947. This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. See, e.g., *Johnson v. Mississippi supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945. Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034. The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. *Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879.

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were

> present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, '*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*' (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)"

People v. Morrison (2004) 34 Cal.4th 698, 730 (emphasis added.).

This assertion is incorrect. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. *Id.*, 32 Cal.4th at pp. 727-729. This Court recognized that the trial court so erred, but found the error to be harmless. *Ibid.* If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. See, e.g., *People v. Montiel, supra,* 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra,* 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth

Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." *Stringer v. Black* (1992) 503 U.S. 222, 235.

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112. Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protections Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants that are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732. Despite these directives, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." *People v. Olivas* (1976) 17 Cal.3d 236, 251. If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." *Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785. A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. *People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant

treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[63] as in *Snow*,[64] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. See, e.g., sections 1158, 1158a. When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court

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[63] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *Prieto, supra,* 30 Cal.4th at p. 275; emphasis added.

[64] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." *Snow, supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.

deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[65]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. See Section C.3, *ante*. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[66]

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.

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[65] In light of the Supreme Court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[66] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, *supra*, 536 U.S. at p. 609.

E. California's Use of the Death Penalty as A Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Imposition of the Death Penalty Now Violates 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. *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366. The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.]. Indeed, *all* nations of Western Europe have now abolished the death penalty. Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" 1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*,

(1895) 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia* (2002) 536 U.S. 304, 316 fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. See *Atkins v. Virginia, supra*, 536 U.S. at p. 316. Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. *Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the

most serious crimes."[67] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[67] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

XIX. THE JUDGMENT SHOULD BE REVERSED DUE TO CUMULATIVE ERROR THAT DEPRIVED MR. JACKSON OF A FAIR TRIAL.

Each of the grounds set forth above prevented Vines 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.

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'].)"

Accord, e.g., *Thomas v. Hubbard, supra*, 273 F.3d 1164, 1179 ("'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.'").

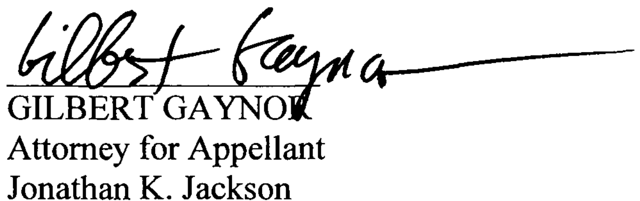
In this case, as shown above, any of the errors independently provide grounds for reversal. Taken together, the cumulative impact of any two or more of the errors produced an unfair trial under California law, prejudicially deprived Mr. Jackson of due process of law under the Fourteenth Amendment, and resulted in an unfair and unreliable capital murder trial in violation of the Eighth Amendment. And even assuming cumulative error was not prejudicial at the guilt phase, it was certainly prejudicial at the penalty phase.

CONCLUSION.

For the foregoing reasons, the Court should reverse appellant Jonathan K. Jackson's judgment of conviction, true finding of a special circumstance, and sentence of death.

DATE: September 18, 2008

Respectfully submitted,



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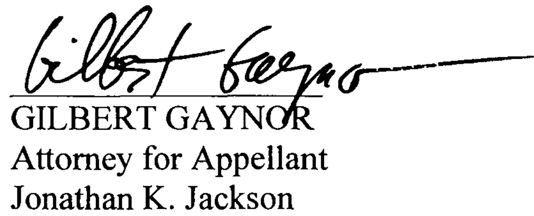
CERTIFICATE OF WORD COUNT

I certify that the forgoing Appellant's Opening Brief contains 87,749 words, exclusive of tables, according to the word-count feature of Microsoft Word.

DATE: September 18, 2008



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