SUPREME COURT COPY

SUPREME COURT No. S090499 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff/Respondent,	Los Angeles Co. Superior Court No. TA100812-01
v.	
DAVID JAMES LIVINGSTON,	
Defendant/Appellant.	

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles,
The Honorable Jack W. Morgan, Presiding

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

UNITED STATES CONSTITUTION **Page**

CALIFORNIA CONSTITUTION

Article I

CALIFORNIA CODES **Page**

CALIFORNIA RULES OF COURT **Page**

CRIMINAL JURY INSTRUCTIONS (CALCRIM)

SPECIAL INSTRUCTIONS

OTHER AUTHORITIES **Page**

STATEMENT OF THE CASE

THE OUTCOME

On April 24, 2000, the jury found Appellant David James Livingston guilty of first degree murder of Roderico Armando Paz and Remigio Perez Malinao, both with special circumstances of multiple murders and lying in wait (counts 1 & 2), of the attempted murder of Saul Conner, Rodolfo Bombarda, and Emmanuel Hunter, with true findings of personally and intentionally discharging a handgun, thereby causing great bodily injury, personal infliction of great bodily injury (counts 3, 4, and 5). The jury also returned true findings that the crimes were committed for the benefit of and with the specific intent to assist in criminal conduct by gang members, (counts 1 through 5), and possession of a firearm by a felon (count 12). (24 CT 6304-6309; 15 RT 2840-28448.)

On May 3, 2000, the jury found the appropriate sentence to be death. (24 CT 6397; 16 RT 3329-3330.) On July 20, 2000, the court sentenced Livingston to death on counts 1 and 2. The court also sentenced Livingston to 25 years to life on counts 3, 4, and 5, permanently stayed upon the imposition of the death penalty. (25 CT 6487-6490, 6492-6493; 17 RT 3462-3467.)

PRETRIAL PROCEEDINGS

The offenses charged in counts 1 through 4 occurred on January 3, 1999. The offense charged in count 5 occurred on October 7, 1998. On a warrant issued on January 4, 1999, for assault with a deadly weapon for the October 7, 1998, shooting, Livingston was arrested on January 8, 1999. (1 CT 1-22, 91-105.)

A felony complaint against Livingston was executed on February 17, 1999, charging Livingston with murder with malice aforethought of Roderico Armando Paz (count 1)[1] and Remigio Perez Malinao (count 2)[2] on January 3, 1999, with a multiple murder allegation,[3] with attempted premeditated murder of Saul Conner (count 3)[4] and Rodolfo Bombarda (count 4)[5] on January 3, 1999, and attempted premeditated murder of Emmanuel Hunter (count 5),[6] Damien Perry (count 6),[7] and Marcus Walker

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[1] Penal Code, section 187, subdivision (a).

[2] Penal Code, section 187, subdivision (a).

[3] Penal Code, section 190.2, subdivision (a)(3).

[4] Penal Code, sections 664 and 187, subdivision (a).

[5] Penal Code, sections 664 and 187, subdivision (a).

[6] Penal Code, sections 664 and 187, subdivision (a).

[7] Penal Code, sections 664 and 187, subdivision (a).

(count 7),[8] on October 8, 1998. Counts 3, 4, and 5 further alleged that Livingston personally inflicted great bodily injury upon the respective victims.[9] Count 5 also alleged that Livingston intentionally inflicted great bodily injury upon Hunter by discharging a firearm from a motor vehicle.[10] All counts were alleged to be serious felonies.[11] For all counts, Livingston was alleged to have personally used and intentionally discharged a handgun, proximately causing great bodily injury or death to Paz, Malinao, Hunter, Bombarda, and Conner.[12] A prior strike (robbery) was also alleged for all counts.[13] (1 CT 186-192.)

An Amended Felony Complaint was filed May 13, 1999. (1 CT 257-263.) It added that all counts were committed for the benefit of and to promote criminal conduct by gang members.[14]

A Felony Complaint for codefendant Freddie Lee Sanders, alleging

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[8] Penal Code, sections 664 and 187, subdivision (a).

[9] Penal Code, sections 12022.7, subdivision (a).

[10] Penal Code, section 12022.55.

[11] Penal Code, section 1192.7, subdivision (c).

[12] Penal Code, section 12022.53, subdivisions (a), (b), (c), and (d), 12022.5, subdivision (a)(1).

[13] Penal Code, sections 211, 667, subdivisions (b) through (I), 1170.12, subdivisions (a) through (d).

[14] Penal Code, section 186.22, subdivision (b)(1).

his participation in the offenses listed in counts 1 through 4 of Livingston's Complaint, was filed May 19, 1999. (1 CT 275-280.) An Amended Felony Complaint for Sanders was filed June 29, 1999, adding four counts involving a second degree robbery and assault with a deadly weapon against two victims on May 18, 1999. (2 CT 285-290.) Livingston was not alleged to be a participant in the May 18 offenses. Nor was Sanders alleged to be a participant in the October 8 offenses.

The next Amended Felony Complaint was filed against both Livingston and Sanders as co-defendants on July 21, 1999, the first day of the preliminary hearing. (2 CT 444-455.) Counts 1 through 4 (January 3, 1999) were amended to name both Livingston and Sanders, except Count 4 did not allege that Sanders personally inflicted great bodily injury on Rodolfo Bombarda, and there was no allegation that Sanders personally used or fired a handgun for counts 1 - 4. Counts 5 through 7 (October 8, 1998) continued to name only Livingston as a defendant. In Count 7, the spelling of the victim's name was changed to Markuis Walker. Counts 8 through 11 were added to allege the May 18, 1999, robbery and assault with deadly weapon charges against Sanders.

Two days later, July 23, 1999, the next Amended Felony Complaint was filed. (2 CT 472-483.) No discernible difference appears from the

complaint filed two days earlier.

The preliminary hearing was held 21 and 22 July 1999. (2 CT 302-442.) At the conclusion of the hearing, the court struck the great bodily injury allegations as to Sanders for counts 3 and 4 and struck gang allegations as to Sanders for counts 8 through 11. (2 CT 436-437.) As to Livingston, the court struck redundant allegations and corrected various statutory references. (2 CT 439-441.) None of these changes appear on the Amended Felony Complaint filed the following day, July 23, 1999. (2 CT 472-482.)

An Information was filed against Livingston and Sanders on August 5, 1999. (2 CT 521-532.)

Count 1 alleged the murder of Roderico Armando Paz by Livingston and Sanders on January 3, 1999, a serious felony.[15]

Count 2 alleged the murder of Remigio Perez Malinao by Livingston and Sanders on January 3, 1999, a serious felony.[16] The two offenses were alleged as a multiple murder special circumstance,[17] and it was alleged as a second special circumstance, that Livingston and Sanders intentionally

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[15] Penal Code, sections 187, subdivision(a), and 1192.7, subdivision (c).

[16] Penal Code, sections 187, subdivision(a), and 1192.7, subdivision (c).

[17] Penal Code, section 190.2, subdivision (a)(3).

killed the victims while lying in wait.[18] Count 3 alleged the attempted, premeditated murder of Saul Conner by Livingston and Sanders on January 3, 1999, a serious felony, and that Livingston personally inflicted great bodily injury upon Conner, a serious and violent felony.[19]

Count 4 alleged the attempted, premeditated murder of Rodolfo Bombarda by Livingston and Sanders on January 3, 1999, a serious felony, and that Livingston personally inflicted great bodily injury upon Bombarda, a serious and violent felony.[20] It was further alleged that a principal personally used and intentionally fired a handgun, and thereby caused great bodily injury and death to the victims named in counts 1 through 4.[21]

Count 5 alleged the attempted, premeditated murder of Emmanuel Hunter on October 8, 1998, by Livingston, a serious felony.[22]

The Information further alleged that Livingston personally used and intentionally discharged a handgun, causing great bodily injury and death to

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[18] Penal Code, section 190.2, subdivision (a)(15).

[19] Penal Code, sections 664, subdivision (a), 187, subdivision(a), 1192.7, subdivision (c), 667.5, subdivision (c)(8), 12022.7, subdivision (a).

[20] Penal Code, sections 664, subdivision (a), 187, subdivision(a), 1192.7, subdivision (c), 667.5, subdivision (c)(8), 12022.7, subdivision (a).

[21] Penal Code, sections 12022.5, subdivision (a)(1), 12022.53, subdivisions (b), (c), (d), and (e)(1).

[22] Penal Code, sections 664, subdivision (a), 187, subdivision(a), 1192.7, subdivision (c).

the victims named in counts 1 through 5;[23] that Livingston personally inflicted great bodily injury upon Hunter, a serious and violent felony;[24] and that Livingston intentionally inflicted great bodily injury on Hunter by discharging a firearm from a motor vehicle, a serious and violent felony.[25]

Count 6 alleged the attempted, premeditated murder of Damien Perry on October 8, 1998, by Livingston, a serious felony.[26]

Count 7 alleged the attempted, premeditated murder of Markuis Walker on October 8, 1998, by Livingston, a serious felony.[27]

The Information further alleged for counts 6 and 7, that Livingston personally used and intentionally discharged a handgun,[28] and that the offenses alleged in counts 1 through 7 were committed for the benefit of

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[23] Penal Code, sections 12022.5, subdivision (a)(1), 12022.53, subdivisions (b), (c), (d).

[24] Penal Code, sections 667.5, subdivision (c)(8), 1192.7, subdivision (c)(8), 12022.7(a).

[25] Penal Code, sections 667.5, subdivision (c)(8), 1192.7, subdivision (c)(8), 12022.55.

[26] Penal Code, sections 187, subdivision (a), 664, subdivision (a), 1192.7, subdivision (c).

[27] Penal Code, sections 187, subdivision (a), 664, subdivision (a), 1192.7, subdivision (c).

[28] Penal Code, sections 12022.5, subdivision (a)(1), 12022.53, subdivisions (b), (c).

and intentionally to promote criminal conduct by gang members.[29]

Counts 8 through 12 alleged robbery and assault with a deadly weapon upon two victims, with personal use of a handgun, and kidnaping for ransom of one of the victims, on May 18, 1999, by Sanders.

Livingston was also alleged to have two previous serious or violent felony convictions.[30] Two prior prison convictions were also alleged.[31]

On February 2, 2000, an Amended Information was filed against Livingston and Sanders. (3 CT 567-580.) To counts 1 through 7, it added notice that conviction would require providing specimens and samples.[32] Count 13 was added alleging that on or about January 3, 1999, Livingston was a felon in unlawful possession of a handgun.[33]

On February 23, 2000, the court denied codefendant Sanders' motion for separate trials as to the charges and the defendants, and a motion to

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[29] Penal Code, section 186.22, subdivision (b)(1).

[30] Penal Code, section 667, subdivisions (a)(1), (b)-(I), 1170.12, subdivisions (a)-(d). San Bernardino County No. FSB0744 on June 24, 1994 (robbery, sec. 211); San Bernardino County No. MCR333 on May 15, 1991 (assault with a deadly weapon, sec. 245, sub. (a)(1).

[31] Penal Code, section 667.5, subdivision (b). San Bernardino County No. FSB04744 on October 31, 1994 (second degree robbery, sec. 211); Los Angeles County No. TA024649 on August 25, 1993 (drug possession, Health & Safety Code, sec. 11350).

[32] Penal Code, section 296.

[33] Penal Code, section 12021, subdivision (a)(1).

dismiss the lying in wait special circumstance. The motion to dismiss count 12 as to Sanders was granted. (3 CT 609; 1 RT 50-52, 58.)

TRIAL PROCEEDINGS

On March 27, 2000, the defense counsel for both defendants stipulated that all objections entered by either would be considered joint objections unless one counsel stated to the contrary. (2 RT 277.) The same practice was followed for acceptance of jurors. (5 RT 967.)

The jurors and alternate jurors were accepted on March 30, 2000. (5 RT 1046.)

On April 11, 2000, the court granted a prosecution motion to dismiss counts 6 and 7 (attempted murder of Damien Perry and Markuis Walker) as not supported by the evidence. (12 RT 2215-2216.)

On April 24, 2000, the jury found Livingston guilty of counts 1 through 5 and 12,[34] and found true all the allegations. (24 CT 6304-6309; 15 RT 2840-2848.)

Also on April 24, 2000, Sanders was found guilty of second degree murder on counts 1 and 2 with true findings on all allegations (24 CT 6310, 6312), attempted murder on counts 3 and 4 with true findings on all allegations (24 CT 6314, 6316), second degree robbery in counts 8 and 9

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[34] Count 12 was the former count 13 (felon in possession of firearm).

with true findings on the allegations (24 CT 6318, 6320), assault with a firearm in counts 10 and 11 with true findings on the allegations (24 CT 6322, 6324).[35]

SENTENCE PROCEEDINGS

Evidence and arguments were presented in the penalty phase of Livingston's trial on April 25, 26, and 27, 2000. On May 3, the jury returned a verdict of death. (24 CT 6397; 16 RT 3330.)

Livingston's motion for a new trial and to modify the death verdict were both denied on July 20, 2000. As well, the court sentenced Livingston to 25 years to life on counts 3, 4, and 5, to be permanently stayed upon imposition of the death penalty. (25 CT 6484-6487; 17 RT 3450-3460.) The commitment pursuant to the death sentence was filed July 21, 2000. (25 CT 6497-6501.)

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[35] On June 28, 2000, Sanders was sentenced to 55 years to life. (25 CT 6478-6482.) On July 17, 2002, his judgment was reversed for a denial of due process in joining in one trial counts 1-4 and 8-11. (25 CT 6512-6530.) On retrial, Sanders pled nolo contendere to counts 8 and 9; counts 10 and 11 were dismissed. (25 CT 6543-6553.) Subsequently, counts 1 - 4 were also dismissed. (25 CT 6559.) On counts 8 & 9 and their allegation, Sanders was sentenced to 10 years in state prison. (25 CT 6609-6612.)

STATEMENT OF FACTS

Proceedings on Guilt

On January 3, 1999, in a single attack at the New Wilmington Arms Apartments at 700 West Laurel in Compton, four security guards were shot, two of whom were killed. Three months earlier, on October 8, 1998, on Bullis Road in Compton, a drive-by shooting injured one man. In each case, eyewitnesses identified appellant David Livingston as the perpetrator. No physical evidence identified Mr. Livingston as the perpetrator of either crime. Throughout the trial, the prosecutor in a recurring refrain, introduced the gang membership of the defendants and of various witnesses, introduced evidence of gang activity in the area, and raised the issue of witnesses testifying though scared of doing so. The prosecution tied no threat regarding testimony to Mr. Livingston or any particular gang or to this particular trial. The prosecution introduced no evidence relating these particular crimes to any gang purpose or benefit. But the prosecution ensured that fear of gang violence remained in the jurors' minds throughout the trial.

January 3, 1999

Prosecution Case

On a foggy five a.m. January 3, 1999, a man wearing a white T-shirt

and black pants appeared at the door of the guard house in the entrance to the Wilmington Arms apartment complex in Compton.[36] (8 RT 1588.) The four armed guards of the night shift were seated inside. (9 RT 1651.) Shouting "mother fuckers," the man sprayed the guards with bullets, killing two and wounding the others. One guard fired a return shot, which apparently missed the man. (8 RT 1608.) The perpetrator disappeared.

Killed were Remigio Malinao (11 RT 2051, 2058) and Roderico Paz. (11 RT 2066-2067.) Wounded and blinded was Saul Conner. Wounded but surviving was Rodolfo Bombarda, who recovered and testified at trial. Mr. Bombarda was the shift supervisor and the only guard to fire a return shot. (8 RT 1608.) The perpetrator fired possibly sixteen shots, based upon the number of casings recovered at the scene. (10 RT 1904-1909.)

The attack completed the blinding of Mr. Conner in his one good eye. (6 RT 1113.) He was sitting on a chair near the entrance to the door reading a newspaper. (8 RT 1598, 1608.) Several months later, he died of unrelated causes. (6 RT 1113.)

Mr. Bombarda was the shift leader from 11:00 p.m. to 7:00 a.m., and arrived for his shift about five minutes to 11:00. (8 RT 1594; 9 RT 1643.)

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[36] The events during the attack are taken largely from the testimony of Rodolfo Bombarda, a security guard who survived the attack. He testified in Tagalog with the assistance of an interpreter. (8 RT 1587-1588.)

At 5:00 a.m. the entrance gate was closed and the exit gate was open. (8 RT 1601.) He was seated filling out the daily activity report (RT 1648) with his back to the door (9 RT 1670), and heard "Mother fucker." He wears prescription glasses for reading. (9 RT 1650.) He believes he took them off, placed them on the desk, stood up, and turned around to see who was making the sound. (9 RT 1670.) As he was standing up, the shooting started. (9 RT 1650.)

He described the perpetrator was holding a 12" barreled assault rifle with his right hand at belt level on right side and his left hand extended out six inches approximately in front of his body or at belly button level.[37] (8 RT 1601-1603.) The man was wearing a white T-shirt and black pants without any jacket or hat or cap. (9 RT 1654.) Mr. Bombarda was shot six times, but was wearing a bulletproof vest. Three bullets struck him in the vest and one went through it. He was also shot in the right hip, the right knee, and the right foot. (8 RT 1604-1606.) He fired a single return shot with his .45 cal. semiautomatic handgun. (8 RT 1607-1608.) He believed he was aiming at the person with the gun, but did not see the person when he fired. (9 RT 1657-1658.) Afterwards, he sheltered behind a steel

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[37] While the description is of a man firing the weapon right handed (9 RT 1655), Mr. Livingston's mother testified that he has been left handed his entire life, though she has never seen him fire a weapon. (12 RT 2237-2238.)

cabinet before answering the ringing phone. (8 RT 1618.)

After the shooting, Maribel Lopez came to the guard shack. Mr. Bombarda asked her to follow up on his call to the police, and to push the button which opens the entrance gate so that the police could enter when they arrived. She did. (8 RT 1609-1610.)

Recovered at the scene were bullet fragments and sixteen 9 mm. cartridge casings. At least 14 of the casings were fired from the same, fluted weapon. There was insufficient impressions on two of the cases to determine the weapon from which they were fired. (10 RT 1904-1906, 1908, 1916.) The casings bore fluting marks, which indicated they were fired from a weapon with a fluted chamber, most commonly manufactured by Heckler and Koch in Germany, and ruling out all American weapon manufacturers. (10 RT 1906, 1923-1924.) From the "F.C." marks on the casings, all the cartridges were manufactured by Federal Cartridge. (10 RT 1916-1918.) Included among the several Heckler and Koch weapons which would fire such cartridges is model SP-89, displayed by the prosecution in the courtroom (10 RT 1921) and identified by Mr. Bombarda as looking like the weapon used by the perpetrator, though with a different clip. (8 RT 1603; 9 RT 1677-1678.) There are tens, and possibly, hundreds of thousands of that model of weapon available in the United States. (10 RT

1922-1923.) The weapon used was never found.

On January 6, 1999, three days after the shootings, police searched the residence and garage of Shantae Johnson, David Livingston's girlfriend, at 709 Anzac Circle in Compton. It is very close to the New Wilmington Arms apartment complex. In the garage attached to the house but with no connecting door (10 RT 1961-1962), an officer found a 31 round banana clip that fits several Heckler & Koch weapons, including the SP-89. (10 RT 1978-1979.) Ms. Johnson had not seen the clip until the searching officers showed it to her. (10 RT 1961.) In the clip were 10 rounds manufactured by Federal Cartridge. (10 RT 1913.) No fingerprints were found on the banana clip or on the bullets it contained. (10 RT 1970.) According to Ms. Johnson, the lock on the garage door was broken, and it could be entered without a key. (10 RT 1959, 1962.) She had never seen Mr. Livingston in the garage. (10 RT 1958, 1959.)

David Livingston was arrested on January 8, 1999, in the home of Rebecca Radovich in Lancaster. In Livingston's black leather jacket found in the home was a Baretta 9 mm. semiautomatic pistol, with one clip in the weapon and three clips independent of the weapon. (10 RT 1993-1995.) The Baretta was not included among the weapon manufacturers listed by the prosecution expert as containing fluted chambers. (10 RT 1924.) When

one round was selected at random by the prosecution witness and in the courtroom removed from the clip of the weapon, it bore the markings "G.F.L.", not "F.C." as on the casings found at the scene. (10 RT 2004.)

Mr. Bombarda identified the perpetrator as David Livingston, known to him as Goldie. He had seen him about 30 times before. (8 RT 1601-1602.) He saw only the perpetrator. (8 RT 1627.)

Kimberly Grant, a resident of the Wilmington Arms, also identified David Livingston as the perpetrator.[38] She testified that she had returned to the complex with her boyfriend and 10 year-old son shortly before morning.[39] (9 RT 1715-1716.) David Livingston in his green Cadillac entered the complex immediately before them, with Freddie Sanders and a girl in his car, and parked directly in front of where her boyfriend had his van.[40] (9 RT 1722-1723, 1826-1827.) Ten or twenty minutes after she and

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[38] In addition to her trial testimony, Ms. Grant was interviewed by the police on January 14, 1999, and by the prosecutor on March 8, 2000. Her pretrial statements contradicted each other and her testimony in numerous crucial respects. At trial, she was impeached extensively with those prior statements. Some of the contradictions are summarized in footnotes 4 through 10, below.

[39] During her interview on March 8, 2000, she said it was not even 3 a.m. when she, her boyfriend and her son returned to the apartment complex. (EX 94-B, 3 CT 819.) During an earlier interview, on January 14, 1999, she did not mention her son's presence at all. (EX 93-B, Death Penalty Supp. III.)

[40] In her January 14, 1999, interview, she said the Cadillac contained only Goldie and Freddy and, after parking in front of them, the Cadillac immediately drove off through the gate. (EX 93-B, Death Penalty Supp. III, 12, 16-17.) She also said Goldie and Freddy entered the gate after her boyfriend parked. (EX 93-

her son went up to her mother's apartment,[41] she heard a sound and came back down to check on the status of her boyfriend's van.[42] (9 RT 1748.) Outside, she heard a clicking sound and walked toward the main gate. (9 RT 1748.) She first saw the back of a person standing in the door of the guard shack, wearing a black leather, waist-length jacket over a white tank top. When he turned, she saw his face, long hair and no cap, with something in this hand. (9 RT 1818-1820.) She saw Mr. Livingston stepping off the curb by the guard shack. (9 RT 1751-1752.) She could not see what was in his hand. (9 RT 1820.) Then she saw him walk rapidly away, out of the apartment complex on Laurel Street. (9 RT 1763-1764.) She also saw codefendant Freddie Sanders facing into the apartment complex, and then saw him leave toward the back of the complex.[43] (9 RT 1766.) She saw a third person, either Samoan or white with long hair, ran

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B, Death Penalty III, 43.)

[41] Ms. Grant did not say whether her boyfriend accompanied her and her ten year-old son, but his car remained parked in the parking lot. In earlier statements she told police that her boyfriend went into the house with her (EX 93-B, Death Penalty Supp. III 15, 19), and that he dropped her off at the house and then left. (EX 94-B, 3 CT 820, 832.)

[42] During her March 8, 2000, interview, she said her boyfriend left immediately after dropping off her and her son. (EX 94-B, 3 CT 820, 832.) She went to talk to the guards a couple of hours later when they were still alive. (EX 94-B, 3 CT 821.)

[43] During her January 14, 1999, interview, she said they both ran towards the park. (EX 93-B, 3 CT 798.)

back to her apartment. (9 RT 1768-1770.) No one else saw Mr. Livingston around the time of the crime.

A few days or weeks before the shooting, Ms. Grant saw Goldie and Freddie in conversation, and heard Goldie telling Freddie, "Don't be no punk."[44] (9 RT 1839-1840, 1846.)

The prosecutor elicited from Ms. Grant testimony that two days after this incident, a long-haired, white, Samoan-looking man with a gun came into her mother's apartment while Ms. Grant was sleeping on the couch watching TV, told her, "You lucky you the homey's momma." After that, she left the area and did not return for a year. (9 RT 1772-1774.) The prosecutor **did not** ask, and Ms. Grant **did not** testify that home invader was Mr. Livingston, nor that the intruder ever mentioned the shootings of January 3 or Mr. Livingston. Ms. Grant **did not** explain, nor did the prosecutor ask her, why she had left the area. The sole connection between the shootings and the intrusion Ms. Grant described was in the prosecutor's question, "After this incident happened, did anyone threaten you?" (9 RT 1772.)

On January 2 at about 8 p.m., while walking through the complex on

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[44] During her January 14, 1999, interview, she said she overheard the conversation three weeks before the shooting night. (EX 93-B, Death Penalty Supp. III, 35.) During her March 8, 2000, interview, she said she overheard the conversation on January 2. (EX 94-B, 3 CT 815-818.)

his shift, security guard Walter Arcia saw a group of five to seven guys talking with Mr. Livingston by the green Cadillac. (9 RT 1696.) During his shift, from 3 p.m. to 8 p.m., Mr. Livingston's car came in and out the gate six or seven times along with a large, old, brown car. It seemed funny because there was no loud music and no beer. (9 RT 1702.)

About 11:15 p.m. on January 2, Maribel's daughter Michelle, 14 at trial, heard arguing and loud screaming outside. Opening the blinds, she saw a blue-green Cadillac and men arguing with the guards. (8 RT 1457, 1463.) The moisture had to be cleaned off the glass because it was foggy that night. (8 RT 1494.) Around the car were Mr. Livingston and two black males whom she did not know. One of the black males said, "We're going to get you later." The car did a U-turn and left.[45] (8 RT 1459, 1461.)

Later Michelle was awoken by a lot of loud gunshots. She saw two black men running and one black female, Kim, standing by the mailbox walking towards the guard shack. (8 RT 1471, 1473, 1479.) She estimated that was around 5 o'clock a.m. (8 RT 1472.) It was dark and real foggy and again she had to clean the window to look out, but she could see lights.

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[45] Mr. Bombarda did not recall hearing any argument between 11 and 12 that night, but he spent about 15 minutes in the bathroom in that period and would not hear somebody from the guard shack talking loudly. (8 RT 1625-1626.) He also did not remember Goldie trying to get into the complex with his Cadillac and being told he could not. (8 RT 1626.)

(8 RT 1506-1507.) The two men were running very close together down the middle of the street toward the park on Alondra Street, towards a white van. (8 RT 1475-1476, 1478, 1497-1498.)

Towards the conclusion of Michelle Lopez's testimony (who was 14 years old when she testified [8 RT 1450]), the prosecutor, over objection, elicited that she was scared to testify, and she did not say anything back when the events happened because she was afraid she would be dead. (8 RT 1485-1486.) On redirect he elicited that when Ms. Lopez talked to the police before she moved out of the Wilmington Arms, she did not tell them everything she knew because she was scared. (8 RT 1518-1519.)

Michelle's mother, Maribel Lopez, testified that she was scared and did not want to be there testifying, and that she had moved out of the complex about July after the shooting. (8 RT 1527-1529.)

Defense Case

Mr. Livingston testified that he is very familiar with the Wilmington Arms Housing Project, because some friends and women he has dated live there. He is a member of the Park Village Crips, composed predominantly of blacks and Samoans with a few Mexicans. (12 RT 2304.) The photographs of a lime green 1981 Cadillac de Ville were of his car. (12 RT 2305-2306.)

On January 2, 1999, he was in and out at the Wilmington Arms all day. The last time was probably 9:00 or 9:30 that night. That evening, around 12:00, he took his girlfriend, Shantae Johnson, to the Catch One club at Pico and Crenshaw. (12 RT 2321-2322.)

His car was not stopped around the area of the main gate in the evening hours of January 2. Nor did he recall being with other people in front of the main gate having an argument with the guards. (12 RT 2322.)

He and his girlfriend left the club after 3:00 and went to Shantae's house. (12 RT 2325.) His car was hard to start, and he had difficulty driving to her home. (12 RT 2326-2327.) They both went to bed and right to sleep. Shantae woke him in the morning. (12 RT 2328-2329.)

Shantae Johnson's mother, Vera Johnson (12 RT 2239), was babysitting at home the night of January 2, 1999, and saw Mr. Livingston and Shantae leave after dark. About 4:00 she heard them enter the house. She got up about 7:00, knocked on the bedroom door, and entered when they said "Come in." Shantae and David were in bed, and she woke them up. (12 RT 2242, 2244-2245.)

He stayed with the Dunns, friends from Pomona, that Sunday night and Monday night. (12 RT 2332, 2338.) He left the Dunns after seeing news about himself on the TV. The Dunns have kids and he did not want

the police to shoot them. He fears police because in 1994 police in San Bernardino County shot him in the back while he was handcuffed. (12 RT 2239-2240.)

On the sixth he went to the house of Rebecca Radovich and stayed there two days. He had the bulletproof vest he was wearing when arrested because of his job as driver-security for exotic dancers. (12 RT 2341-2342.) While at Radovich's, he picked up Darlene Toa. She was wearing one of his jackets because she was cold, and she put her gun in the pocket where police found it. When the police knocked on the door, he put on the bulletproof vest but did not arm myself. (12 RT 2344-2346.)

He had nothing to do with shooting the guards at the Wilmington Arms. (12 RT 2346.)

October 8, 1998.

Prosecution Case

Damien Perry, his cousin Antwone Hebrard, and Markuis Walker were driving on Compton Blvd. when the police stopped them for a vehicular violation. (6 RT 1184-1185.) After issuing the ticket, the police refused to let Mr. Perry drive his car because he had no license. They were told to walk. (6 RT 1188.)

While they walking north on Bullis Street, a light green Cadillac

passed them. (6 RT 1187-1188.) The three crossed the street and stood talking with a friend, Emmanuel Nunley (Droopy), who was sitting in the lane between apartments at 1117 and 1203 Bullis. The three friends then left Mr. Nunley and accompanied Mr. Perry in taking his clothes into a nearby apartment. (6 RT 1195-1198.) The green car made a U-turn further down Bullis and drove back in their direction. When the car returned, seven or eight shots were fired from it; Mr. Nunley was hit in the leg and taken to the hospital. (6 RT 1196, 1198-2000, 1203; 7 RT 1281-1282.) The shots were not targeted at Mr. Perry, Mr. Hebrard or Mr. Walker.[46] (6 RT 1198, 1209-1210; 7 RT 1271.)

At trial, only Mr. Perry identified Mr. Livingston as the occupant in the front passenger seat. (6 RT 1196.) Mr. Hebrard did not, testifying that he did not see the person who did the shooting and had never seen the defendant Livingston before. (7 RT 1258-1260.) Mr. Perry was the only witness who identified Mr. Livingston as the shooter and photographs of Mr. Livingston's car as the vehicle. (6 RT 1198-1200, 1204.) Mr. Hebrard was inside the house at the time of the shooting and did not see it. (7 RT 1271, 1275.) Mr. Nunley was not able to identify anyone who had been in the car;

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[46] The charges of attempted murder against Mr. Perry and Mr. Walker were dismissed upon prosecution motion at the conclusion of the prosecution case. (12 RT 2215-2216.) There was no charge of attempted murder regarding Mr. Hebrard.

but testified that the shots came from a white Cadillac. (7 RT 1287.)[47]

The prosecution elicited from Damien Perry that Antwone Hebrard, Mr. Perry's cousin, was a member of the Leuder Park Piru gang,[48] that Markuis Walker's gang-name was "Noon," and that Emanuel Nunley was a member of the Leuder Park Piru and had a gang-name of "Droopy"[49] (6 RT 1182-1184), that Mr. Hebrard and the friends with him that night were wearing the Bloods color, red, and Bloods had fights and shootings with Crips, with whom they did not get along. (6 RT 1218.) The prosecution **did not introduce** evidence that Mr. Nunley, the only person shot at that evening, was wearing red.

At the conclusion of the direct examination of Damien Perry, the prosecutor elicited that Mr. Perry did not want to speak with the police between the October 8 shooting and his interview in January 1999 because he did not want anything to happen to him, and that he was still afraid. (6

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[47] When interviewed by the police, Mr. Perry, Mr. Hebrard, and Mr. Walker all selected Mr. Livingston's photograph from a sixpack as the shooter. (7 RT 1327-1328.) Mr. Nunley selected a photograph of another as the shooter. (7 RT 1327.)

[48] Mr. Hebrard testified that he was a member of the MOB, but agreed that the MOB and the Leuder Park Piru were different "sets" of the Bloods. (7 RT 1254-1255.)

[49] Mr. Nunley testified that his gang name was "Rat," and that he had never been known as "Droopy." (7 RT 1285.)

RT 1207.) The prosecutor did not elicit what Mr. Perry had been concerned about happening in October to January, nor of what he was still afraid. (6 RT 1206-1207.)

During the testimony of Antwone Hebrard, then incarcerated, the prosecutor asked a series of questions to elicit answers indicating that Mr. Hebrard was afraid of gang retaliation and that was why the substance of his testimony differed from what the prosecutor was expecting. Despite Mr. Hebrard's denial that he was scared, the prosecutor persisted in asking him why he told someone the day before that he planned to take the Fifth on the stand, asked if being a snitch placed him in some danger, asked if he was in the protective custody unit of the jail which was designed to protect the life of snitches, and asked that if he did not snitch was he not saving himself. (7 RT 1252-1254.)

Two expended shell casings for a 7.62 x 39 automatic rifle were recovered at the scene. (7 RT 1295, 1298.) The weapon used was never found. No evidence was introduced connecting Mr. Livingston to such a weapon or to such ammunition.

Looking for a mint green Cadillac, officers went to the Wilmington Arms where security guard Chavers confirmed the car had come by their gate, and located the car for the officers. Three uninjured witnesses to the

shooting were brought to the scene and indicated to their escorting officer that the car found was the vehicle involved in the shooting. The officer did not identify the witnesses. (7 RT 1365-1366.) The car was towed. (7 RT 1304-1305, 1308, 1310-1312)

A gang expert testified that Markuis Walker, Antwone Hebrard, and Emmanuel Nunley are members of different Blood gangs. Livingston was a member of the Park Village Crips, a criminal street gang. Bloods do not get along with Crips. (7 RT 1322-1323, 1329, 1332.)

Photographs of tattoos on Mr. Livingston's neck, chest, and back were introduced. They refer to the Compton Westside Park Village Crips and 700 West Laurel. (7 RT 1352-1354.) Mr. Livingston testified that he was a member of the Park Village Crips. (12 RT 2304.) Photographs were introduced of gang graffiti on the vicinity of the apartment complex at 700 West Laurel, and a police officer testified, explaining the meaning of the various "tags" in the photographs. (11 RT 2160-2170.)

Security guard Charles Chavers testified that between 11:00 and 12:00 p.m. the Cadillac shown in the photographs drove through their gate with Mr. Livingston sitting in the front passenger seat. In the back seat was Freddie Sanders, not charged with regard to this incident. The driver was Mr. Brown. Mr. Chavers let them through. (7 RT 1375-1377, 1395, 1425.)

Mr. Chavers testified that it was unusual that Mr. Brown was driving the vehicle. Mr. Chavers had never seen Mr. Livingston let anybody else drive his car. (7 RT 1397-1398.)

Ten minutes later Mr. Chavers testified, two police officers arrived, asking if Goldie's car just came through. (7 RT 1378-1379, 1395, 1426.) Mr. Chavers located the car for the officers. (7 RT 1381.) When the officers left with the car but without arresting anyone, Mr. Chavers called his office and told them he was leaving. (7 RT 1382-1383.) The following day security guard Arcia called Mr. Chavers and told him that Mr. Livingston had come to the guard house, asked, "Where's the fucking cripple," and said something in the nature that if he came back, he would kill him. Chavers never returned to the Wilmington Arms guard shack. (7 RT 1390.)

Defense Case

Mr. Livingston testified that he parked his Cadillac in the space he always uses in the Wilmington Arms around 6:00 on October 8. Then a girlfriend of his arrived, and he went with her to her house on Signal Hill and Long Beach. The next day before 12 she brought him back to the Wilmington Arms to pick up his car, and he discovered it was missing. More than ten people told him the police took it. (12 RT 2306-2309.)

Proceedings on Sentence

Evidence in Aggravation

Deputy Sheriff Alberto Salazar testified he was working at the Men's Central Jail on October 8, 1999, approximately 6 in the morning. An inmate was down, holding a white cloth to his neck. (15 RT 2944-2497.) Inmate Weatherspoon, the victim, told Deputy Salazar that a white guy, a white Crip, cut his throat with a razor blade. (15 RT 2947-2498.) Photographs were entered showing the injury. (15 RT 2950.) The Deputy was not aware of any white Crips in the entire module other than David Livingston in C-11. (15 RT 2953.)

During the subsequent search of C-11, Mr. Livingston was found hiding underneath his bunk. He had a big cut and some sort of ointment or cream covering it, making it more difficult to see. (15 RT 2962-2963.) No weapon was found. (15 RT 2965.)

Inmate Weatherspoon was brought to the courtroom, but refused to testify. His injuries were described to the jury by the judge. (15 RT 3018-3019.)

William Holland, a San Bernardino County deputy sheriff testified that he was dispatched to the scene of a multiple person fight at a trailer park in 29 Palms on January 31, 1991. (15 RT 2995-2996, 3005.) When he arrived at the scene, he found about five people outside a mobile home.

Inside, he found a man, Eldon Shull, with a large puncture slash-laceration wound to the left side of his chest. Shull, a Marine, was six feet tall and weighed 200 pounds. (15 RT 2998-3000.)

Deputy Holland interviewed Mr. Livingston that evening. Mr. Livingston, then 5-7, 5-8, 140 or 145 pounds, and seventeen years old, told the deputy he had been fighting with a large, muscular, white male, a description which fit Mr. Shull. (15 RT 3002, 3006.) The weapon recovered was a black K-bar style fixed blade bayonet-style knife, commonly used in the Marine Corps. (15 RT 3008-3009.)

Judy Paz Avalos testified that her grandfather was one of the individuals killed on January 3. (15 RT 2967.) She identified photographs showing Mr. Paz with his wife, children, and grandchildren. (15 RT 2967-2968.) She read a statement that her grandmother's health deteriorated because of this. (15 RT 2969.)

Leticia Paz Cortez testified that Roderico Paz was her father, that her daughter refuses to love her father because she fears losing him as she lost her grandfather, her mother's health got worse, and they have big problems with house support. (15 RT 2971-2973.)

Oscar Paz, Roderico Paz's son, testified that his mother and father had been married for 40 years. (15 RT 2976.) His father was born a

Guatemalan citizen and died as a U. S. citizen. He wanted all his children to become Americans. (15 RT 2979.)

Hermene Gilda Malinao testified that her husband Remy was killed on January 3. He was born in the Philippines and came to the United States in 1992. They have one five year old boy. She showed family pictures and testified that he loved to help other people. (15 RT 3022-3023, 3029.)

Miriam Marroquin testified that Saul Conner was her grandfather. He had three children and nine grandchildren. She showed family pictures. Before the shooting, he was blind in one eye. After the shooting, he was blind in both eyes and couldn't see anything. He was a kind, hardworking man. (15 RT 3036-3040.)

Documents of Mr. Livingston prison record were introduced, indicating that he was involved in five fist fights over six years. (15 RT 3050-3053, 3055.)

Evidence in Mitigation

Judy Lynn Gary testified that she was Mr. Livingston's mother. She was not married when David was born, and his father has not seen David since David was a year and a half old. (15 RT 3066-3067.)

Mrs. Gary testified that David was born March 22, 1973, following a two day labor. The umbilical cord was wrapped twice around his neck. The

scar on the left side of his face was from the umbilical cord impression. The doctor says he should have strangled from that. (15 RT 3070-3071.) The scar got smaller as he got bigger. The scar always bothered him, and she imagines he got picked on a lot at school. (15 RT 3071-3072.) She took prescription medication during David's pregnancy, but does not recall what it was. Around the time of David's birth, the medication was stopped because it was causing some sort of problem. The doctor told her to watch for anything unusual. She did not stop smoking during the pregnancy. (15 RT 3073-3075.)

For a while she was married to Donald Aitken. Aitken was a violent man who hit her in David's presence. After leaving and returning to him a few times, she left him for good and went to her mom's, with David and David's younger sister, Donna Aitken. (15 RT 3079-3082.)

For a while she had a relationship with Lou Rossi, who was the best father figure for David of any of the men she was involved with. But Lou died in 1983. (15 RT 3084-3085.)

Mrs. Gary testified that the family moved a lot and that David had problems after starting school. At bus stops, kids beat him up and took his lunch money and pencils. (15 RT 3086.) Before he dropped out of school, he attended a minimum of eight schools. (15 RT 3102.)

She did not have problems with David in school until he started junior high in Norco. He started ditching school and being the class clown. (15 RT 3090-3091.) He attended Downey High School, but did not finish ninth grade. His grades in those years were D's, F's, and some C's. (15 RT 3092.)

From the time David was 5 years old until he was eleven, he lived with Mrs. Gary's mother. (15 RT 3094.) Sometimes Mrs. Gary lived there and sometimes not. When David was eleven, Mrs. Gary married Robert Thomas. (15 RT 3093.) David did not want her to marry Thomas because of the way Thomas treated him. David lived with her and Thomas from the time he was eleven until he was seventeen. He and Thomas hated one another. One time Thomas grabbed David by the throat and lifted him off the ground. He was always saying things to David that he shouldn't. (15 RT 3095-3096.)

When the family was living in Norco, David and a friend stole tape from K-Mart and had to do community service. (15 RT 3098.) When he was seventeen, he got in trouble in 29 Palms, and was convicted of a 245. By then, David was involved with a black gang.

Mrs. Gary testified that she loved her son, and his sisters appear to have a loving relationship with him. (15 RT 3101.)

Mrs. Gary said David got most of his tattoos in jail. Since the age of seventeen, he was incarcerated most of the time.

Mrs. Gary showed the jury cards she had regularly received from David for birthdays and Mother's Days. (15 RT 3102-3105.) She told the jury that David was not really a bad person and that he had a good heart, but he had been locked up most of his life. (15 RT 3114.)

Sunita Dunn testified that she has known Mr. Livingston like a brother, through her husband, about two years. He's a sweet person and lovable with her kids. He is not the type of person to hurt anyone. (15 RT 3119-3120.)

Richard Flennaugh explained that he was shot by a shotgun on New Years 1999. He would have lost his foot but David told people to put him in David's car and David rushed him to the hospital. They had not been friends before that. Richard lost three toes, and the doctor told him if it had been 30 minutes later, they probably would have had to take his foot completely off. (15 RT 3123, 3125.)

April Theodora Morris testified that Mr. Livingston was her nephew, son of her oldest sister. (15 RT 3127.) She has known David all his life and considered herself to be a friend. When he was shot in San Bernardino County, he was in a coma and not expected to live. (15 RT 3128-3129.)

Mary Nordmann is David's grandmother. When work or affairs did not work out, Mrs. Gary and her kids lived at Mrs. Nordman's house. The door was always open. (15 RT 3132, 3136.) Don Aitken, Donna's father, abused David. One time he had beaten up Judy while she was pregnant with Donna, and Mrs. Nordmann went down to get her. Mr. Aitken had locked David in the bathroom. Mrs. Nordmann and her oldest son's wife got David out through the window. The man was very nasty. (15 RT 3137.) She said David is a good person and did things for people. He did not look to bother anybody, just wants to live the rest of his life. He sent her cards while he was in prison. (15 RT 3138-3140.)

Christina Rossi testified that David is her half brother. She grew up with David, but the last ten years he has been in jail. She was in contact with him while he was in jail. (16 RT 3158-3159.) She has two children. David was always there for her and for her children. He continued to write to her while in jail before his trial. (16 RT 3159-3160.)

Donna Aitken testified that David is her brother; they had the same mother but different fathers. She grew up in same homes as David. (16 RT 3164.) When she was young, they moved a lot. She moved 22 times before finally moving to San Francisco. (16 RT 3164-3165.) She said she does not think she and her sister would have made it through those younger years if it

were not for David. (16 RT 3165.) At times she wanted to drop out of school, but she did not because he told her not to. (16 RT 3166-3167.) They had a stepfather who was not nice to them. Their mother was not around too often; she had to keep a job and came back on weekends. (16 RT 3167.) David continued to write to her often after he was in jail; he sent her more letters than she sent him. (16 RT 3168-3169.) She did not feel that David was capable of committing the charged crime. (16 RT 3169.)

Jean Segall is a psychiatrist at the Parolee Outpatient Clinic in Los Angeles. The clinic treated parolees referred by the prisons because they have a history of psychotic disorder in prison or before. (16 RT 3175-3176.) David was referred by his parole agent, who stated David had a history of major depression in prison. David had been treated for major depression in prison and prescribed 100 mg. of Zoloft every morning. David also had a history of abusing PCP, cocaine, alcohol, amphetamine.

Based upon his interview with David and the sheet from state prison, Dr. Segall gave David a tentative diagnosis of major depression with psychotic features. (16 RT 3177, 3203.) Dr. Segall graded David's life stressors as a severe 4 and his global assessment functioning at 40. Those numbers indicate somebody who is very depressed, with auditory hallucinations and paranoic delusions. Hallucinations and delusions are

psychotic features; and David complained of paranoic delusions. Delusion is a false belief which cannot be reversed by appeals to reason. Paranoia is defined as irrational fears. (16 RT 3177-3179.)

Dr. Segall continued David on 100 mg. of Zoloft every morning, the same dosage he had received in prison. He also prescribed him two mg. A.P.D. of Rispridal, an antipsychotic for the voices and paranoic delusions. Both Zoloft and Rispridal have a good reputation in the psychiatric community. (16 RT 3179.)

Dr. Segall saw Mr. Livingston again on July 27, 1998, and noted that he complained of depression, anxiety, auditory hallucinations and paranoic delusions, but no suicidal or violent tendencies. Dr. Segall's diagnosis remained major depression with psychotic features. At the July visit, Dr. Segall increased his dosage of Rispridal to 3 mg. three times a day because he was complaining of voices and paranoia. On July 27th, he was either worse or not getting any better. (16 RT 3180-3181.)

At the July visit, Dr. Segall gave him two months supply because Dr. Segall was going on vacation. David was supposed to come back on September 28. He did not show up on September 28. Nor did he show up for the next appointment on November 4. The case was then closed, in accordance with the clinic's rule. (16 RT 3182.)

In the usual course of business, the clinic informs the parole office if a parolee misses an appointment. Copies of the evaluation are sent to the parole agent so the agent is informed of the psychiatric medicines being prescribed and of paranoia cycles. (16 RT 3183.)

People with paranoic delusions do irrational things, but they may appear to a layperson to be functioning in a normal manner. Paranoids are also hypervigilant. It is possible that a person with paranoid delusions might feel they must strike first in order to protect themselves. (16 RT 3184-3185.)

Antidepressant medications relieve depression and help the patient's sleeping and eating pattern: many depressed patients complain of insomnia and poor appetite. They make you feel good and better. (16 RT 3195.) Rispridal is supposed to take away the voices and paranoid delusions. (16 RT 3196.) Patients feel better when they do not hear voices.

Mr. Livingston was given Rispridal on June 1st and the prescription was increased on July 27th. He never came back to the clinic. Contacting him is the business of the parole agent. The clinic automatically sends the attendance list every day to the parole agent. Parole agents are supposed to check that. (16 RT 3197.)

Santos Fuertez is a parole agent at the Huntington Park Facility. He received Mr. Livingston's file from his supervisor a week before being

called to testify. (16 RT 3146.) Mr. Sanchez, who was not Mr. Livingston's parole agent, testified regarding entries in the parole file.

Mr. Sanchez testified that Mr. Livingston was paroled on 4-23-98, and never missed an appointment for drug testing. All tests were negative except for one occasion in which the file contained no record of the result.

The parole office knew Mr. Livingston was wearing or had in his possession a bulletproof vest; this was not considered a violation of his parole. (16 RT 3147-3149.)

The parole file also shows that Mr. Livingston had appointments with a doctor at the Parole Outpatient Clinic and prescription for psych medicines. The file did not indicate the kind of psychiatric medicine he was taking. The file contained no entry that he ever missed any meetings at the Parole Outpatient Clinic, or that he was having paranoid delusions. The Parolee Outpatient Clinic never informed the Parole Office that Mr. Livingston had run out of his psychiatric medicine. (16 RT 3151-3152.)

On cross-examination, Agent Fuertez stated that Mr. Livingston's parole did not include a condition requiring him to attend the Parolee Outpatient Clinic. He said that if a parolee requested a clinic referral, one would be made. He could not tell from the file whether Mr. Livingston's parole agent saw some mental instability and referred him to the clinic, or

whether Mr. Livingston requested a referral. (16 RT 3154-3155.)

Rebecca Radovich testified that she and Mr. Livingston met when she was employed as a vocational instructor at the state prison in Lancaster. She invited David to her home a couple of times. This was not a romantic relationship. He was respectful to her and her family. He treated her kids like they were his brother and sisters. (16 RT 3213, 3215-3216.)

David Livingston testified on his own behalf at the penalty phase that he gave guidance in prison to people younger than him in the hope that he could help minimize the violence there. He felt that in his life, he had made some positive contributions to his family. He expressed great sympathy for the families who lost their loved ones. (16 RT 3223, 3226-3227.)

ARGUMENT

I

THE TRUE FINDINGS OF GANG ENHANCEMENTS ON COUNTS ONE THROUGH FIVE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. THE ERROR DENIED MR. LIVINGSTON DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THOSE TRUE FINDINGS AND OF THE VERDICTS ON THOSE COUNTS.

A. INTRODUCTION.

The first five counts of the Information alleged murder (counts 1 and 2) and attempted murder (counts 3, 4, and 5). The Information also alleged that the crimes were committed for the benefit of and with the specific intent to assist in criminal conduct by gang members in violation of section 186.22, subdivision (b)(1).[50] (24 CT 6304-6309; 15 RT 2840-2848.) At trial, the prosecution offered no evidence on the second element of the enhancement: that the crimes were committed with the specific intent to promote, further,

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[50] (b) (1) Except as provided in paragraph (4), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or three years at the court's discretion. (Sec. 186.22(b)(1) as in force in 1998 and 1999.)

or assist in any criminal conduct by gang members. In addition to guilty verdicts, the jury also returned true findings on the gang allegations as to each count.

Because the true findings were not supported by sufficient evidence, the judgment against Mr. Livingston on those findings denied him due process of law under the Fifth and Fourteenth Amendments.

Because the prosecutor stressed Mr. Livingston's gang membership and played on the jury's fears about gangs and their violent behavior, the due process denial on the gang enhancements also tainted the guilty verdicts on their underlying counts. Those also must be reversed.

B. TRUE FINDINGS UNSUPPORTED BY SUBSTANTIAL EVIDENCE DENY DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND A JUDGMENT BASED UPON THEM MUST BE REVERSED.

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358, 364.) A criminal defendant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations, are violated when criminal sanctions are imposed based on legally insufficient proof of guilt. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const. art. I, §§ 1, 7,

12, 15, 16, & 17; *Beck v. Alabama* (1992) 447 U.S. 625, 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

A conviction will be sustained on appeal only where a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Only if a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations, satisfied. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 324; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.)

A review of the record in this case reveals that the evidence was legally insufficient to sustain jury findings that the crimes were gang related. Those findings cannot be sustained without violating state and federal constitutional standards governing the sufficiency of evidence to support a conviction.

C. ELEMENTS OF GANG-RELATED ENHANCEMENTS UNDER PENAL CODE, SECTION 186.22, SUBDIVISION (B)(1), AND WHY THE EVIDENCE WAS NOT SUFFICIENT.

1. Introduction.

Penal Code, section 186.22, subdivision (b), enacted as part of the

STEP Act, provides enhanced punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal gang conduct by gang members...." This Court has stated that the STEP Act "imposed increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a group that meets the statutory conditions of a 'criminal street gang,' but also with the 'specific intent to promote, further or assist in any criminal conduct by gang members.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.) Both prongs must be proved to support this enhancement.

On the first prong of section 186.22, subdivision (b)(1), for the benefit of, at the direction of, or in association with a criminal street gang, the prosecution offered no evidence that the crimes were committed for the benefit of, or at the direction of, a criminal street gang. Instead, the prosecution's theory was that Mr. Livingston committed the shooting "in association with" a gang. The prosecutor presented evidence that both Mr. Sanders and Mr. Livingston were members of the Park Village Crips [hereinafter PVC]. (7 RT 1332, 1352-1354.) The parties stipulated that the PVC was a criminal street gang. (12 RT 2355.) Mr. Livingston also testified

that he was a member of the PVC. (14 RT 2707-2708.) Mr. Sanders did not testify, and his counsel disputed that Mr. Sanders was a PVC member.

The prosecution presented no evidence to support a finding on the second prong: that the underlying charges were committed with the specific intent to promote, further, or assist in criminal conduct by gang members.

2. To Preserve the Constitutionality of Penal Code, Section 186.22, Subdivision (b)(1), the Second Prong of the Enhancement Must Be Construed as Requiring a Specific Intent to "Promote, Further, or Assist" Gang Members in Criminal Activity Other than the Charged Offense.

Penal Code, section 186.22, subdivision (b)(1), requires the trier of fact to make two sets of findings before the sentence enhancement may be imposed: (1) that the defendant must be convicted of a "felony committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) that the defendant must have acted "with the specific intent to promote, further, or assist in any criminal conduct by gang members...." Read literally, the statutory language potentially creates enhanced criminal liability based solely on the defendant's commission of a crime as the accomplice of a gang member, whether or not the defendant or the crime is gang related.

The Ninth Circuit adopted a construction of section 186.22 that avoids this potentially unconstitutional result, by interpreting the statute to

mean that the criminal activity furthered in the second prong of the statute must be a crime other than the underlying charge. (*Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103.)

Two California Court of Appeal decisions have declined to accept this interpretation of California law. (See *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20; accord, *People v. Hill* (2006) 142 Cal.App.4th 770, 883-774. But see, *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1078-1082.) This Court has not yet considered this issue of California law.

The interpretation of section 186.22, subdivision (b)(1), in *Garcia v. Carey* and *Briceno v. Scribner* is reasonable. It gives full effect to the language of the statute and avoids the constitutional problems of punishing defendants for mere association with members of a street gang.

In rejecting the Ninth Circuit interpretation, the Court in *Romero* cited only the "plain language" of the statute. (*Romero*, 140 Cal.App.4th at p. 19; see also *Hill*, 142 Cal.App.4th at p. 774.) Yet that language is not so plain. "Any criminal conduct" may be intended to include the charged offense as the Court in *Romero* held, or instead, the Legislature may have intended to include misdemeanors along with felonies in future criminal conduct, thereby explaining the emphatic "any" and specifying "criminal conduct" rather than "felonies" in the formula. That subdivision (a) requires

that the "criminal conduct" "assisted, promoted, or furthered" be felonious, while that requirement is missing from subdivision (b), supports this interpretation.

A hypothetical will make this difference clear. Assume a gang member burglarizes an inhabited dwelling and steals spray cans of paint to spread gang graffiti in various locations. The burglary is a felony committed for the benefit of a criminal street gang, satisfying the first element. The future criminal conduct -- vandalism -- normally would be a misdemeanor unless its repair costs were very high. But it satisfies the second element because its purpose is to assist criminal conduct by gang members. A true finding under subdivision (b)(1) would be justified.

If, however, the spray cans of paint are stolen to be used in school repair projects, the incident would not qualify for subdivision (b)(1) treatment, unless the gang member can suffer the enhancement because he had the specific intent to assist a gang member, himself, in committing the burglary.

Now let us assume that a nongang member served as look out during the burglary. Under *Romero* he would be liable for an enhancement under section 186.22(b)(1) without regard to the purpose of the theft of spray cans because he had committed the offense in association with a gang member,

with the specific intent to aid that gang member in the burglary. If the charged offense satisfies "criminal conduct," that means in the school repair project scenario, the aider and abettor would be subject to a more severe sentence than the perpetrator.[51] Thus *Romero* compels an outcome which appears absurd. On the other hand, if the gang member perpetrator is also held subject to the (b)(1) enhancement in the school repair project scenario, his sentence is being enhanced solely because of his membership in a gang, which raises severe federal constitutional questions under both the First and Fifth Amendments. (See *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 452 [59 S.Ct. 618, 83 L.Ed. 888], discussed at *People v. Gardeley* (1997) 14 Cal.4th 605, 622-624, and *Scales v. United States* (1961) 367 U.S. 203, 228-230 [81 S.Ct. 1469, 7 L.Ed.2d 782], discussed at *People v. Loeun* (1997) 17 Cal.4th 1, 11.)

In *Gardeley, supra*, and *Loeun, supra*, this Court found section 186.22 to be constitutional because it punished conduct, not association. The *Romero* court's statutory interpretation, unfortunately, can lead to guilt from association rather than conduct, and appellant asks this Court to reject

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[51] In *People v. Ngoun* (2001) 88 Cal.App.4th 432, interpreting subdivision (a), the Court of Appeal held that a person "who willfully promotes, furthers, or assists" includes a perpetrator. Appellant has not found any case under subdivision (b)(1) in which that issue was raised and the *Ngoun* reasoning adopted.

it. "[I]f reasonably possible, courts must construe a statute to avoid doubts as to its constitutionality." (*People v. Smith* (1983) 34 Cal.3d 251, 259.)

If the "criminal conduct" referred to in the second prong of section 186.22, subdivision (b)(1), may be satisfied by the charged offense, it renders much of the statute surplusage, a result to be avoided in statutory interpretation. (*People v. Loeun* (1997) 17 Cal.4th 1, 9; *Woods v. Young* (1991) 53 Cal.3d 315, 323.) In any offense in which the first prong of the statutory enhancement is satisfied by the commission of a felony "in association with" a gang member among the participants, the second prong becomes superfluous. Where subdivision (b)(1) now reads "felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," it could more easily and clearly be read "felony committed with the specific intent to promote, further, or assist any criminal street gang, or in association with a member of a criminal street gang." That language would make clear that a prosecutor need not prove any specific intent to assist in any criminal conduct by gang members beyond the current offense.[52]

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[52] In *People v. Morales* (2003) 112 Cal.App.4th 1176, involving a robbery committed during a drug deal gone bad, the court of appeal found the defendant gang member's association with two other gang members in committing the crimes satisfied both the "association" alternative of the first prong as well as the

Under the Ninth Circuit's interpretation of section 186.22, subdivision (b)(1), the evidence was clearly insufficient to support the true findings on the gang enhancements. Despite the plethora of gang evidence offered by the prosecution in the instant case, and admitted by the court, **none of it explained or even asserted that the crimes which were the subject of the underlying charges furthered other criminal conduct by any gang**. This was true for both the attempted murder charged for October 8, 1998, and the murders and attempted murders of January 3, 1999.

a. October 8, 1998.

On October 8, 1998, the police stopped a car for a vehicular violation. Of the riders, two (Markuis Walker and Antwone Hebrard [7 RT 1322-1323]) were members of the Treetop Piru and MOB Piru, respectively, both Blood gangs. The prosecution also offered evidence that Mr. Livingston and other riders in another car, a blue or white Cadillac, were members of the PVC. The riders of the stopped car, however, were not targeted by the shooter. The prosecution moved to dismiss those charges (counts six and

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specific intent to aid other gang members commit a crime from the second prong. (*Morales*, *supra*, 112 Cal.App.4th at p. 1198.) As observed in *Briceno*, however, the reasoning in *Morales* does not seem consistent with this Court's interpretation of section 186.22, subdivision (b)(1), in *People v. Gardeley* (1997) 14 Cal.4th 605. (*Briceno*, *supra*, 555 F.3d at p. 1081, fn. 4.) In *Gardeley*, this Court emphasized the separate nature of the two prongs of section 186.22, subdivision (b)(1), both of which must be satisfied before there was criminal liability. (*Gardeley*, *supra*, 14 Cal.4th at pp. 623-624, text and fn. 10.)

seven), and the court agreed. (12 RT 2215-2216.)

Mr. Nunley, the victim of a drive-by shooting on October 8 but not a rider in the car stopped that night, was a member of the Lueder Park Piru gang. (6 RT 1185; 7 RT 1323.) There was no evidence that he, unlike the riders in the stopped car (6 RT 1187), was wearing red, or that in any way the shooter knew that he was a member of the Lueder Park gang. Mr. Nunley was merely sitting outside his house (6 RT 1195), one house removed from the stopped car riders, when the shooting occurred. (6 RT 1197, 1198; 7 RT 1285.)

While a gang expert testified that there were bad relations between Crips and Blood gangs, there was no testimony that shooting a person not identified as a rival gang member, in this location, in any way furthered PVC criminal conduct. (Cf. *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332-1333.) There was no testimony that the shooting was retaliation for some earlier incident. (Cf. *People v. Gamez* (1991) 235 Cal.App.3d 957, 978.) Mr. Nunley, the victim, testified that he had been having more trouble with Hispanic gangs than with Crips. (7 RT 1289.) There was no testimony that the shooter or his comrades shouted out gang slogans at the time of the shooting. In short, there was no evidence to explain how or if PVC criminal conduct was furthered by this crime. Nor was there evidence that the

shooter had the specific intent to further PVC criminal conduct.

b. January 3, 1999.

The prosecution offered testimony that the Wilmington Arms was within the territory "claimed" by PVC, illustrated with 45 photographs of graffiti to that effect (EXs. 9A-G, 84A-D, 85A-C, 86A-C, 87A-F, 88A-E, 89A-E, 90A-F, 91A-F), and that Mr. Livingston was a PVC member. There was also testimony that he associated with other PVC members, and many of those members lived in the Wilmington Arms. (12 RT 2304.)

This evidence, however, was not sufficient to prove the second element. The Wilmington Arms was not located in hostile territory which the PVC may desire to raid. The guards were not members of a rival gang. There was no evidence that the guards sought to exclude gang members from the Wilmington Arms. At the time of the shooting, the shooter shouted a common expletive, but did not shout any gang slogans or make gang signs. There was no testimony that defiance against the guards, who protected their housing and their families, would add to the status of the PVC or the shooter. No gang expert testified as to how this shooting would further PVC criminal conduct.

In short, regarding both the October 8 and January 3 counts, no evidence was introduced, much less sufficient evidence, that the crimes

charged either furthered other criminal conduct or any such conduct by the PVC, or that the shooter had the specific intent to further such conduct.

If the Ninth Circuit correctly interpreted section 186.22, subdivision (b)(1) in *Garcia v. Carey*, the true findings must be reversed.

3. If *Garcia v. Carey* and *Briceno v. Scribner* are Rejected.

Even under the analysis chosen by the Court of Appeal in *People v. Romero*, *supra*, the jury's findings were without support in the evidence presented at trial. Moreover, applying *Romero*'s interpretation of section 186.22 to this case would raise serious questions of its constitutionality.

In *Romero*, the defendant was a gang member who aided and abetted another gang member, Moreno, who shot two people, one of whom died. The Court of Appeal found that "[t]here was ample evidence that appellant intended to commit a crime, and that he knew Moreno was a member of his gang. This evidence creates a reasonable inference that appellant possessed the specific intent to further Moreno's criminal conduct." (*Romero*, *supra*, 140 Cal.App.4th at p. 20.)

In this case, however, Mr. Livingston was prosecuted not as the aider and abettor, but as the shooter. Applying the *Romero* court's analysis, the prosecution's argument would have to be that Mr. Livingston aided himself in committing a crime, and, since he is also a gang member, he is therefore

guilty of the gang enhancement. It amounts to nothing more than making gang membership, if one commits a crime, suffice for an enhanced sentence. Allowing an enhancement to be based on past criminal history and gang membership has been regularly rejected in California. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195; *People v. Martinez* (2004) 116 Cal.App.4th 753, 761.) It would also violate the First and Fifth Amendments of the United States Constitution. (See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 623; *People v. Loeun*, *supra*, 17 Cal.4th at p. 11.)

To uphold a gang enhancement because of the defendant's criminal history and gang membership would write out of the statute the requirement that gang criminal conduct be furthered by the crime committed. If the Legislature had intended such a result, it could easily have provided for it by adding a third prong applying the enhancement to any perpetrator who is also a gang member.

In *People v. Ngoun* (2001) 88 Cal.App.4th 434, 426, the Court of Appeal, interpreting subdivision (a) of section 186.22, held that a person who "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" includes a perpetrator. The court reasoned it was irrational to deem the Legislature intended to exclude the more culpable and include the less culpable. However, much of the

Legislature's concern over gang crime is directed at violent crimes, and a perpetrator, gang-affiliated or not, who personally inflicts great bodily injury, personally uses a dangerous weapon or firearm, is already subject to a variety of severe enhancements. The gang enhancement of subdivision (b)(1) does not result in the less culpable receiving more severe treatment.

That Mr. Sanders was present does not affect this analysis. Mr. Sanders was prosecuted as a lookout. His presence was a crime only insofar as it contributed to a crime perpetrated by the shooter. If there had been no shooting, Mr. Sanders' presence would not have been a crime. Therefore, it cannot be reasoned that Mr. Livingston was aiding another gang member in the commission of a felony.

In another case involving a subdivision (b)(1) enhancement, the issue was whether a perpetrator and his aider and abettor committed two separate offenses for purposes of proving a "pattern of criminal activity," under section 186.22, subdivision (e), to established the organization to which the defendant and his aider and abettor were affiliated was a criminal street gang. This Court held that a perpetrator and his aider and abettor committed but a single offense. Though two people were involved, the single offense could not satisfy the "two predicate offenses" required to establish a "pattern of criminal activity." (*People v. Zermeno* (1999) 21 Cal.4th 927,

931-932.)

Whether a second gang member aided the shooter in the instant case by acting as a lookout on January 3, 1999, or by driving the car on October 8, 1998, there was but a single perpetrator in each offense, the shooter. Consequently, the shooter cannot be subject to a section186.22, subdivision (b)(1) enhancement on grounds that he was assisting his aider and abettor commit an offense.

On both October 8 and January 3, the basis for the reasoning used in *Romero* is absent. In each case, the shooter had the specific intent to perpetrate the shootings committed, not to assist another to assist him in perpetrating those shootings. The reasoning of *Romero* may apply to an aider and abettor, but not to the actual perpetrator.

Holding the contrary is *People v. Hill* (2006) 142 Cal.App.4th 770, in which a criminal threat by a gang member, conceded by the defendant to be for the benefit of the gang, provided the evidence to satisfy the second prong as well. The crime qualified for the enhancement because the defendant uttered with the specific intent to "promote, further, or assist" the perpetrator, himself, in committing that same crime, making a criminal threat. (See *Hill*, *supra*, 142 Cal.App.4th at p. 774.)

This case is akin to *In re Frank S.* (2006) 141 Cal.App.4th 1192,

1195, 1199, in which true findings were reversed when the Court of Appeal found that evidence of criminal history and gang affiliations was insufficient to establish the current charges were gang related. (See also *People v. Martinez* (2004) 116 Cal.App.4th 753, 761-762 [evidence of defendant's past criminal offenses and past gang activity was not sufficient to establish current crimes were gang-related]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 ["a mere possibility is not sufficient to support a verdict"].)

D. BOTH THE TRUE FINDINGS AND THE UNDERLYING CHARGES TO WHICH THEY ARE ATTACHED MUST BE REVERSED.

1. Reversal of the True Findings is Required for Lack of Substantial Proof on All the Elements, a Denial of Mr. Livingston's State and Federal Constitutional Rights.

The lack of substantial evidence on the second element of the gang enhancements requires their reversal. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 324; *Herrera v. Collins* (1993) 506 U.S. 390, 401-402.)

That **no** evidence was offered on that second prong, however, means that the gang evidence was offered not to prove the gang enhancements, but to depict Mr. Livingston as a sinister fellow who had committed crimes in the past, who would likely commit crimes in the future, and who was worthy

of the most severe penalty, even if he did not commit the crimes charged against him. Alternatively, since no gang evidence was offered on the indispensable second element, the gang evidence offered had no probative value. Its prejudice was all that remained. It served no purpose other than to provide a basis for the jurors to improperly infer Mr. Livingston had a criminal disposition and, on that basis, was guilty of the charges against him.

2. That Defense Counsel Failed to Object to Introduction of Gang Evidence Does Not Preclude Reversal of the Underlying Counts Because the Introduction of this Evidence Resulted in a Denial of Due Process.

Defense counsel objected to very little of the gang evidence. The gang enhancements alleged on each count opened the door to a wide variety of possibly relevant gang evidence, depending on how the case developed. So long as the gang enhancements remained a factor in the trial, their presence rendered futile objections to evidence pertinent to proving those enhancements. An objection which will be futile, need not be made. (*People v. Kitchens* (1956) 46 Cal.2d 260, 263.)

More to the point, the error at issue here rendered Mr. Livingston's trial fundamentally unfair, itself a denial of due process requiring reversal under the facts of this case. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 435-436; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Mr. Livingston was denied due process because insufficient evidence was presented to support the second element of the gang enhancement and because the insufficient gang enhancement evidence rendered the gang allegations nothing more than a pretext to justify admission of the gang evidence. Throughout the trial the prosecution relied upon gang evidence and intimations of fear by some witnesses, despite Mr. Livingston's incarceration since January 8, 1999, to create an atmosphere of gang relationship to substitute for the lack of evidence on the second element. This denied Mr. Livingston due process of law.

3. Prosecution Gang Evidence and Argument.

a. The Prosecutor's Opening Statement.

In his opening statement, the prosecutor informed the jurors that they would be learning a lot about gang activity in Compton, that the Wilmington Arms area was dominated by the Park Village Crips (PVC) (6 RT 1133); that defendants Livingston and Sanders were both members of the Crips, and that Mr. Livingston was believed to be the only white member (6 RT 1133-1134). The prosecutor continued that gang violence was a sad aspect of this city and other cities in Los Angeles (6 RT 1134);[53] and that Compton had Blood gangs, Crips gangs, and Hispanic gangs. (6 RT 1134-1135.)

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[53] This was argument unsupported by any evidence the prosecution offered.

On October 8, 1998, the prosecutor continued, police stopped a car and impounded it, stranding the riders across the street from the territory of a rival gang. The prosecutor commented on the "inherent danger" for the riders and how stupid the police were to impound the car under those circumstances. (6 RT 1136-1137.) The prosecutor emphasized for the jury the gang names of the men in Mr. Livingston's Cadillac, after emphasizing that Mr. Livingston is a Park Village Crip, rival to the Lueder Park Piru, a Blood gang. (6 RT 1137-1138.) The prosecutor also predicted that the witnesses/victims from the October 8 shooting will all be "deathly afraid of being a snitch which I think we all can somewhat appreciate."[54] (6 RT 1144.)

Regarding January 3, 1999, the prosecutor informed the jurors that many of the residents of the Wilmington Arms were Park Village Crips members. (6 RT 1148.) The prosecutor related in some detail, though it was not supported by the evidence subsequently offered, an alleged period of growing tension between the guards and gang members dating from October 8 when Mr. Livingston's car was impounded. (6 RT 1149-1151.)

During his predictions of one witness's testimony, the prosecutor informed the jurors that the Park Village Crips is divided 60-40 between

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[54] The prosecutor supported this allegation with questions he asked, but not with their answers or other evidence.

Samoans and African-Americas, with the single exception of Mr. Livingston. (6 RT 1159.)

b. The Prosecutor's Opening Argument on the Merits.

After completion of the guilt phase evidence, during his opening argument on the merits, the prosecutor stated that gang membership is not enough to make defendants guilty, and expressed his wish that the jurors not think the prosecution was putting on the gang evidence solely to make the defendants look dirty. (14 RT 2647.) He then explained that gang enhancements were to deter gang members. (14 RT 2648.) He argued that the elements of the enhancement are satisfied if two members of the same gang assisted one another in committing the crime. (14 RT 2649.) He concluded that section with a reminder of the stipulation that the Park Village Crips is a criminal street gang. (14 RT 2649-2650.)

During his discussion of the October 8 shooting, the prosecutor referred to Blood and Piru territory. (14 RT 2662.) He invoked the movie "Colors" and "this whole Blood and Crip thing" (14 RT 2662) to introduce his discussion that people [but two of the three counts had already been dismissed on his motion] were shot at for wearing the wrong colors in the wrong territory. (14 RT 2663.)

Finally, the prosecutor reiterated that Mr. Livingston's moral

turpitude (for two prior convictions) did not mean he was guilty of the charged offenses. His membership in the Park Village Crips and his tattoos did not mean he was guilty. "But when you put it together with a lot of other stuff, it does mean something." (14 RT 2679.) The evidence would support a conclusion it meant gang membership, which Mr. Livingston admitted. But the prosecutor was obviously trying to go beyond membership to invoke general community fear of gangs to taint Mr. Livingston.

c. The Prosecutor's Closing Summation.

During his closing summation, the prosecutor observed that defense counsel never asked the gang expert whether members of rival gangs lie or snitch -- the "mark of death" in the prosecutor's words -- against members of rival gangs, and editorialized "because that's not how it works." (14 RT 2761.)[55] Later he returned to this theme, informing the jurors they can make their own assessment of gang culture. (14 RT 2765.) Since the case lacked evidence of gang culture, the prosecution invited the jurors to indulge whatever fears they may have developed on their own while living in Compton, and then apply them to their deliberations in this case.

When arguing the October 8 shooting, he again referred to the car riders wearing red, even though all counts involving the car riders had been

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[55] Nor did the prosecutor ask that question of the gang expert, who was his witness.

dismissed. (14 RT 2788.) But it provided a convenient method to remind the jurors of the gang background the prosecutor asserted was behind shooting someone who was not one of the car riders and was physically separated from them when shot. He again raised gang motivation and cooperation when one gang member has been "dissed," when he explained why Mr. Sanders would have served as a lookout for Mr. Livingston on January 3, 1999, when it was not Mr. Sanders' car that was impounded on October 8.[56] (14 RT 2791-2792.)

d. The Gang and Fear Evidence.

Compton Police Detective Ray Richardson was the prosecution's gang expert. (7 RT 1320.) He testified for the jury that a "gang" was a group of three or more people who came together to "terrorize" the public, by which he meant criminal behavior, such as rapes, murders, robberies, and drugs. (7 RT 1321.) In Compton, he had come in contact with thousands of gang members. (7 RT 1322.) He identified Markuis Walker as a member of the Treetop Piru gang, with a gang name of C. K. Noon. (7 RT 1322.) He identified Antwone Hebrard as a member of the MOB Piru, and Emmanuel Nunley as a member of the Leuders Park Piru. (7 RT 1322-1323.) Detective Richardson testified that Bloods do not get along with Crips, that Bloods and

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[56] Again support from other gang members when one member is "dissed" was not a subject raised by the prosecutor in his presentation of evidence.

Crips do not get along with Hispanic gangs, and that currently no Hispanic or Black gangs get along. (7 RT 1329.) He testified that the Park Village Crips was a criminal street gang, and had about 200 members, including Samoans, Blacks, some who appear Hispanic, and one white. (7 RT 1331-1332.) He testified that both Mr. Livingston and Mr. Sanders were members of the Park Village Crips, and described the area controlled by the Park Village Crips. (7 RT 1332.)

Detective Richardson also interpreted the photographs of Mr. Livingston allegedly "throwing gang signs" and explained the gang-related meaning of Mr. Livingston's tattoos. (Exs 20A-D, 21A-B, D-E; 7 RT 1349-1354.)

In later testimony, Detective Richardson interpreted photographs showing gang graffiti at sites in and around the Wilmington Arms apartment complex. He stated they consisted of Park Village Crip graffiti, along with some graffiti of gangs with which the PVC were feuding. Those graffiti would frequently include "K," allegedly for Killer. (EXs 84 (four photographs), 85 (three photographs), 86 (three photographs), 87 (six photographs), 88 (five photographs), 89 (five photographs), 90 (five photographs); 7 RT 2160-2170.)

During direct examination of other witnesses, the prosecutor wasted

no opportunity to bring before the jurors gang connections and evidence. Damien Perry denied being a gang member, but had a "moniker," "Day-Day." (6 RT 1182.) He identified Emmanuel Nunley as a member of the Leuder Park Piru or Blood sect, and his gang-name of Droopy. (6 RT 1182-1183.) Antwone Hebrard (Perry's cousin) was also a member of the Leuder Park Piru. (6 RT 1183.) He also knew the gang-name "Noon," but not Noon's real name of Markuis Walker. (6 RT 1184.) Mr. Perry further testified that he and the friends with him were wearing red that night, which stands for Bloods, and the Bloods do not get along with Crips. There are fights and shooting between them. (6 RT 1218.) He identified gang graffiti in photographic exhibits as those of the Treetop Piru, who are Bloods from the same basic area as Leuders Park. (6 RT 1218-1220.)

Antwone Hebrard testified that he was a member of the MOB, and that the MOB, the Treetop Piru, and the Leuders Park Piru, were all different sets of Bloods. (7 RT 1254-1255.)

Once the prosecutor had set the theme of gang involvement, and reminded the jurors through Detective Richardson's testimony that gangs terrorize people, he revived that theme whenever possible if a witness was scared either around the time of the crimes or about testifying. Since Mr. Livingston was confined from January 8, 1999, through the trial, witnesses'

source of fear could only be gang involvement. Sometimes that was explicit; other times it was implied. But it served to taint Mr. Livingston, even though no evidence was ever introduced connecting him to any fears expressed after January 3, 1999.

With regard to Mr. Chavers, the security guard, the prosecutor brought out that his residence had been relocated after January 3, 1999, and before August 9, 1999, when he was interviewed. (7 RT 1424.) The move was part of the witness protection program, which paid to move him and some fees in connection with that move. (7 RT 1430-1431.) Since Mr. Livingston was in jail, the inference was that the protection could only have been from gang activity. The prosecutor further elicited that there were shootings at the Wilmington Arms while Mr. Chavers was there, and that police activity was common. (7 RT 1432.) There was no need to state that the shootings or police activity were related to gang activity.

Kim Grant, when asked by the prosecutor whether anyone had threatened her, described an incident two days after the shooting when a white man with long hair, looking like a Samoan, entered her apartment, threatened her with a gun, and told her she was lucky she was a homey's mother, referring to her son who was a member of the gang. She then moved out of the complex. (9 RT 1772-1775.) She did not testify that the

home invader made any mention of the shootings on January 3, 1999, or that she was aware of any connection between the home invader and Mr. Livingston.

Towards the conclusion of Michelle Lopez's testimony (who was 14 years old when she testified [8 RT 1450]), the prosecutor, over objection, elicited that she was scared to testify because she was afraid she would be killed. (8 RT 1485-1486.) On redirect he elicited that when Ms. Lopez talked to the police before she moved out of the Wilmington Arms, she did not tell them everything she knew because she was scared. (8 RT 1518-1519.)

When Michelle's mother, Maribel Lopez, testified, the first subject addressed by the prosecutor was that she also was very nervous and did not want to be there [testifying]. (8 RT 1527.) She explained that about July after the shooting she and all her children moved elsewhere. (8 RT 1529.) The prosecutor made clear he would not tell or elicit in what part of the state she now lives. (8 RT 1528.)

At the conclusion of the direct examination of Damien Perry, the prosecutor elicited that Mr. Perry was still afraid. (6 RT 1207.)

During the testimony of Antwone Hebrard, the prosecutor asked a series of questions to elicit answers indicating that Mr. Hebrard was afraid of

gang retaliation and that was why the substance of his testimony differed from what the prosecutor was expecting. Despite Mr. Hebrard's denial of any answer indicating he was scared, the prosecutor persisted in asking him why he told someone the day before that he planned to take the Fifth on the stand, asked if being a snitch placed him in some danger, asked if he was in the protective custody unit of the jail which was designed to protect the life of snitches, and asked that if he did not snitch was he not saving himself. (7 RT 1252-1254.)

All this evidence was irrelevant to proving the gang enhancements. It proved neither a felony was committed in association with a gang member nor that the felony was committed with the specific intent to further either other criminal conduct, or, under *Romero*, the underlying felony. It did not address a pattern of conduct by Mr. Livingston or other factors to identify him as the perpetrator of the charged offenses. The evidence and suggestions of gang activity in the area and witnesses afraid to testify only served to paint a dramatic and inflammatory portrait of a community threatened by vicious and powerful gang members, including Mr. Livingston. This was a violation of due process requiring reversal, as explained in the following section.

4. The Pervasive Gang Taint of the Proceedings, Unrelated to any Legitimate Purpose, Requires Reversal of the

Underlying Counts.

This was a case in which the gang enhancements served no purpose other than to permit the prosecution to introduce evidence of gang memberships, gang activity, and gang-related themes such as fear among witnesses. The prosecution failed even to introduce evidence on the second element of the gang enhancements. If this Court adopts a reasoning that parallels that of the Ninth Circuit in *Garcia v. Carey*, the true findings must be reversed because the prosecution introduced **no** evidence that these crimes furthered other gang criminal conduct. If the Court rejects the Ninth Circuit reasoning, but agrees that gang enhancements cannot be found where another gang member does nothing more than aid and abet the defendant perpetrating the crimes, again the prosecution failed to prove all the elements of the enhancements. In either case, the gang evidence served no purpose other than to vilify the defendants and to present Mr. Livingston as a dangerous thug who had committed crimes in the past and was likely to commit them in the future, and who therefore should be punished without regard to whether he had committed the crimes charged against him in this case.

A case similar in this regard was *People v. Albarran* (2007) 149 Cal.App.4th 214, in which the court of appeal found not only that the gang

enhancements were unsupported by sufficient evidence and therefore had to be reversed, but also that some of the gang evidence admitted, despite the trial court's admonishment to the jury on its proper use, was "so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt." (149 Cal.App.4th at p. 228.) "[T]here was a real danger that the jury would improperly infer that whether or not Albarran was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished. Furthermore, this gang evidence was extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (149 Cal.App.4th at p. 230.) The *Albarran* court of appeal reversed the conviction on all counts.

In *Albarran*, the trial court admonished the jury as to the limited purpose for which the gang evidence may be considered. (149 Cal.App.4th at p. 228.) No such admonishment was given to the jurors in the instant case. No connection, other than gang membership, linked Mr. Livingston to any of the graffiti in the 45 photographs admitted into the evidence and carried by the jurors into their deliberations. Except for testimony about Mr.

Chavers leaving the security guard force after October 8, 1998, no evidence connected Mr. Livingston to the constant theme of fear elicited from witnesses by the prosecution. But the constant emphasis of gang activity and fear of witnesses brought home to the jury how evil members of such groups must be, and, by association, the defendant, Mr. Livingston, as an admitted member.

The introduction of this evidence violated Mr. Livingston's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations, in violation of the United States Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments, and the California Constitution, article I, sections 1, 7, 12, 15, 16 and 17. The evidence of gang activity, connected with the constant prosecution theme of fearful witnesses, so tainted the proceedings below that all counts should be reversed.

II

THE TRUE FINDINGS OF "LYING IN WAIT" FOR COUNTS ONE AND TWO ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, REQUIRING DISAPPROVAL OF THOSE FINDINGS.

A. TRUE FINDINGS UNSUPPORTED BY SUBSTANTIAL EVIDENCE DENY DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND MUST BE REVERSED.

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. (*In re Winship* (1970) 397 U.S. 358, 364.) A criminal defendant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations, are violated when criminal sanctions are imposed based on legally insufficient proof of guilt. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const. art. I, §§ 1, 7, 12, 15, 16, & 17; *Beck v. Alabama* (1992) 447 U.S. 625, 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

A conviction will be sustained on appeal only where a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Only if a rational trier of fact could

find the essential elements of the crime proved beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations, satisfied. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 324; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) This standard also applies to a finding of special circumstances. (*People v. Mayfield* (1997) 14 Cal. 4th 668, 790-791.)

A review of the record in this case reveals that the evidence was legally insufficient to sustain jury findings that the murders were committed while lying in wait. Those findings cannot be sustained without violating state and federal constitutional standards governing the sufficiency of evidence to support true findings.

B. ELEMENTS OF LYING IN WAIT SPECIAL CIRCUMSTANCE.

The jury returned true findings that the murders in counts one and two were committed "while lying in wait" in violation of Penal Code, section 190.2, subdivision (a)(15).[57] (15 RT 2841, 2843; 24 CT 6304-6305.) A

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[57] "The defendant intentionally killed the victim while lying in wait." (Penal Code, sec. 190.2, subd. (a)(15). Proposition 18, an initiative approved by the voters in the March 7, 2000, Primary Election, and effective March 8, 2000, changed the language of the lying-in-wait special circumstance to delete the word "while" and substitute in its place "by means of." (Stats. 1998, ch. 629, § 2.) The murders here took place before this change in the law, and the change therefore does not affect this case. (*People v. Lewis* (2008) 43 Cal.4th 415, 511, fn. 25.)

lying in wait special circumstance requires "proof of 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.' " (*People v. Lewis* (2008) 43 Cal.4th 415, 508, quoting *People v. Jurado* (2006) 38 Cal.4th 72, 119, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.)[58]

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[58] The jury was instructed: "To find that the special circumstance, referred to in these instructions as murder while lying in wait, is true, each of the following facts but[sic] be proved:

1. a defendant intentionally killed the victim, and

2. the murder was committed while a defendant was lying in wait.

The term "while lying in weight" [sic] within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur between the same time -- or during same time period, or in an uninterrupted attack commencing no later than the moment concealment ends.

Let me read it again since I didn't read it perfectly.

Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends.

If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

C. LACK OF SUBSTANTIAL EVIDENCE OF THE LYING IN WAIT SPECIAL CIRCUMSTANCE.

1. There Was a "Cognizable Interruption" Between the Period of Watchful Waiting and the Killing.

The third element, and the trial court's instruction, incorporates the meaning of "while lying in wait" found by the first appellate court to address the meaning after the special circumstance was added to the Penal Code in 1978. (*Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007.) That court found that "the killing must take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (129 Cal.App.3d at p. 1011.)[59]

A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include, (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established. (CALJIC No. 8.81.15, 14 RT 2589-2891; 24 CT 6262-6263.)

[59] This Court has, at times, "declined to decide whether *Domino's* 'restrictive' reading of the lying-in-wait special circumstance is correct" while at other times has apparently "assumed the viability of the *Domino* formulation." (*People v. Lewis* (2008) 43 Cal.4th 415, 513.) So *Domino* was the law in force during Mr. Livingston's trial.

During security guard Walter Arcia's shift on January 2, he saw Mr. Livingston's car enter and leave the complex six or seven times from 3 p.m. to 8 p.m., along with a large, old, brown car. (9 RT 1702.) At about 8 p.m. on January 2, he saw five to seven "guys" talking to Mr. Livingston by his green Cadillac. (9 RT 1696.) At about 11:15 p.m. on January 2, Michelle Lopez, then age 13, saw Mr. Livingston with two black males standing outside Mr. Livingston's car. One of the black men was arguing with the security guards; Mr. Livingston was not. After the argument, the men got in the car, which made a U-turn and left. (8 RT 1457, 1459, 1460, 1461.)

Kimberly Grant testified that when she, her son, and her boyfriend drove into the complex in the boyfriend's van the morning of January 3,[60] Mr. Livingston drove his green Cadillac, with Freddie Sanders and a girl, into the complex immediately before them, or after them, and parked directly in front of her boyfriend's van. (9 RT 1715-1716, 1722-1723, 1826-1827.) She also testified she saw Mr. Livingston's car enter and exit a couple of times (9 RT 1784) or a few times.[61] (9 RT 1845.)

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[60] During her January 14, 1999, interview with the police investigators, she made no mention of her son being with her. (CT Supplemental III 12-13.)

[61] During the January 14, 1999 interviews she also said that she saw Mr. Livingston's car leave the complex. (CT Supplemental III 12, 16-18, 53.)

Ten or twenty minutes later,[62] Ms. Grant heard a sound, went outside to check on her boyfriend's van, and walked toward the main gate.[63] (9 RT 1748.) She saw a person standing in the door of the guard shack, whom she recognized as Mr. Livingston when he stepped off the curb and walked out of the complex. He was holding something she could not identify in his hand. Later she testified she saw a small gun in his hand. (9 RT 1818-1820, 1751-1752, 1763-1764, 1820.) Ms. Grant testified that, after the shooting, Mr. Livingston left, walking or running, through the exit gate from the complex on to Laurel Street. (9 RT 1763-1764, 1837, 1839.)

Mr. Livingston testified that he had spent the night at his girlfriend's, Shantae Johnson, after they got back to her house from a club they left around 3 a.m. (12 RT 2325.) When he left the next afternoon, he did not take his car because it was hard to start. (12 RT 2326, 2331, 2431.) Ms. Johnson lives at 709 Anzac Circle, about ½ mile from the entrance to the

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[62] She also testified that she returned to the complex around 3 or 4 in the morning. (9 RT 1782.) In her March 8, 2000, interview with the prosecutor, she said she returned about 3 a.m. (3 CT 819, 832.) During the same interview, she told the prosecutor that within a couple of hours after arriving back, she went to the gate to talk to the guards, who were still alive. (3 CT 821.) The shooting occurred about 5 a.m. (8 RT 1588.)

[63] Either her boyfriend dropped off Ms. Grant and her son and left (9 RT 1748; 3 CT 820, 832), or he entered the house with them (9 RT 1785), but did not come out with her, staying in the house until he left the next day. (9 RT 1822.) Ms. Grant refused to divulge his name. (CT Supplemental III 13.)

Wilmington Arms. (10 RT 1936; EX 26.)

If the jury credited Ms. Grant's testimony, depending on which version, Mr. Livingston left the complex between 10 minutes and two hours before the shooting. Even if the periodic drive-ins and exits could count as watchful waiting, there was a cognizable interruption between their cessation and the attack upon the guards. That attack was not perpetrated during the watchful waiting or immediately thereafter. To paraphrase the court of appeal in *Domino*, "the killing [did not] take place during the period of concealment and watchful waiting [nor did] the lethal acts ... begin at and flow continuously from the moment the concealment and watchful waiting end[ed]." (129 Cal.App.3d at p. 1011.) A "cognizable interruption separate[d] the period of lying in wait from the period during which the killing [took] place, [and] the circumstances calling for the ultimate penalty do not exist." (*Ibid.*)

2. There is Not Substantial Evidence Supporting Concealment, Watching and Waiting, or Attacking from a Position of Advantage.

"'[M]ere concealment of purpose is not enough to support the lying-in-wait special circumstance. [Citation omitted.] Rather, such concealment must be contemporaneous with a substantial period of watching and waiting for an opportune time to act, and followed by a surprise attack on an

unsuspecting victim from a position of advantage." (*People v. Lewis* (2008) 43 Cal.4th 415, 514.) Concealment "may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer." (*People v. Morales* (1989) 48 Cal.3d 527, 555.) In this case the victims were unsuspecting and hence surprise was achieved. However, there was no ambush, creation of a situation, substantial period of watching and waiting, or even attack from a position of advantage.

a. No watchful waiting.

Prosecution witnesses (security guard Arcia, 14 year-old Michelle Lopez, Kim Grant) testified that Mr. Livingston, or at least his car, entered and left the apartment complex several times beginning the preceding afternoon and ending 10 to 20 minutes or two hours before the shooting. If we assume these witnesses are accurate, there are, at most, several brief occasions spread over a period of 14 hours and two separate shifts of guards, during which Mr. Livingston could have momentarily observed a scene with which he was already very familiar from past experience, up to four guards at a time in and about the guard house, depending on whether any were touring the grounds or absent on other errands. Possible periodic surveillance does not qualify as a substantial period of watchful waiting under any published case the undersigned has found.

b. No ambush or created situation or position of advantage.

The guards were not lured to an isolated corner of the complex. Nor did the perpetrator approach in some disguise or misrepresenting an emergency situation. There were four armed guards in the guard house. The guard house and the approaches to it were well lighted by flood lights pointing toward the entrance from the surrounding buildings. (8 RT 1507; 9 RT 1667, 1749, 1793.) The outside roof over the door to the guardhouse held a fixture with three bulbs pointing out toward the approaches. Both sides of the guard house contained spacious windows through which the guards could see all approaching vehicles and pedestrians. (See EXs 31A; 36C, D, E; 46A, C, D, E; 47A, B, C; 50G.) At one point during her January 14, 1999, interview by police investigators, Ms. Grant said she saw Mr. Livingston walking in from the exit gate, holding something that looked like a gun pointed towards the ground. (CT Supplemental III 29-30.) This information was given to the jury. She did not say she saw him concealing his presence in any way, hiding the weapon under his jacket or in his waist band, or crouching to avoid being observed through the windows.

D. THE LACK OF SUBSTANTIAL EVIDENCE REQUIRES REVERSAL AND DISMISSAL OF THE SPECIAL CIRCUMSTANCE.

The lack of substantial, supporting evidence requires reversal of the

special circumstance finding. Moreover, retrial of that allegation is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. (*Burks v. United States* (1978) 437 U.S. 1, 18 [98 S.Ct. 2141, 57 L.Ed.2d 1]; *People v. Lewis* (2008) 43 Cal.4th 415, 509.)

III

THE LYING-IN-WAIT CIRCUMSTANCE, GENERALLY AND AS APPLIED IN THIS CASE, FAILS TO PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING BETWEEN CAPITAL AND NONCAPITAL CASES IN VIOLATION OF THE EIGHTH AMENDMENT.

A. THE LYING IN WAIT CIRCUMSTANCE GENERALLY FAILS TO PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING BETWEEN CAPITAL AND NONCAPITAL CASES IN VIOLATION OF THE EIGHTH AMENDMENT.

1. Summary of Argument.

The lying-in-wait special circumstance provision as set forth in California Penal Code section 190.2, subdivision (a)(15), which provided one of the statutory bases for Mr. Livingston being deemed death-eligible, violates the Eighth Amendment to the United States Constitution, in that the special circumstance provision, which applies to a substantial portion of all premeditated murders, fails to adequately narrow the class of persons eligible for the death penalty or to provide a meaningful basis for distinguishing between those who are subject to that penalty and those who are not.

2. The Constitutional Requirement That the Death Penalty Adequately Narrow the Class of Death-Eligible Defendants.

The United States Supreme Court has long "required States to limit

the class of murderers to which the death penalty may be applied." (*Brown v. Sanders* (2006) 546 U.S. 212, 216.) In 1972, Justice White's concurring opinion in *Furman v. Georgia* explained that death penalty systems in Georgia and other states lacked a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346].) In 1980, Justice Stewart's plurality opinion in *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, required: "A capital sentencing scheme must, in short, 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.' "

This "meaningful basis" is provided by "channel[ling] the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." (*Godfrey*, 446 U.S. at p. 438.)

To accomplish the constitutionally required narrowing, aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877, quoted at *Romano v. Oklahoma*

(1994) 512 U.S. 1, 7.) "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244.)

The narrowing requirement is based on the Eighth Amendment, and not just the Due Process Clause of the Fifth Amendment. The difference in analysis can be profound. (See *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 309 [using a "notice" approach since the case was noncapital], and *Bradway v. Tilton* (S.D.Cal, Feb. 15, 2008, 2008 U.S. Dist. LEXIS 11500, pp. 10-12, & fn. 1.) In *Maynard v. Cartwright*, the United States Supreme Court rejected the Due Process approach used by the State as not recognizing the rationale of the Supreme Court cases. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) .... *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious

manner; there was no principled means provided to distinguish those that receive the penalty from those that did not. .... Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362 [100 L.Ed.2d 372, 108 S.Ct. 1853].)

There are two aspects to the capital decision-making process: the eligibility decision and the selection decision. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 971-972 [114 S.Ct. 2630, 129 L.Ed.2d 750].) The narrowing requirement applies to the former. In California the jury's finding on special circumstances determines death eligibility. (*People v. Boyette* (2002) 29 Cal.4th 381, 439.) If special circumstances are found, the jury then decides between death or life without parole in an additional penalty phase hearing. In this argument, appellant addresses the constitutionality of the lying-in-wait special circumstance found as part of the eligibility decision.

3. California Law on the Special Circumstance of Lying in Wait.

At the time of the crimes charged in this case, the pertinent statute provided among its special circumstances: "The defendant intentionally

killed while lying in wait."[64] (Penal Code, sec. 190.2, subd. (a)(15).) The proof required is "'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.' " (*People v. Lewis* (2008) 43 Cal.4th 415, 508, quoting *People v. Jurado* (2006) 38 Cal.4th 72, 119, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.)

"Lying in wait," as a rule prohibiting pardons, appeared in the Fourteenth Century "as a reaction by the Norman conquerors of England against the subjugated Anglo-Saxons' practice of killing the Normans by ambush." (*People v. Stevens* (2007) 41 Cal. 4th 182, 217-218 (Moreno, J., Conc. & dis opn.).) It became a form of first degree murder in California as an alternative means of proving premeditation or deliberation. (*Id.* at p. 218, citing *People v. Thomas* (1953) 41 Cal.2d 470, 481 [Traynor, J., conc. opn.].) Judicial decision in California, however, has expanded "lying-in-wait" far beyond the classical ambush of the Fourteenth Century or the bushwhacking of the old West.

a. Watching and waiting.

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[64] In 2000 Proposition 18 deleted the word "while" and substituted the phrase "by means of." (*People v. Lewis* (2008) 43 Cal.4th 415, 511, fn. 25.)

The temporal duration required by "a substantial period of watching and waiting for an opportune time to act" is satisfied by no more than the time required for premeditation or deliberation. (*People v. Sims* (1993) 5 Cal.4th 405, 433-434.) The watching need not be of the intended victim, but mere alertness and vigilance, while waiting for the victim to appear.[65] (*Id.* at p. 433.) Thus, the watchful waiting element does not distinguish the special circumstance of lying-in-wait from a premeditated, deliberated first degree murder. The required period of watchful waiting distinguishes lying in wait from a rash impulse. (*People v. Stevens* (2007) 41 Cal.4th 182, 202.) But acting upon a rash impulse is also inconsistent with premeditation and deliberation. (CALJIC No. 8.20; 14 RT 2580-2581.) Again, the watchful waiting element does not in itself distinguish lying-in-wait from a deliberate, premeditated murder.

b. Concealment and surprise.

Concealment of purpose does not, alone, serve to distinguish lying-in-wait murders from many "routine" murders in which concealed purpose also appears. (*People v. Morales* (1989) 48 Cal.3d 527, 557.) Only when it is combined with the other two elements is it said to justify as a special circumstance. (*Ibid.*) That this element does not require physical

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[65] Falling asleep while waiting for the victim did not terminate the lying in wait. (*People v. Tuthill* (1947) 31 Cal.2d 97, 101.)

concealment, as in an ambush, was long ago decided. (See cases cited in *Morales*, *supra*, 48 Cal.3d at pp. 554-555.)

The concealment required is that which enables the defendant to achieve surprise. "The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise." (*Morales*, *supra*, 48 Cal.3d at p. 555.) "Concealing murderous intent and launching a surprise attack from a position of advantage are not two distinct factors distinguishing lying-in-wait murder, but one circumstance--almost invariably, one conceals a murderous intent in order to gain advantage over the victim." (*People v. Stevens* (2007) 41 Cal.4th 182, 220, Moreno, J., conc. and dis. opn.) Surprise is perhaps more important than concealed intent. If surprise may be achieved by warning the victim of the intent to kill so often that anticipation is deadened and surprise is achieved, there may still be lying-in-wait. (*People v. Arellano* (2004) 125 Cal.App.4th 1008, 1095.) While concealment/surprise is not a requirement for premeditation and deliberation, it is a very common feature of many premeditated, deliberated murders. It enhances the chances for success. (*People v. Stevens,* 41 Cal.4th at p. 233, Moreno, J., conc. & dis. opn.)

As explained above, none of the elements of special circumstance

lying-in-wait, by themselves, satisfy the constitutional requirements of the Eighth Amendment. Taken together, this Court has said the elements distinguish between the lying-in-wait special circumstance and other first degree murders. (*People v. Lewis* (2008) 43 Cal.4th 415, 516.) But the broadened interpretation given these elements by California decisions does not satisfy the federal constitutional requirements.

Under article 189, all murders which are "willful, deliberate, and premeditated," including specifically those perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of armor-piercing ammunition, poison, lying-in-wait, or torture, plus a variety of felony murders, and discharging a firearm from a motor vehicle at another person with the intent to inflict death, are murders in the first degree. (Penal Code, sec. 189.) The issue is whether the lying-in-wait special circumstance sufficiently narrows those eligible for the death penalty from other first degree murders, in particular other willful, deliberate and premeditated murders.[66]

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[66] "By the use of the phrase 'or any other kind of willful, deliberate, and premeditated killing' . . . following the phrase 'All murder which is perpetrated by means of poison, or lying in wait, torture,' the Legislature identified murder committed by any of the enumerated means as a 'kind of' willful, deliberate, and premeditated killing." (*People v. Thomas* (1953) 41 Cal.2d 470, 477, Traynor, J., concurring opn., explaining why the trial court committed harmless error in instructing the jury that murder by lying in wait could involve an unintentional killing and did not require an intent to kill.)

The elements of special circumstance lying-in-wait are coterminous with first degree lying-in-wait (see CALJIC Nos. 8.81.5 and 8.25) with one exception: the special circumstance requires an intentional killing while implied malice will suffice for first degree lying-in-wait. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023. But see *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 313 (McDonald, J., dis. opn.).) Intentional killing, however, is a feature of all first degree murders accomplished with express malice aforethought. When the elements of lying-in-wait special circumstance are shared by so many other first degree murders, how can they constitutionally fulfil the narrowing function? This is not an original concern. It has been raised in several concurring and dissenting opinions. (*People v. Morales* (1989) 48 Cal.3d 527, 575 (Mosk, J., dis. opn.); *People v. Stevens* (2007) 4 Cal.4th 182, 213 (Werdegar, J., conc. opn.), 216-225 (Moreno, J., conc. & dis. opn.); *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1180-1188 (McKeown, J., dis. opn.).) That the elements fail to constitutionally narrow the category of those eligible for death is raised again here.

c. The elements of lying-in-wait, as interpreted by this Court and lower California courts, do not effectively narrow the class of persons eligible for the death penalty to those more deserving of the more severe

sentence.

Under the Eighth Amendment, the special circumstances must both "genuinely narrow the class of persons eligible for the death penalty **and** must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Romano v.* Oklahoma (1994) 512 U.S. 1, 7 [129 L.Ed.2d 1, 114 S.Ct. 2004], quoting *Zant v. Stephens* (1983) 462 U.S. 862, 876 [emphasis added].) The narrowing is to be accomplished by principles that "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877, quoted at *Romano v. Oklahoma* (1994) 512 U.S. 1, 7.) "[T]he lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not. To my mind, the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly." (*People v. Morales* (1989) 48 Cal.3d 527, 575 (Mosk, J., dis. opn.).)

California courts have addressed surprisingly little attention to this aspect of the constitutionally narrowing requirement. The majority in *People v. Stevens* said only: "[C]oncealment of purpose inhibits detection,

defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise." (*Stevens, supra*, 41 Cal.4th at p. 204.) The first two of these characteristics, however, are in fact the same. Self-defense is denied by inhibiting detection. Nor are they characteristics unique to lying in wait. They are found also in many premeditated murders, including most of the others specified in article 189 as premeditated: murder by destructive device or explosive, weapon of mass destruction, knowing use of armor-piercing ammunition, and poison. Thus, they are not limited to capital murders.

The third characteristic listed by the *Stevens* majority, some degree of betrayal of trust, may be found in some lying in wait cases but be missing in others. The classical Western ambush as the victim rides down the trail may occur even if the victim is very suspicious and alert to his surroundings, thus, with no betrayal of trust. The betrayal of trust admittedly found in some lying-in-wait cases could better be served if the category was expressly limited to active deceit as to purpose, going beyond mere concealment. As suggested by Justice Werdegar, "active deceit as to purpose—a misrepresentation or ruse that lulls the victim into a false sense of security....could reasonably be regarded as more culpable [because] deceitful behavior is traditionally and rationally condemned. Perhaps more to the

point, an aspiring murderer who lures his victim into a vulnerable position and then launches a surprise attack is particularly likely to succeed, and hence is particularly dangerous. As the penal law is meant to deter, the special circumstance is not irrational in selecting especially dangerous behavior for special punishment. " (*People v. Stevens* (2007) 41 Cal.4th 182, 213 (Werdegar, J., conc. opn.).)

The lying-in-wait special circumstance, as currently interpreted by this Court and the Court of Appeal fails the second reason for narrowing, justification for a more severe penalty, for the same reasons that it fails to narrow. The criteria as defined in California law do not limit themselves to sets of circumstances which identify the most culpable. "Special circumstances based on moral trivialities would ... not pass constitutional muster." (*Stevens*, 41 Cal.4th at p. 222 (Moreno, J., Conc. & dis. opn.).)

While some cases within the lying-in-wait special circumstance may include the most culpable circumstances, its elements are not defined to limit its applicability to those cases. The definitions are too broad in scope to distinguish the most culpable from other first degree murders. It does not pass constitutional muster.

B. THE LYING IN WAIT CIRCUMSTANCE, AS APPLIED IN THIS CASE, FAILS TO PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING BETWEEN CAPITAL AND NONCAPITAL CASES IN VIOLATION OF THE EIGHTH

AMENDMENT.

This discussion incorporates the discussion of general application above, and adds the following discussion of Mr. Livingston's case.

Concealment of purpose was completely lacking under the evidence in this case. For the perpetrator in this case to have revealed his purpose any more clearly than he did would have required posting a sign or telling the security guards in advance that later he would return and shoot them. The victims in this case were not lured to a remote location. The windows in their guard shack facing all avenues of approach were not covered. Their weapons were not taken from them in advance by subterfuge. They were not shot from a concealed position. Nothing about the alleged concealment in this case distinguishes it from the average store robbery. In any event, as this Court has recognized, concealment of purpose does not distinguish lying-in-wait special circumstance from other "routine" murders. (*People v. Morales* (1989) 48 Cal.3d 527, 557.)

The only watchful waiting to be found in the evidence of this case would be, under the prosecution's theory, Mr. Livingston's alleged repeated drive-by reconnaissances of the scene. Even the prosecutor did not argue that the purported two seconds of delay when the perpetrator stood in the door, after shouting at the guards and allowing Mr. Bombarda to take off his

glasses, put them down, and turn around before the shooting started, constituted the watchful waiting. To include drive-by reconnaissances within the scope of "watchful waiting," however, is to expand the category beyond past examples. Alternatively, to rule that watchful waiting is satisfied by the time it took the perpetrator to decide he was going to shoot to kill, the period for premeditation and deliberation, is again to stretch the concept so far as to include most premeditated murders.

The surprise attack upon an unsuspecting victim from a position of advantage is the third element. The attack in this case was a surprise to the victims; otherwise, they would have drawn their weapons and defended themselves, as did Mr. Bombarda. Since it was a surprise, the victims must been unsuspecting. Yet there was no position of advantage that facilitated the surprise and the victims' unsuspecting nature. There was nothing about a perpetrator walking by the large windows of the guardhouse to reach the door which gave him a position of advantage, compared to a drive-by shooter from a moving car, a shooter from a concealed position, or many other scenarios.

In short, if the evidence of this case is held to be within the parameters of lying-in-wait special circumstance, then the California law fails the narrowing requirements of the federal Eighth Amendment.

C. THIS ERROR WAS NOT CONSTITUTIONALLY HARMLESS.

In this case, the jury also found a multiple murder special circumstance. The United States Supreme Court, however, has ruled in a California case involving multiple sentencing factors that "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Brown v. Sanders* (2006) 546 U.S. 212, 220 [126 S.Ct. 884, 163 L.Ed.2d 723].) In this case, the factual evidence pertinent to the lying-in-wait special circumstance remained available for consideration, in the juror's discretion, under the "circumstances of the case" factor even if it failed to provide substantial evidence to prove that special circumstance or if the special circumstance, either generally or as applied to this case, violates the Eighth Amendment.

The problem in the instant case is that the trial court deprived the jurors of the discretion to determine whether that evidence was aggravating. The jurors were instructed that, on penalty, they "**shall** consider, take into account, and be guided by...any special circumstance[s] found to be true." (CALJIC No. 8.85; 16 RT 3265-3267; 24 CT 6374-6375 [emphasis added].)

The jury receiving that instruction was the same jury which had already found, under the instructions given, that the evidence proved the lying-in-wait special circumstance, rendering Mr. Livingston eligible for the death penalty. The jury was never given the choice to decide whether they thought that combination of evidence should render a person eligible for death.[67] They were, in effect, instructed that if the evidence proved that allegation, that was so serious under the law that the person was eligible for death.

Whether the lying-in-wait special circumstance, as currently defined, is sufficient to render a person death-eligible in all cases currently included within that combination of elements is a question on which justices of our courts are divided. (Sec. IIIA1b(3), *ante*.) To effectively instruct the juries that the evidence before them, if sufficient to prove lying-in-wait, is by law so serious as to render the defendant death eligible imbues that evidence with seriousness far beyond what the jury in its own unmandated discretion might conclude. In effect it operates as a unconstitutional mandatory presumption that the evidence is aggravating. (See *Sandstrom v. Montana* (1979) 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450.)

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[67] During their deliberations on the verdicts and special circumstances, they were instructed **not** to discuss or consider the subject of penalty or punishment. "That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstances alleged in this case." (CALJIC No. 8.83.2, 14 RT 2594; 24 CT 6266.)

The effect is aggravated by another instruction to the jury that "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity...." (CALJIC No. 8.88; 16 RT 3272-3274; 24 CT 6389-6390.) The jury had already been instructed that proof of lying-in-wait so increased the severity of the murders as to render Mr. Livingston eligible for the death penalty. The evidence of lying-in-wait in this case was so equivocal that a jury may easily not have considered it added to the enormity of the offenses but for already having been instructed that lying-in-wait, if proven, rendered Mr. Livingston eligible for death. That is a very serious aggravating factor.

As Justice Scalia commented: "The issue we confront is the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." (*Brown v. Sanders*, 546 U.S. at p. 221.) In this case, it is by no means clear that the evidence supporting lying-in-wait would have been construed by the jury as aggravating unless they were led to that conclusion by the court's instructions. The jury was not left free to determine for itself whether that evidence was aggravating. That denies due process. (See *Sandstrom v. Montana* (1979) 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450.) The death penalty must be reversed.

IV

THE COURT ADMITTED TESTIMONIAL STATEMENTS WITHOUT THE OPPORTUNITY FOR CROSS-EXAMINATION IN VIOLATION OF MR. LIVINGSTON'S RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION: CONFRONTATION LAW AND THE TEST FOR HARMLESS ERROR.

Over the objections of Mr. Livingston's counsel, the trial court permitted the prosecution to introduce as evidence a taped statement made to the police about the October 8 shooting incident by a witness, Markuis Walker. The court's ruling was error and denied Mr. Livingston his constitutional right of confrontation.

In 2004, the United States Supreme Court decided that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Crawford v. Washington* (2004) 541 U.S. 36, 59.) It follows that "[t]he [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Id.*, fn. 9.) Without fully defining "testimonial," the Supreme Court held that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police

interrogations." (*Id.*, at p. 68.)[68] Mr. Livingston's trial was held before the *Crawford* decision, but his appeal is still pending. Hence, the Supreme Court's decision applies retroactively to his case. (*People v. Cage* (2007) 40 Cal.4th 965, 974, fn. 4.)

Because admission of the statements of Markuis Walker violated a constitutional right, the test for harmless error is proof beyond a reasonable doubt that the error did not affect the outcome of the trial. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Cage* (2007) 40 Cal.4th 965, 979.)

B. THE VIDEOTAPE OF INTERROGATION OF MARKUIS WALKER, DECEASED, WAS INTRODUCED AND THE JURY WAS GIVEN A TRANSCRIPT OF THAT INTERROGATION TO READ.

Markuis Walker was one of the witnesses to the shooting on October 8, 1998. He was originally listed as a victim (count 7, 3 CT 574), but that count was dismissed, along with another, on the prosecutor's motion at the end of the prosecution case-in-chief. (12 RT 2215-2216.)

Mr. Walker was interrogated by the police on January 4, 1999, by Detectives Aguirre and Richardson (Supp. IV CT, p. 2), and that interrogation was videotaped. (Court Exhibit 1, 6 RT 1081.) Neither Mr.

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[68] More recently, affidavits prepared by analysts at a state laboratory were included within "testimonial statements." (*Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527].)

Livingston nor his counsel was given an opportunity to be present and cross-examine Mr. Walker during that interview. Mr. Walker later died in an incident not related to this case. (2 RT 271-272.) The videotape of his police interrogation was admitted into evidence and a transcript of that interrogation was given to the jury to use when watching that videotape. (6 RT 1229-1232, 14 RT 2732.)

Mr. Walker stated that the person who shot Emanuel Hunter was a "light skinned guy" driving a green Cadillac (Supp. IV CT, pp. 2, 5), though the "light skinned complexion guy" had to be sitting on the passenger side at the time of the shooting. (*Id.*, at p. 7.) Mr. Walker identified Mr. Livingston's photograph from a sixpack as the person he saw. (*Id.*, at p. 12.) He also identified a photograph of a light green Cadillac as the car he saw. (*Id.*, at p. 15.)

Defense counsel objected to admission of the videotape on grounds that section 1370 of the Evidence Code, under which the videotape was offered, was unconstitutional for denying Mr. Livingston's right to confrontation, that the interview was not sufficiently close in time to the actual incident to satisfy the conditions set by section 1370, and that many of Mr. Walker's statements were based on additional hearsay. (6 RT 1085.) The court overruled all objections and admitted the videotape. (6 RT 1089-

1090.)

Later in the trial Officer Richardson testified that during his interview, Mr. Walker identified the photograph of Mr. Livingston as the shooter. (7 RT 1327-1328.) No objection was made at that time by defense counsel to this testimony. However, any objection would have been futile because of the court's earlier overruling of all objections to the videotape of that interview. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.)

1. Admission of the Videotape Violated the Federal Constitution's Sixth Amendment Confrontation Clause.

The admission of Markuis Walker's hearsay statements in the videotaped interview and Detective Richardson's testimony was error and denied Mr. Livingston his right under the Sixth Amendment to confront and cross-examine witnesses.

Police interrogation is included among those items which are testimonial. (*Crawford, supra*, 541 U.S. at p. 68.) That would include Mr. Walker's interrogation, conducted almost three months after the shooting, and after the police had earlier met with Mr. Livingston and released his Cadillac back to him. (12 RT 2312-2313.) Mr. Walker was not available for cross-examination at trial because he had died of unrelated causes before trial. There was no prior opportunity to cross-examine Mr. Walker. Under *Crawford*, the admission of the videotape, and Detective Richardson's

testimony about the Mr. Walker's statements during that interview, were violations of the Sixth Amendment's Confrontation Clause, as applied to the states through the due process clause of the Fourteenth Amendment.

2. Neither the Videotape nor Detective Richardson's Testimony Satisfied the Conditions of Section 1370, Evidence Code, For Admission.

Even assuming, for the sake of argument, that *Crawford* did not invalidate Evidence Code section 1370, that section did not provide a proper basis for the admission of Walker's statements into evidence. Section 1370 makes admissible a statement of a declarant not available as a witness if (1) that statement describes the infliction or threat of physical injury upon the declarant, (2) the statement was made at or near the time of the infliction or threat of physical injury, (3) the statement was made under circumstances that indicate its trustworthiness, and (4) the statement was, *inter alia*, made to a law enforcement official. These conditions are phrased as multiple requirements, not alternatives.

Following the decision in *Crawford*, a California court held that the trustworthiness prong of section 1370, subdivision (a)(4), required a prior opportunity to cross-examine the declarant. (*People v. Price* (2004) 120 Cal.App.4th 224, 238-239.)

Section 1370 requires that the declarant be the victim, the subject of

the threat or actual infliction of injury. (Sec. 1370, subd. (a)(1).) In this case, Detective Aguirre was interrogating Mr. Walker about the injury to Emmanuel Hunter. (Walker Transcript, Supp. IV CT, p. 2.) Nowhere in the transcript does Mr. Walker state, or is he asked, whether he ever felt that the shots were aimed at him or that he was in danger from them. He first heard a gunshot after the car had passed him and he saw the back of the car. (*Id.* at p. 7.) Mr. Walker does not even say that he ducked.

The statement must be taken "at or near" the time of the incident. (Sec. 1370, subd. (a)(3).) Mr. Walker's statement was taken and videotaped on January 4, 1999, for a shooting that occurred on October 8, 1998. This was almost three months after the shooting. The "at or near" criterion is also required for the admission of public employee records offered under Evidence Code, section 1280, subdivision (b). At least one court has held that the "at or near" criterion was not satisfied by a forensic report prepared a week after the tests recorded, because of the "danger of inaccuracy by lapse of memory." (*Glatman v. Valverde* (2006) 146 Cal.App.4th 700, 704, quoting *People v. Martinez* (2000) 22 Cal.4th 106, 128.)

In the instant case, in addition to the risk of lapse of memory, three months elapsed while Mr. Walker was free to discuss the incident with others, perhaps decide to shade or even make up facts to worsen the situation

for a person he knew to be from a rival gang. If there had been cross-examination, these possibilities could have been explored. Lacking the opportunity for cross-examination, however, three months after the event was certainly not "at or near" the time of the event. The court erred in denying the objection under Evidence Code section 1370.

3. Admission of the Videotape Was Prejudicial.

In the videotape, Mr. Walker identified Mr. Livingston as one of the two shooters he saw in the car. (Supp. IV CT, p. 12.) Mr. Walker also stated he had identified the car later that night, in the company of the police, and identified a photo as a picture of that car. (*Id.*, at pp. 14-15.) Officer Richardson's testimony concerning the contents of that videotaped interrogation indicated that Mr. Walker had identified a photograph of Mr. Livingston as the shooter. (7 RT 1327-1328.)

At trial, only Mr. Perry identified Mr. Livingston as the shooter.[69] (6 RT 1198-1199.) This identification, made at night of a shooter from a passing car, needed corroboration to be persuasive. Antwone Hebrard was also present the night of October 8, 1998. At trial he testified that he was in

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[69] Mr. Perry also identified as the shooter a photograph of Mr. Livingston from a sixpack during his police interrogation on January 6, 1999. (6 RT 1201-1202.)

his friend's home and did not see the shooting.[70] (7 RT 1271, 1275.) The victim, Mr. Nunley (Hunter), did not identify Mr. Livingston as the shooter. (7 RT 1287.) Neither witness's trial testimony corroborated Mr. Perry's identification, but Mr. Walker's videotape provided the needed corroboration. Consequently, it cannot be proved beyond a reasonable doubt that the videotape of Mr. Walker's police interrogation had no effect on the guilty verdict to the charges from October 8, 1998.

C. THE COURT ERRONEOUSLY PERMITTED CAPTAIN WRIGHT TO TESTIFY THAT THREE UNINJURED WITNESSES WERE TAKEN TO THE WILMINGTON ARMS AND IDENTIFIED THE CAR INVOLVED IN THE SHOOTING.

Compton Police Captain Reginald Wright testified that he brought three uninjured witnesses from the October 8, 1998, shooting to the Wilmington Arms. They indicated that the car found there was the vehicle involved in the shooting. (7 RT 1365-1366.) Captain Wright did not

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[70] To impeach Mr. Hebrard (7 RT 1264), the court permitted the prosecution to play a videotape of Mr. Hebrard's police interrogation from January 7, 1999. The court denied the defense request to cross-examine Mr. Hebrard concerning the videotape before it was played. (7 RT 1264.) After it was played and following cross-examination, the defense objected to Mr. Hebrard's entire testimony, including the videotape, as hearsay, based upon Mr. Hebrard's testimony that most of what he had told the police during that interrogation was what others had told him, and that the videotape exceeded the scope of impeachment. (7 RT 1270-1271, 1278.) The court denied the objection, the motion to strike, and the request for an admonition. (7 RT 1280.)

identify the witnesses by name even though he responded to the scene, in part, because they stated they would only go with him. (7 RT 1367.)

Defense counsel did not object to what the witnesses told Captain Wright. Since his earlier objection on confrontation grounds to the Markuis Walker videotape had been denied, objection on that basis would have been futile. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27; *People v. Hillery* (1965) 62 Cal.2d 692, 711-712.)

The testimony was inadmissible. Captain Wright's role in the shooting incident did not involve providing emergency assistance, but was part of the investigative effort. The statements he elicited were aimed at discovering who was the culprit, and subsequently were used in trial. The unidentified witnesses' statements were testimonial statements taken as part of a police interrogation. (*Crawford, supra*, 541 U.S. at p. 68.) The witnesses, not even identified, were not available for cross-examination. Hence, admission of the statements violated the Confrontation Clause of the Sixth Amendment and due process clause of the Fourteenth Amendment, to the United States Constitution.

In this case, prejudice is shown by the weak nature of the remaining evidence that the shots came from Mr. Livingston's Cadillac.

The victim, Mr. Nunley (Hunter), testified that the shots came from a

white Cadillac. (7 RT 1287.) He testified that pictures of Mr. Livingston's green Cadillac could be the vehicle, but he was not sure. (7 RT 1289.) During his interrogation, the police showed him pictures of a Cadillac and told him that it was the car that did the shooting. (7 RT 1288.) Mr. Nunley's ambivalent answers at trial, as well as the tainting of his memory by the police interrogation, substantially weakened the evidentiary weight of his testimony.

Mr. Perry's identification, during the trial, of pictures of Mr. Livingston's green Cadillac as the car did not provide a reliable identification. (6 RT 1204.) He did not identify photographs of Mr. Livingston's car during his January 9, 1999, police interrogation, much closer to the incident than the trial. His in-court identification occurred only after he was shown photographs of Mr. Livingston's car in court and did not involve selecting Mr. Livingston's car from a variety of other vehicles.

Mr. Perry was allowed to testify, over defense objection, that when the Cadillac on Bullis was pulling up to the light on Rosecrans, somebody said that was Goldie. (6 RT 1192.) While the statement should have been excluded and the jury admonished to disregard it (see Argument V, *post*) does show that any information that Mr. Perry might have had about the car and its ownership came from someone other than himself, who was not

identified and not available for cross-examination.

In sum, absent the erroneous admission of Markuis Walker's videotaped statement, it cannot be shown beyond a reasonable doubt that the jury would have found Mr. Livingston guilty of the charges arising from the October 8 shooting.

The admission of Mr. Walker's statements violated the Confrontation Clause of the Sixth Amendment and due process clause of the Fourteenth Amendment to the United States Constitution. Additionally, because the evidence at the guilt phase is admissible in the penalty phase, any errors affecting the reliability of the guilt determination necessarily reflect the reliability of the penalty phase as well, thus violating the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) The errors were prejudicial, and require that the judgment against Mr. Livingston be reversed.

V

IN ALLOWING DAMIEN PERRY TO TESTIFY THAT SOMEBODY IDENTIFIED THE CADILLAC AS GOLDIE'S, THE COURT DENIED MR. LIVINGSTON DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION: SUMMARY OF TESTIMONY, OBJECTION, RULING, AND STANDARD OF REVIEW.

During testimony about the shooting incident on October 8, 1990, Damien Perry stated that when the Cadillac on Bullis was pulling up to the light on Rosecrans, somebody said that was Goldie. (6 RT 1192.) The defense objected and, without waiting for explanation, the court overruled the objection, accepted the prosecutor's assertion that the remark was only offered to explain conduct, and not for the truth of the matter asserted, and so explained to the jurors.[71] (6 RT 1192.)

Neither the prosecutor nor the court explained for the jury's benefit what was the conduct to which the remark related. Following the statement

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[71] "Q Tell the jury what happened next.
A Somebody had said that that was Goldie and --
Mr. Martin: I object to what somebody else said.
Mr. Stirling: It's not based on the truth of the matter asserted. Explaining what happened next.
The Court: Ladies and gentlemen, this is offered to merely explain conduct. And it is not for the truth of the matter asserted. I'm referring specifically to the statement the witness just said, that someone else made reference to someone named Goldie." (6 RT 1192.)

"that was Goldie," Mr. Perry continued that the Cadillac ran the red light, and then his friends and he returned to their car, got his clothes and "stuff" he was taking to a friend's apartment, and took them there. (6 RT 1192-1193.) Nothing in Mr. Perry's testimony and no question from the prosecutor related the statement "that was Goldie" to any of the group's prior or subsequent conduct.

The prosecutor's purpose for introducing the statement was clearly to associate the defendant, Mr. Livingston, with the car from which shots subsequently were fired. The statement was extraordinarily prejudicial, and its introduction was unnecessary;[72] it should have been excluded. Alternatively, under Evidence Code, section 352, if the pertinent conduct had been identified and it was relevant, the court could have required redaction of the statement, limiting it to the fact that someone with Mr. Perry said something that caused the pertinent conduct. Either action would have recognized that this statement identifying Mr. Livingston with the car from which shots were subsequently fired was so damaging to the defense that a limiting instruction would not suffice to avoid that prejudice. Identification of the shooter was the central issue in the case. This Court has recognized

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[72] If the defense counsel had been given an opportunity to argue, he could have explained that the taking of clothes and "stuff" from the car and transporting them to a friend's apartment was not relevant to the subsequent shooting.

that some statements may be so prejudicial by relating to a central issue that a limiting instruction will not suffice to offset that prejudice. (*People v. Bell* (2007) 40 Cal.4th 582, 607-609; *People v. Coleman* (1985) 38 Cal.3d 69, 81; *People v. Hamilton* (1961) 55 Cal.2d 881, 894.)[73]

The court's prompt ruling gave defense counsel no opportunity to argue his objection. (6 RT 1192.) But since defense counsel's earlier objection to the Markuis Walker videotape had been denied (6 RT 1089-1090), it was clear this objection, no matter its grounds, would also be denied. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1007.) Further objection was futile, and therefore does not preclude raising this argument on appeal. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27; *People v. Hillery* (1965) 62 Cal.2d 692, 711-712.)

There is no dispute as to what was said or that the person who made the statement was not identified. The only issue is whether admission of the testimony was prejudicial and an abuse of discretion, and whether its admission denied Mr. Livingston due process under the federal Constitution.

The admission of the testimony is reviewable for abuse of discretion.

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[73] To the same effect in federal court, see *Bruton v. United States* (1968) 391 U.S. 123, 126, 128, 129 [quoting Mr. Justice Jackson's concurring opinion in *Krulewich v. United States* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed.2d 790]: "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

(*People v. Alvarez* (1992) 14 Cal.4th 155, 203; *People v. Rowland* (1992) 4 Cal.4th 238, 264.)

B. ADMISSION OF THE TESTIMONY WAS AN ABUSE OF DISCRETION; THE PREJUDICE WAS NOT CURABLE BY THE LIMITING INSTRUCTION.

The weakness of other identifications of Mr. Livingston as the shooter on October 8 have already been explored. (See Argument IVB3&C, *ante*.) This statement supported those identifications by asserting Mr. Livingston, "Goldie," was in the car. It could not be attacked because the person making the statement was not present to be subjected to cross-examination, nor was his identity revealed. There was no live witness on the stand who could be questioned to determine whether he or she meant Mr. Livingston when he referred to "Goldie," or whether he or she meant the other "Goldie" known to Mr. Hebrard (7 RT 1261, 1272), or still a third person. There was no one to question as to the basis for their knowledge of whichever "Goldie" was referred to, or even whether it referred to a person in the car or someone else seen in the street. There was no one to question as to the opportunity for observation. In short, there was no way for the defense to challenge the accuracy of this purported identification.

Moreover, as this Court recognized in *Bell*, *supra*, sometimes a limiting instruction is not effective, for example, when it will be difficult to

separate proper and improper uses. (*Bell, supra*, 40 Cal.4th at p. 609.) In this case the court told the jurors that the statement was offered only to explain conduct and not for the truth of the matter asserted. (6 RT 1192.) But no explanation was made by the court or the prosecutor as to what that connection was and the conduct, if any, to which it related.

That not considering the words for the truth of the matter asserted -- that "Goldie" was in the car -- was very difficult was shown in the prosecutor's own failure to abide by the justification he had given for the testimony. Knowing what testimony he intended to introduce, in his opening statement he described the scene and highlighted the danger to the group being forced to travel on foot through hostile gang territory, and stated: "I believe that more -- more than one -- possibly only one of the people in the car knows this car, knows--knows who is in it, knows it's a Park Village Crip gang member named Goldie." (6 RT 1137.) The prosecutor in his opening statement did not relate that anticipated identification to any subsequent conduct by the group or by the unknown speaker.

In his closing argument on the merits, the prosecutor again referred to that identification for its truth, not for any explanation it may have provided for any conduct. "What was the opportunity or ability to see or hear? Well, they are at Compton Boulevard, and they see the vehicle there. Some of

them do. It's an easily recognizable vehicle with an easily recognizable person who drives the vehicle." (14 RT 2765.)

When the prosecutor cannot distinguish between the purpose for which he introduced testimony and the truth of the matter asserted, this Court has accepted that as evidence that jurors cannot be expected to recognize and abide by that distinction. "If the trained legal mind of the prosecutor could not limit the declarations to the limited purpose allowed by law, how was the jury to accomplish this almost impossible bit of mental gymnastics?" (*People v. Hamilton* (1961) 55 Cal.2d 881, 899.) "Either the prosecutor was deliberately flaunting the limitations placed by the court on the evidence...or he found it impossible to indulge in the mental maneuvers required by the limiting instruction. In either event, it was error, and error of a most serious nature." (*Id.*, 55 Cal.2d at p. 900. See also, *People v. Coleman* (1985) 38 Cal.3d 69, 94.)

C. ADMISSION OF THIS TESTIMONY DENIED MR. LIVINGSTON DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE LACK OF IDENTITY AS TO THE DECLARANT RENDERED THE STATEMENT TOTALLY UNRELIABLE AND NOT SUBJECT TO CROSS-EXAMINATION.

The statement by the unknown declarant was not a "testimonial statement," as understood in *Crawford* and in *Davis v. Washington* (2006)

547 U.S. 813. As actually used by the prosecutor, and very likely by the jurors, however, it was hearsay: an out-of-court statement offered to prove the truth of the matter stated. (Evid. Code, sec. 1200, subd. (a).) The issue is whether the reliability analysis of *Ohio v. Roberts* (1980) 448 U.S. 45 [100 S.Ct. 2531, 65 L.Ed.2d 597] remains viable for nontestimonial hearsay statements.

Our highest court has determined that the Confrontation Clause does not apply to non-testimonial statements. (*Davis v. Washington*, 547 U.S. at p. 821; *Whorton v. Bockting* (2007) 549 U.S. 406, 413-414 [127 S.Ct. 1173, 167 L.Ed.2d 1].) From that conclusion, the California Supreme Court has extrapolated that a non-testimonial statement need not be analyzed under *Ohio v. Roberts* before it may be admitted. (*People v. Cage* (2007) 40 Cal.4th 965, 981, fn. 10.) The conclusion that a non-testimonial statement need not undergo Confrontation Clause analysis, however, should not be decisive in whether the statement should undergo a due process analysis before admission. The clauses protect two different interests. Consequently, this Court is requested to consider the following comments as pertinent to determine whether the hearsay statement of this unknown declarant denied due process in its admission against Mr. Livingston.

First, has the United States Supreme Court overruled *Ohio v. Roberts*

in its entirety? In *Davis v. Washington*, the Supreme Court stated: "We overruled Roberts in Crawford by restoring the unavailability and cross-examination requirements," (547 U.S. at p. 825, fn. 4), but that was discussing testimonial statements. In *Whorton v. Bockting* (2007) 549 U.S. 406, 413-414, the Supreme Court again spoke of *Crawford* overruling *Roberts*, but in the context of testimonial statements. (See *United States v. Thomas* (7th Cir. 2006) 453 F.3d 838, 844, fn. 2.)

Justice Scalia, who wrote the majority opinions in both *Crawford* and *Davis*, earlier joined Justice Thomas in a concurring opinion to say: "Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them." (*White v. Illinois* (1992) 502 U.S. 346, 363-364 (Thomas, J., with Scalia, J., concurring).) Consequently, some courts have stated: "Where a hearsay statement is found to be nontestimonial, we continue to evaluate the declaration under *Ohio v. Roberts*...." (*United States v. Thomas*, *supra*, 453 F.3d at p. 844. See also, *United States v. Johnson* (E.D. Mich. No. 05-80025, Aug. 23, 2007) 2007 U.S. Dist. LEXIS 62035, p. 9, fn. 4; *United States v. Lin* (N.D. Cal. No. CR-01-20071-RMW, Jan. 5, 2007) 2007 U.S. Dist. LEXIS 3713, pp. 3-5.)

Past decisions of the United States Supreme Court have linked reliability both with due process and the possibility of cross-examination in Reliability of identification was a concern of the Supreme Court when it determined proper procedures for lineup if the identification evidence is to be permitted in evidence. "[R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stoval confrontations." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114. See also, *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.) Key in determining whether due process was accorded is whether "[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification...." (*Manson v. Brathwaite*, 432 U.S. at p. 113, fn. 14.)

In the instant situation, no cross-examination to delve into the identification capabilities of the witness was possible since the declarant's identity was not known. Indicia of reliability are totally absent. Admission of such testimony denies due process.

D. A REASONABLE DOUBT OF PREJUDICE EXISTS.

As a violation of federal constitutional due process, harmless error is measured by the *Chapman* test that reversal must follow unless it can be said that the error was harmless beyond a reasonable doubt. (*Chapman v.*

California (1967) 386 U.S. 18, 24.) The weakness of the identification of Mr. Livingston as the shooter from the car on October 8, 1998, was explained in an earlier section (Argument IVB3&C, *ante*). In light of the weakness of the properly admitted identification evidence, the prejudicial effect of giving the jury information, even in the guise of a non-hearsay statement, that someone at the scene of the shooting had identified the man in the Cadillac as Mr. Livingston is manifest. The same reasoning applies in this instance and is adopted and incorporated herein.

VI

IN PROVIDING A LOWER BURDEN OF PROOF FOR CIRCUMSTANTIAL EVIDENCE TO PROVE SPECIFIC INTENT OR MENTAL STATE THAN FOR USE OF CIRCUMSTANTIAL EVIDENCE GENERALLY, AND AGAIN FOR USE OF CIRCUMSTANTIAL EVIDENCE TO PROVE THE REQUIRED MENTAL STATE FOR SPECIAL CIRCUMSTANCES THAN FOR PROVING SPECIAL CIRCUMSTANCES GENERALLY, THE COURT DENIED MR. LIVINGSTON HIS RIGHTS TO TRIAL BY JURY AND DUE PROCESS, AND TO HEIGHTENED RELIABILITY, UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE ONE, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

A. INTRODUCTION

The jurors were instructed per CALJIC No. 2.01 (Sufficiency of Circumstantial Evidence – Generally) and No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State). (14 RT 2554-2555; 24 CT 6211-6212.) The jurors were also instructed per No. 8.83 (Special Circumstances – Sufficiency of Circumstantial Evidence – Generally) and No. 8.83.1 (Special Circumstances – Sufficiency of Circumstantial Evidence to Prove Required Mental State). (14 RT 2591-2593; 24 CT 6264-6265.)

The difference in language between 2.01 and 2.02 and again between 8.83 and 8.83.1 is striking. No. 2.01 contains the language "before an

inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, *each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.*" (Emphasis added.) Similar language is found in No. 8.83 to require findings of reasonable doubt to support each inference before a true finding of a special circumstance.

No similar language is found in No. 2.02 or No. 8.83.1 (as noted above, the circumstantial evidence instructions addressing specific intent and mental state) to address their respective specific intents or mental states. Nothing in Nos. 2.02 and 8.83.1 requires that the facts or circumstances upon which an inference of a required specific intent or mental state rests, be found beyond a reasonable doubt.

This reduced burden of proof denied Mr. Livingston his rights to trial by jury and to due process under the federal and state constitutions. No objection to these instructions was made at trial.

B. THE ISSUE HAS BEEN PRESERVED FOR APPELLATE REVIEW AND STANDARD FOR REVIEW.

Mr. Livingston may raise this issue on appeal despite his failure to object below because the instructions affected his substantial rights. (Penal Code, sec. 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Instructional error is reviewed under the independent, de novo

standard of review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

C. DISCUSSION.

1. CALJIC Nos. 2.02 and 8.83.1 Permit Reduced Standard of Proof When Specific Intent or Mental State Is Proved by Circumstantial Evidence.

It might be argued that jurors should assume that the more general language of No. 2.01 should also be applied to the more specific findings addressed in No. 2.02. The same could be argued for 8.83 and 8.83.1. Yet in other contexts, such as statutory construction, the specific is to prevail over the general. (*Santa Clara County v. Deputy Sheriffs' Assn.* (1992) 3 Cal.4th 873-883.) Moreover, the Use Notes under both Nos. 2.01 and 2.02 state that "CALJIC 2.01 and CALJIC 2.02 should never be given together." The Use Notes under No. 8.83 and No. 8.83.1 both refer back, respectively, to the Use Notes under 2.01 and No. 2.02. This reflects past decisions. Where circumstantial evidence relates only to specific intent or mental state, No. 2.02 should be given rather than No. 2.01. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Honig* (1996) 48 Cal.App.4th 289, 340-341.) It was not contemplated that both 2.01 and 2.02 would be given as a set, and the same is true for 8.83 and 8.83.1.

Jurors may instinctively apply the statutory interpretation maxim *expressio unius est exclusio alterius* to the court's instructions. In *People v.*

Salas (1976) 58 Cal.App.3d 460, the Court of Appeal found the giving of CALJIC No. 2.02 for the specific intent element of robbery without giving it for the specific intent element of intent to commit great bodily injury was prejudicial error. Because of the instructional omission, the jury could fail to consider whether the evidence of specific intent to commit great bodily injury was irreconcilable with any other rational conclusion. (*Salas*, 58 Cal.App.3d at pp. 474-475.) In 1959 this Court reasoned similarly. "The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." (*People v. Dewberry* (1959) 51 Cal.2d 548, 557.)

Specific intent and mental state were also addressed in CALJIC Nos. 3.31 and 3.31.5, respectively. Those instructions require a union or joint operation of the act or conduct and the specific intent or mental state, and inform the jurors that the crime is not committed unless the specific intent or mental state exists. (14 RT 2575; 24 CT 6243, 6244.) Numbers 3.31 and 3.31.5 also do not instruct the jurors that the specific intent or mental state

need be found beyond a reasonable doubt, nor that the facts which underlie those inferences must be found beyond a reasonable doubt.

The omission of reasonable doubt from Nos. 2.02 and 8.83.1 permitted the jurors to find the elements of specific intent or mental state, wherever required, without finding their underlying facts beyond a reasonable doubt.

2. The Reduced Burden of Proof Denies Mr. Livingston Rights Under the State and Federal Constitutions.

In this case the jurors may reasonably have concluded that because Nos. 2.02 and 8.83.1 do not refer to reasonable doubt, their findings of fact supporting inferences of specific intent or of mental state need not be made by the constitutionally required level of proof. Yet required specific intents or mental states are elements just as indispensable to a guilty finding of most of the counts against Mr. Livingston as any other element of the offenses charged. Each and every element must be found beyond a reasonable doubt or due process is denied. (*In re Winship* (1970) 397 U.S. 358, 363, 364; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.)

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Mr. Livingston's state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and

14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also, *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.) Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal Constitution (5th, 8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 633-646; see also, *Kyles v. Whitley* (1995) 514 U.S. 419, 422, quoting *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Further, because the error arbitrarily violated Mr. Livingston's state created right to proper instruction on the burden of proof, under the state Constitution and the Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also, *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.)

D. PREJUDICE.

1. Scope of Error.

This error pervaded most of the counts and allegations against Mr. Livingston. Mr. Livingston was charged and found guilty on two counts of

first degree murder, three counts of attempted willful, deliberate, and premeditated murder, two special circumstances, and special allegations of felonies committed for the benefit of street gangs. This error figured in all these verdicts.

The jurors were instructed in the terms of CALJIC Nos. 8.10 and 8.11, that murder is a killing done with malice aforethought (No. 8.10, 14 RT 2578; 24 CT 6249), and that malice aforethought is the "required mental state [which] must precede rather than follow the act." (No. 8.11, 14 RT 2579; 24 CT 6250.) "Malice is express when there is manifested an intention unlawfully to kill a human being." (*Ibid.*)

The jurors were also instructed that murder of the first degree is "[a]ll murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought...." (CALJIC No. 8.20, 14 RT 2580-2581; 24 CT 6251-6252.) "Willful... means intentional." (*Ibid.*) "'[D]eliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*Ibid.*) CALJIC No. 8.20 thus describes the mental processes required for this element to be satisfied.

The definitions of willfulness, deliberation, and premeditation were repeated in the jury instructions for the attempted murders alleged in this

case (see CALJIC No. 8.67, 14 RT 2583; 24 CT 6255-6256), with one very significant addition. The definition of "willful, deliberate, and premeditated," when applied to attempted murder also informed the jurors that "[t]he People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true." (*Ibid.*) If similar language had been included for the definition of wilful, deliberate and premeditated for first degree murder, it would have helped dispel the implication of a lessened burden of proof found in CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Intent or Mental State). Instead, the presence of that language in the attempted murder instruction, combined with its absence in the instruction on first-degree murder, supports the implication of No. 2.02 that circumstantial evidence of those elements was subject to a lessened burden of proof on the counts alleging first degree murder.

Nor does the additional language in CALJIC No. 8.67 save the attempted murder verdicts from error, because malice aforethought, defined as "a specific intent to kill unlawfully another human being," is an element of attempted murder. (CALJIC No. 8.66, 14 RT 2582; 24 CT 6254.) The additional language about reasonable doubt found in No. 8.67 for the element of "willful, deliberate, and premeditated" is absent from No. 8.66

regarding malice aforethought. Therefore, the attempted murder verdicts remain faulty.

The instruction on the special circumstance of lying in wait includes the requirement that the duration of the lying in wait must "show a state of mind equivalent to premeditation or deliberation." (CALJIC No. 8.81.15, 14 RT 2588; 24 CT 6262-6263.)

The special circumstances of multiple murders does not directly articulate a required specific intent or mental state. However, each murder which underlies it, whether first or second degree, does have a required specific intent or mental state. If the error in the murder instructions is faulty, this special circumstance also must fall.

The elements for the allegation of felonies committed for the benefit of street gangs includes "the specific intent to promote, further, or assist in any criminal conduct by gang members...." (CALJIC No 6.50, 14 RT 2576-2577; 24 CT 6246-6247.)[74]

In each of these cases, the specific intent and mental states required for conviction had to be inferred from circumstantial evidence. There were no express statements of intent directly addressing these elements.

2. The Constitutional Error Is Structural and Requires Reversal Per Se.

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[74] CALJIC No. 6.50 is now CALJIC No. 17.24.2.

The Due Process Clause requires the "prosecution [to] bear[] the burden of proving all elements of the offense charged [citations omitted], and [to] persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements [citations omitted]." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Instructions which permit jurors to find guilt, truth of special circumstances, or special allegations on a degree of proof below reasonable doubt violate the Due Process Clause. (*Cage v. Louisiana* (1990) 498 U.S. 39, 41.) When a jury verdict is rendered on a standard other than beyond a reasonable doubt, there is no jury verdict within the meaning of the Sixth Amendment to review for harmless error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-281.)

Because CALJIC No. 2.02 and 8.83.1 permitted the jury to find Mr. Livingston guilty following deliberations on a standard less than reasonable doubt, the instructional error is structural and reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280; see *People v. Johnson* (2004) 119 Cal.App.4th 976.)

VII

THE COURT'S INSTRUCTIONS DISTINGUISHING THE TREATMENT OF DIRECT AND CIRCUMSTANTIAL EVIDENCE DENIED DUE PROCESS AND RIGHT TO TRIAL BY JURY UNDER THE STATE AND FEDERAL CONSTITUTIONS.

In Mr. Livingston's case, at the prosecution's request, the court instructed the jurors with the terms of CALJIC Nos. 2.00,[75] 2.01,[76] 2.02,[77]

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[75] "Evidence 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. [Par.] Evidence is either direct or circumstantial. [Par.] Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact. [Par.] Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. [Par.] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [Par.] It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other." (CALJIC No. 2.00, 14 RT 2553-2554, 24 CT 6210.)

[76] "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but, two, cannot be reconciled with any other rational conclusion. [Par.] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [Par.] Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt. [Par.] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable

8.83,[78] and 8.83.1.[79] (24 CT 6210-6212, 6264-6265.) No objection was

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interpretation and reject the unreasonable." (CALJIC No. 2.01, 14 RT 2554-2555, 24 CT 6211.)

[77] "The specific intent and mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in counts I, II, III, IV, V, VIII, IX, and XII or find the allegation of gang crime under Penal Code section 186.22(b) to be true, unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent and mental state but, two, cannot be reconciled with any other rational conclusion. [Par.] Also, if the evidence as to any specific intent and mental state permits two reasonable interpretations, one of which points to the existence of the specific intent and mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent and mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CALJIC No. 2.02, 14 RT 2555-2556, 24 CT 6212.)

[78] "You are not permitted to find a special circumstance alleged in this case to be true based upon circumstantial evidence unless the proved circumstance is not only, (1), consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt. In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.

"If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CALJIC No. 8.83, 14 RT 2591-2592, 24 CT 6264.)

[79] "The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding

made to these instructions.

A. DISCUSSION

1. The Issue Has Been Preserved for Appellate Review.

Mr. Livingston may raise this issue on appeal despite his failure to object below because the instructions affected his substantial rights. (Penal Code, sec. 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

2. The Distinctions Between Direct and Circumstantial Evidence.

No. 2.00 defines direct evidence and circumstantial evidence and states that neither type of evidence is entitled to greater weight than the other. For circumstantial evidence alone, Nos. 2.01 and 2.02 both illustrate the application of the reasonable doubt rule: any fact or circumstance necessary to establish guilt must, itself, be proved beyond a reasonable doubt; the proved circumstances must not be reconcilable with any rational

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circumstances are not only, (1) consistent with the theory that the defendant had the required specific intent or mental state but, (2) cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to any specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.

"If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CALJIC No. 8.83.1, 14 RT 2592-2593, 24 CT 6265.)

conclusion other than guilt; and if there are two reasonable interpretations of that circumstantial evidence, one of which points to innocence, that interpretation must be adopted. Nos. 8.83 and 8.83.1 repeat those rules for circumstantial evidence in proof of special circumstances.

None of these explanations is applied to direct evidence. Nothing states that any of the inferences underlying the direct evidence must be proved beyond a reasonable doubt. No instruction states that if the direct evidence permits two rational conclusions or two interpretations, one of which does not lead to guilt, that must be adopted. In other words, two different standards are set forth for the treatment of direct and circumstantial evidence, despite the words of No. 2.00 that neither is entitled to greater weight than the other.

Circumstantial evidence instructions are given to "clarify the application of the general doctrine requiring proof beyond a reasonable doubt as to a case in which the defendant's guilt must be inferred from a pattern of incriminating circumstances." (*People v. Gould* (1960) 54 Cal.2d 621, 629. See also, *People v. Rayol* (1944) 65 Cal.App.2d 462, and *People v. Hatchett* (1944) 63 Cal.App.2d 144, 152-155, both cited at *Gould, supra.*) These rules for application of the reasonable doubt standard are omitted for direct evidence.

3. Treatment Under Federal Law.

Federal law does not distinguish between direct and circumstantial evidence in explaining how to apply the reasonable doubt standard. In reviewing the denial of a defendant's request for an instruction that a government circumstantial evidence case must exclude every reasonable hypothesis other than guilt, the United States Supreme Court found some support among federal cases, but decided: "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect [citations omitted]. [Par.] Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." (*Holland v. United States* (1954) 348 U.S. 121, 139-140.)

As the Ninth Circuit later explained: "The Supreme Court did more than reject the particular instruction before it: it clearly stated that no

instruction is to be given distinguishing the manner in which direct and circumstantial evidence are to be weighed. Since circumstantial and testimonial evidence are indistinguishable as far as the jury's fact-finding function is concerned, all that is to be required of the jury is that it weigh all of the evidence, direct or circumstantial, against the standard of reasonable doubt." (*United States v. Nelson* (9th Cir. 1969) 419 F.2d 1237, 1241.)[80]

Federal cases approving in a jury charge the "two reasonable hypotheses" language used in CALJIC Nos. 2.01 and 2.02 have approved it in a context clearly applying to all evidence, direct and circumstantial, while explaining reasonable doubt. (See e.g., *United States v. Cleveland* (1st Cir. 1997) 106 F.3d 1056, 1062-1063 ["Of course, a defendant is never to be

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[80] It should be pointed out that "direct evidence" in federal decisions is broader than in California decisions. The Supreme Court used "testimonial" as synonymous with "direct" in *Holland*. Further examples of "testimonial" as "direct" may be found in *Easley v. Cromartie* (2001) 532 U.S. 234, 254 "[Testimony of a state legislator before a state legislative redistricting committee] is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases."] and in *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 385 ["[S]tatements of foreign powers necessarily involved in the President's efforts to comply with the federal Act, indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act."]

California law limits "direct evidence" to that evidence which directly proves an element of the offense, not requiring further inferences. An element is the only fact which would pass the strain of relevance without inferences. (See Evidence Code, sec. 410, CALJIC No. 2.00, and especially CALCRIM No. 223 ["Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge."]) This is not explained to the jury, however.

convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions -- one that a defendant is guilty as charged, the other that the defendant is not guilty -- you will find the defendant not guilty."], aff'd., *Mucarello v. United States* (1998) 524 U.S. 125 [118 S.Ct. 1911, 141 L.Ed.2d 111]; *United States v. James* (9th Cir. 1978) 576 F.2d 223, 227, text & fn. 3 ["So a reasonable doubt exists whenever, after careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. And so, if you view the evidence in this case as reasonably permitting either of two conclusions, one pointing to innocence and the other pointing to guilt, you must necessarily adopt the conclusion pointing to innocence, because so long as that is a reasonable conclusion and it exists, it would be impossible to find guilt beyond a reasonable doubt, because the very existence of a reasonable alternative on the other side would preclude you from finding guilt beyond a reasonable doubt."]; *United States v. Wolfe* (5th Cir. 1980) 611 F.2d 1152, 1155 text and fn. 5.)

4. The California Rules Diminish the Reasonable Doubt Standard for Direct Evidence.

A California jury told to apply particular rules of interpretation to circumstantial evidence, but not to direct evidence, may legitimately

conclude they need not regard the latter evidence with the same rigor. Jurors may instinctively apply the statutory interpretation maxim *expressio unius est exclusio alterius* to the court's instructions. In *People v. Salas* (1976) 58 Cal.App.3d 460, the Court of Appeal found the giving of CALJIC No. 2.02 for the specific intent element of robbery without giving it for the specific intent element of intent to commit great bodily injury was prejudicial error. Because of the instructional omission, the jury could fail to consider whether the evidence of specific intent to commit great bodily injury was irreconcilable with any other rational conclusion. (*Salas*, 58 Cal.App.3d at pp. 474-475.) In 1959 this Court reasoned similarly. "The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." (*People v. Dewberry* (1959) 51 Cal.2d 548, 557.)

It may be argued that the qualification in the definition of direct evidence, "if found to be true," avoids this problem. The same qualification is also found, however, in the definition of circumstantial evidence. But

circumstantial evidence follows up with an explanation of the operation of inference and alternative possible constructions and interpretations. No such explanation is applied to direct evidence. Yet direct evidence, if true, rests upon a base of various inferences and factual determinations, at least implicitly, just as does circumstantial evidence. (See Jones, Evidence, sec. 11:6 at p. 268, text & fn. 33.) As the United States Supreme Court recognized, both circumstantial and direct evidence may point to wholly incorrect conclusions. (*Holland*, *supra*, 348 U.S. at p. 140.) The result is, as the United States Supreme Court stated, "confusing and incorrect." (*Holland*, *supra*, 348 U.S. at p. 140.)

Mr. Livingston's jury was instructed how it must consciously decide to accept or reject various items of circumstantial evidence, but was left open to abandon that rigorous standard when dealing with direct evidence. This Court has previously commented, in another instructional contest, upon "the danger that a jury exposed to a welter of conflicting evidence may drift to a verdict without proper appreciation that such a verdict necessarily entails rejection of some evidence in favor of other evidence." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) The result is a standard of proof for direct evidence reduced below that prescribed for circumstantial evidence.

5. Federal Constitutional Error and Standard of Review.

Instructional error is reviewed under the independent, de novo standard of review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

It is axiomatic that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) This requires the state to prove "every ingredient of an offense beyond a reasonable doubt...." (*Sandstrom v. Montana* (1979) 442 U.S. 510, 524.) Moreover, it is a violation of due process for a statutory scheme to lessen the prosecution's burden of proving every element of the charged offense. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 699.) It has been long and widely recognized that the prosecution's burden to prove guilt beyond a reasonable doubt is equally applicable whether the evidence is direct, circumstantial or a combination of both. (See CALJIC No. 2.00.)

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Mr. Livingston's state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also, *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia*

(1979) 443 U.S. 307.) Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal Constitution (8th and 14th Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 633-646; see also, *Kyles v. Whitley* (1995) 514 U.S. 419, 422, quoting *Burger v. Kemp* (1987) 483 U.S. 776, 785.) Further, because the error arbitrarily violated Mr. Livingston's state created right to proper instruction on the burden of proof, under the state constitution and the Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also, *People v. Sutton* (1993) 19 Cal.App.4th 795, 804.)

B. PREJUDICE

1. Test for Harmless Error.

The constitutional error outlined above, by providing a standard of proof for the jury below a reasonable doubt if the jury relied upon direct evidence, requires reversal per se. Since there is not a verdict of guilt beyond a reasonable doubt against which the effect of the error may be measured, it is impossible for an appellate court to conclude that the verdict

of guilty beyond a reasonable doubt would not have been different absent the constitutional error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

If a harmless error test if applied, however, it must be that prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24, that the prosecution prove beyond a reasonable doubt that the error did not affect the verdict.

2. Direct Evidence.

In its opening argument on the merits the prosecution emphasized the testimony of Rodolfo Bombarda and Kim Grant, the only witnesses who identified Mr. Livingston as the shooter for the murders on January 3, 1999, as direct evidence.[81]

a. Testimony of Rodolfo Bombarda.

Mr. Bombarda testified he was seated at the desk at the far end of the guard shack filling out his reports when the perpetrator came to the door and

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[81] "Again, when dealing with what people are thinking at certain times without being in their heads or, you know, you need to use circumstantial evidence, which as we know is just as good as direct evidence, the difference is direct evidence. Kim seeing Goldie shoot or Kim hearing the shots where Goldie was standing and then Goldie ran away. The circumstantial evidence is if she heard shots and they came from a certain area, she hears shots in a certain area and she sees something in Goldie's hands, she walks in. She looks in and she sees what she sees.

"The circumstantial evidence is Goldie did that. The direct evidence is that she saw him there and heard the shots and so forth. Mr. Bombarda has direct evidence as to what happened. He sees the whole thing happen. There is no circumstantial evidence involved there." (Opening arg., prosecutor, 14 RT 2683-2684.)

shouted "Mother f-----." (8 RT 1601, 1626; 9 RT 1649.) Mr. Bombarda testified that there was delay of about two seconds while he took off his prescription reading glasses and placed them on the desk, stood up, and turned around. Then the shooting started. (9 RT 1650.)

Mr. Paz, seated right next to the door on the left as one enters (EXs 30, 60; 8 RT 1597-1598), was shot once in the head, the bullet entering the left portion of the mouth. (11 RT 2066.) Mr. Conner, seated right next to the door on the right as one enters, was shot once, the bullet entering his upper left cheek and exiting his middle right cheek. (EXs 30, 60; 8 RT 1597-1598, 1890.)

The sequence of events raises several issues the jurors should have considered and resolved before accepting Mr. Bombarda's direct evidence identifying Mr. Livingston.

First, did Bombarda really pause to take off his reading glasses and place them on the desk before standing? The glasses were not found in the shack during the subsequent search and seizure of evidence by the police. Nor did the ambulance crew testify to recognizing the glasses as belonging to Mr. Bombarda rather than one of the other guards, picking them up and taking the glasses to the hospital with Mr. Bombarda. The glasses were next seen when Mr. Bombarda was wearing them during his interview by the

police in the hospital. Mr. Bombarda thought he took the glasses with him to the hospital, though he does not recall returning to the desk (after being shot six times) to retrieve his glasses. (9 RT 1651.)

If Mr. Bombarda did not take off his reading glasses, could he really identify the perpetrator as Mr. Livingston, or did he merely note that the perpetrator and Mr. Livingston merely share certain characteristics, such as light skin and a blond pony tail?

Mr. Bombarda also testified that he was facing the door at the time the shooter shouted. (8 RT 1601.) Yet he also testified that he was seated at the desk at the far end of the guard house writing his reports. (8 RT 1626, 9 RT 1648-1649.) If he was seated at the desk writing a report, his back would have been to the door. (See EX 60.) When placing his position within the guard house on Exhibit 30 (8 RT 1597), Mr. Bombarda indicated he was sitting at the desk with his line of sight to the door blocked by a metal filing cabinet. (See EX 30.)

Were there really two seconds between the shout and the firing, giving Mr. Bombarda time to take the actions he testified and still look at the perpetrator? If so, why did neither of the guards closest to the door seek to grab the weapon?

Was the perpetrator perhaps not inside the door, but back aways and

out of their reach? If the latter, the perpetrator's face would be shadowed from the inside lights by the door jamb, and he would only be backlit by the flood lights behind him on the apartment buildings. How would this have affected Mr. Bombarda's identification?

When Mr. Bombarda posed prosecutor Stirling where Mr. Bombarda said the shooter was, he placed Mr. Stirling at least the door's width outside the entrance. (EX 31; 8 RT 1600, 1602.) There was a light fixture in the ceiling outside and above the entrance, but the three bulbs in that fixture were turned in directions away from the doorway. (EX 46.) The face of anyone standing outside the entrance and under that fixture would be in shadow.

The perpetrator was holding and shooting a weapon that Mr. Bombarda described in some detail (8 RT 1603-1604), and testified as resembling the sample produced by the prosecutor. (EX 32B; 8 RT 1603.) This opens the question of weapons focus and the reduction of the witness' ability to later recall details other than the weapon.[82]

These were all issues which should have been addressed and resolved

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[82] Wikipedia, the free encyclopedia, defines "Weapon focus is a factor affecting the reliability of eyewitness testimony. Weapon focus signifies a witness to a crime diverting his or her attention to the weapon the perpetrator is holding, thus leaving less attention for other details in the scene and leading to memory impairments later for those other details." (en.wikipedia.org/wiki/Weapon_focus, on July 7, 2009.)

by the jury before deciding Mr. Bombarda's testimony was accurate. The "two rational conclusions/reasonable hypotheses" language from the circumstantial evidence instructions would have forced the jurors' attention to consideration of all the issues necessary before they could correctly conclude not only that Mr. Bombarda believed what he was testifying, but that it was accurate beyond a reasonable doubt. Those rules were omitted from the court's instructions on direct evidence, however.

b. Testimony of Kim Grant

Kimberly Grant, then a resident of the Wilmington Arms, also identified David Livingston as the perpetrator. Viewing her testimony most charitably, she returned to the complex with her boyfriend and 10 year-old son shortly before the shooting. (9 RT 1715-1716.) David Livingston in his green Cadillac entered the complex immediately in front of them or after them, with Freddie Sanders and a girl in his car, and parked directly in front of where they parked her boyfriend's van. (9 RT 1722-1723, 1826-1827.) Ten or twenty minutes after she and her son went up to her mother's apartment, she heard a sound and came back down to check on the status of her boyfriend's van. (9 RT 1748.) Outside, she heard a clicking sound and walked toward the main gate. (9 RT 1748.) She saw the back of a person standing in the door of the guard shack, wearing a black leather, waist-length

jacket over a white tank top. When he turned, she saw his face, long hair and no cap, with something in this hand. (9 RT 1818-1820.) She saw Mr. Livingston stepping off the curb by the guard shack. (9 RT 1751-1752.) She saw a small gun in his hand. (9 RT 1820.) Then she saw him walk rapidly away, out of the apartment complex on Laurel Street. (9 RT 1763-1764.) She also saw codefendant Freddie Sanders facing into the apartment complex, and saw him leave toward the back of the complex. (9 RT 1766.) She saw a third person, either Samoan or white with long hair, standing behind Freddie. The third person went out the gate the cars go in, but she does not know if the gate was open or if he climbed the gate. (9 RT 1806, 1812.) She continued on to the guardhouse, saw that the guards had been shot, heard one call to her for help. She ran back to her apartment and called 9-1-1. (9 RT 1768-1770.)

A few days or weeks, or the day before the shooting, Ms. Grant saw Goldie and Freddie in conversation, and heard Goldie telling Freddie, "Don't be no punk." (9 RT 1839-1840, 1846.)

Ms. Grant's testimony and statements were notable for the contradictions, ambiguities, and the extent to which she had to be led to give statements favorable to the prosecution. She testified at trial, and the jury was shown videotapes and given transcripts of those videotapes from earlier

interviews by the detectives on January 14, 1999, and by the prosecutor on March 8, 2000. (EX 93 A&B - interview by police detectives on January 14, 1999; EXs 94 A&B - interview by prosecutor Stirling on March 8, 2000.)

(1) When did Ms. Grant arrive at the complex?

At trial she first testified that she got back shortly before the shootings, which occurred around 5 a.m. on January 3, 1999. (9 RT 1781.) Shortly thereafter, she said she returned to the complex around 3 or 4 in the morning. (9 RT 1782.) She had been gone for three days. (9 RT 1783.) In her interview with the prosecutor on March 8, 2000, she stated she returned when it was almost 3 a.m. (3 CT 819), or approximately 3 a.m. (3 CT 832.)

The significance of when she arrived is the accuracy of her testimony that the shooting occurred shortly after she returned. It was well established that the shooting occurred at about 5 a.m. If she arrived at about 3 a.m., or even 4 a.m., much more happened between her arrival and the shooting, casting a doubt about her recitation of the events. What did she leave out and why?

(2) With whom did Ms. Grant arrive at the complex?

She testified that she arrived with her 10 year-old son and her boyfriend Kenneth. (9 RT 1715.) This is also what she told the prosecutor on March 8, 2000. (3 CT 819.) During her interview with the police

investigators on Jan 14, 1999, when asked who was with her, she made no mention of her son. (CT Supplemental III 12-13.) The van in which they rode varied with rainbow-colored on January 14, 1999 (CT Supplemental III 13) to pink with a blue top on March 8, 2000 (3 CT 820.)

(3) Did Ms. Grant's boyfriend stay in the complex?

Initially in her testimony she stated that her son and she got out of the car and went in the house. (9 RT 1748.) Much later, she qualified that boyfriend Kenny went in the house with her son and her. (9 RT 1785.) Later she explained that her boyfriend did not come out of the house until the next day. (9 RT 1822.) During her January 14, 1999, interview, she explained that they both went in the house. (CT Supplemental III 15, 19.) To the prosecution on March 8, 2000, she stated under oath that her boyfriend dropped them off at the door and then left. (3 CT 820, 832.)

Whether her boyfriend was present during the shooting would determine whether he was a witness of the events. If he was there, did he hear the noises Ms. Grant did? Did she ever tell him what she heard, why she was going outside, what she saw when she was outside? Contrary to her statement, did he ever go outside, either to accompany her or on his own?

He was not called as a witness because she refused to tell the detectives his last name. (CT Supplemental III 13.) During her interview on

March 8, 2000, as at trial, the prosecutor specifically asked only for the boyfriend's first name (3 CT 820, 8 RT 1715), and asked no question to clarify the contradiction between her sworn statement then that her boyfriend left right after dropping them off, and her statement to the detectives on January 14, 1999, that the boyfriend entered the apartment with them (3 CT 820).

(4) When did Ms. Grant talk with the guards?

She testified that she talked to the little Japanese guard while walking up to their parking lot. (9 RT 1787.) She told the police detectives on January 14, 1999, that she stopped to talk to the two guards outside at the front gate for five or ten minutes and then went and parked. (CT Supplemental III 11-15.) On March 8, 2000, she swore to the prosecutor that within a couple of hours after arriving back, she went to talk to the guards, who were alive then. (3 CT 821.)

The sworn statement to the prosecutor on March 8, 2000, omits any mention of talking the guards as she entered the gate, and places it within a couple of hours after returning and involving a special trip to the gate to speak with them. It also contradicts other statements that the shooting occurred shortly after her return.

(5) When did Mr. Livingston's Cadillac arrive, or leave, and who was with him?

She testified that "Goldie's" vehicle entered in front of them and parked in front of their van, in the parking lot by K building. (9 RT 1722-1723, 1747.) Later she testified that they were in front of "Goldie's" vehicle, that it parked on the side of K building and did not go into the parking lot of J building where they parked. (9 RT 1826-1827.) She saw them talking in front of their vehicle parked by K building. (9 RT 1828.) She saw "Goldie's" car go in and out a couple of times (9 RT 1784) or a few times. (9 RT 1845.) Inside the car was "Goldie," Freddie [Sanders], and a Samoan girl. (9 RT 1845.)

On January 14, 1999, she told the police detectives Mr. Livingston's car entered in front of them, and then turned around and left. (CT Supplemental III 12, 16-17.) Later she said she and her boyfriend had already parked their car when she saw "Goldie's" car coming through the front gates. (CT Supplemental III 53.) The car held only "Goldie" and Freddy. (CT Supplemental III 17.) She saw it leave through the gate, where it slowed down and then went through, or stopped for five minutes. (CT Supplemental III 17, 18, 53.)

This subject was not addressed by the prosecutor on March 8, 2000. (3 CT 10-57.)

(6) What was the sound that attracted Ms. Grant's

attention, and when and where did she hear it?

She testified that not 10 or 20 minutes after they arrived, she heard a noise and went out to check on her boyfriend's van. Once outside, she heard a click, click, click, like the noise that cars made going out the exit gate, but there were no cars. (9 RT 1748-1749.) Later she testified that after the entered their house, she heard clicking and went to her bedroom window. While looking out the bedroom window, she heard screaming and hollering, and somebody screaming "somebody help me." She walked out the door. (9 RT 1788, 1815.)

On January 14, 1999, she told the detectives that she went in the house, heard a noise, and came back out to check her boyfriend's car. As she was going to check the car, she saw people walking and heard a click, click, click. Then she ran back inside the house. This was about five in the morning. (CT Supplemental III 12.) Later she told the detectives she had been in the house a minute and heard click, click, click, like a car going out. But it wasn't a car; it was gun shots. (CT Supplemental III 19.) Still later she told the detectives that she was getting closer to the guard house, and that's when she heard the little click, click, click. (CT Supplemental 28.)

On March 8, 2000, she told the prosecutor that she had put her stuff in the house, had told her son to go into the house, and then started walking

toward the guard house because she kept hearing some noise, like hassling or hollering, like somebody was fighting or tussling, and then she heard the gunshots. All this started almost immediately upon her arrival back at the complex. (3 CT 821, 832.)

Aside from the problems these differing versions pose for her credibility in general, if she had been in her apartment when she heard the clicks, which she sometimes identified as gunshots, she could not have seen what she testified she saw as she approached the guard house; the shooter would have been long gone.

(7) How many people other than guards did Ms. Grant see?

She testified that she saw Mr. Livingston, Freddie Sanders, and a white person with long hair who looked like a Samoan. (9 RT 1750-1751, 1765-1766, 1800, 1806.) She described the same three people to the prosecutor on March 8, 2000. (3 CT 822, 824.) On January 14, 1999, she told the detectives that Mr. Livingston and Mr. Sanders were the only two people she saw. (CT Supplemental III 31.)

8. When and where did Ms. Grant see the perpetrators?

She testified that she first saw Mr. Livingston when he stepped down off the curb, two or three feet from the door, and then he went out the gate. (9 RT 1750-1751, 1762-1763.) Later, she testified that when she was close

to the mailboxes she saw someone standing in the door of the guard house with his back to her. She first thought it was one of the guards, but it turned out to be Mr. Livingston. (9 RT 1818-1819.) She saw Mr. Sanders near the guard shack, on the opposite side of the gate, facing in. (9 RT 1765-1766.) Later she said Mr. Sanders was inside the gate. (9 RT 1799.) She didn't see the Samoan until Mr. Sanders ran away. (9 RT 1806.)

On January 14, 1999, she told the detectives that she saw Mr. Livingston walking in from the exit gate, holding something that looked like a gun and pointing it towards the ground. (CT Supplemental III 29-30.) Earlier she had said she did not see Mr. Livingston walk up to the guard shack. (CT Supplemental III 28.) She saw Mr. Sanders standing outside in the front. (CT Supplemental III 30.)

On March 8, 2000, she told the prosecutor that she did not see any of the three guys shoot, but did hear shots as she got closer. (3 CT 824.) She saw Mr. Livingston standing by the one door, with a gun in his hand. (3 CT 822.) She saw Mr. Sanders by the corner, about four feet from Mr. Livingston. (3 CT 822.) She saw the Samoan standing by the window on the entrance side. (3 CT 822.)

(8) Where did the perpetrators go after the shooting?

Ms. Grant testified that Mr. Livingston left by the exit gate, running.

(9 RT 1837, 1839.) Mr. Sanders either ran to the back of the complex (9 RT 1833, 1839), or she could not see where he went once he left the guardhouse where the lights were. (9 RT 1811-1812.) The third person (white or Samoan) went out the entrance gate, but she didn't know if that gate was open. (9 RT 1812.) Later she testified that she saw two run out the gate, and she did not know where went the third one, whom she did not know. (9 RT 1830.) That would mean Mr. Sanders was one of the two that ran out the gate. Shortly thereafter, however, she reverted to her earlier testimony. Mr. Sanders ran towards the back and did not go out the gate with Mr. Livingston. (9 RT 1833, 1837.)

On January 14, 1999, she told the detectives that Mr. Livingston was the only person she saw leave, and he walked out the exit gate. (CT Supplemental III 21-22.)

On March 8, 2000, she swore to the prosecutor that, after the shots ended, she saw Mr. Livingston and the other one run out the gate, without specifying who was the other one or which gate, but implying two people together ran out the same gate. (3 CT 824.) Soon thereafter, she specified that Mr. Livingston walked out the exit gate first, towards the park. (3 CT 825.) Mr. Sanders left by the gate in the back. (3 CT 825.) The third guy went out the gate. (3 CT 825.)

(9) When was the earlier Livingston-Sanders conversation and who was present?

Ms. Grant testified that a few days before the shooting she saw Mr. Livingston and Mr. Sanders in a conversation in the parking lot of K building, but she didn't know what it was about. (9 RT 1839.) Then she testified that she heard the word "punk" and one girl was sitting in or on Mr. Livingston's Cadillac. (9 RT 1840-1841.) Subsequently, she explained that the conversation was about a week before the shooting. (9 RT 1846.)

She told the detectives on January 14, 1999, that she heard the conversation about three weeks from the shooting, and two girls were present. (CT Supplemental III 45.) The conversation included Mr. Livingston saying "Are you down to shoot this... Are going to be down there to shoot them mother fucker's." The two girls were Samoan and they were "down", in agreement, with Mr. Livingston. (CT Supplemental 47-49.) For the detectives, Ms. Grant identified a picture as one of the Samoan girls, said that her niece socialized with the girl, and that the girl was called "Baby," or "Little Baby." (CT Supplemental 50-51.)

For the prosecutor on March 8, 2000, Ms. Grant swore that she heard Mr. Livingston asking Mr. Sanders "is down on doing this? fuck them at the front." (3 CT 816.) From the reference to the front, Ms. Grant knew they could only be talking about the guards. (3 CT 816-817.) At first she denied

any girls were with the two men. After the prosecutor reminded her of her statements during the January 14, 1999, interview, she said she saw one girl in the car with them, but could not see her and did not know who she was. (3 CT 817-818.) She indicated to the prosecutor that this conversation occurred on January 2. (3 CT 815.) That would have been inconsistent with her absence from the complex on the night of January 2 (9 RT 1779), the end of a three day absence. (9 RT 1783.) Her testimony reverted to the conversation occurring a few days before the shooting. (9 RT 1839.)

(10) The threat to Ms. Grant after the shooting.

Mr. Grant testified that two days after the shooting, a white guy who looked Samoan and had long hair, had a gun in her mother's house. (9 RT 1772-1774.) She did not testify that the person was Mr. Livingston nor that the person said anything to her mentioning the shooting or warning her not to talk about the shooting, or that she was aware of any connection between the person and Mr. Livingston.

She did not mention this incident to the detectives during the January 14, 1999, interview. (9 RT 1776.)

On March 8, 2000, she told the prosecutor she did not know who pulled the gun on her in her mother's house, but that he had long hair and looked Samoan. (3 CT 828-829.) Again she did not identify the person or

anything he said as connected to Mr. Livingston.

(11) Explanations for contradictions in testimony.

A variety of explanations may be given for Ms. Grant, or were given by her. At the beginning of her direct examination, when ruling on a defense objection that the prosecution was leading her, the judge implied that Ms. Grant was a witness of only limited intelligence and so he would allow the prosecutor some leeway. (9 RT 1718-1719.)

When officers first talked to Ms. Grant, she told them nothing. (9 RT 1794-1795, 1796.) Her January 14, 1999, interview was preceded by a telephone call from Detective Aguirre on January 13, 1999. At the conclusion of that telephonic interview, Detective Aguirre asked her to come in the next day and be interviewed on videotape. (11 RT 2077-2078.) Despite Ms. Grant's denial of any knowledge when first interviewed at the Wilmington Arms, by January 13, the detectives had a good reason to search for and interview her. Detective Aguirre believed Michelle Lopez (daughter of Maribel Lopez) looked out her window when she heard the shots, saw Kim Grant, and heard her say, "Run, run, get out of here." (12 RT 2278-2279.)

Maribel Lopez had heard the gunshots and called the guard house. A guard answered and asked her to get help. She called 9-1-1. (8 RT 1534-

1535.) After that call, she looked out her sliding door and saw two black men, one of whom was Mr. Sanders, on a patio. Then they ran away. (8 RT 1536-1538.) After they ran, she opened her door and saw Kim Grant go toward the guard house, see inside, say "Oh, shit," and run. (8 RT 1546, 1561.) When the police came, Ms. Lopez ran to the gate and the guard told her what button to push to open the gate so the police could drive in. (8 RT 1546-1547.)

Mr. Bombarda's memory was that after the shooting started, he first tried to crouch behind the steel cabinets, and then fired his one shot. After that, the phone was ringing. (8 RT 1616-1617.) He thought he was behind the cabinets three minutes before he went to answer the phone, but he wasn't looking at his watch. (8 RT 1618.) That telephone call was from Maribel Lopez. (8 RT 1609-1610.)

The sequence of events related by Ms. Lopez and Mr. Bombarda would mean that Ms. Grant never appeared on the scene until after the shooters had disappeared. Ms. Grant's testimony of all she saw involving the shooters is a fabrication if Ms. Lopez' and Mr. Bombarda's testimony is true. But nothing in the instructions to the jurors informed them, in the words of this Court, "a verdict necessarily entails rejection of some evidence in favor of other evidence," particularly if the evidence is direct evidence.

(*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.)

Before she was interviewed on January 14, 1999, Ms. Grant had seen the news account of the shooting, knew that Mr. Livingston was the suspect, and that the police suspected that the PVC (Crips) were involved. (CT Supplemental III 36.) Detective Aguirre testified as to the police's use of the media to help find the suspect, Mr. Livingston. (12 RT 2272.) If Ms. Grant became aware during her telephone conversation from Detective Aguirre (the day before her January 14, 1999, interview) that someone had seen her that night and thought she had told the shooters to run, she had ample interest in satisfying the detectives' interest and directing attention away from herself and her boyfriend.

Her own explanations of contradictions were to deny saying the inconsistent statement, not recalling such a statement, or explaining that at the time of the earlier interview she did not want to talk about that subject. Her explanation for not mentioning her son was with her when she returned to the complex was that the detectives didn't ask. (9 RT 1782.) Detective Aguirre's question during that interview was "I just need to know who you were with?" (CT Supplemental III 12.)

She explained that she had not told the prosecutor two weeks before the trial about Mr. Livingston's car entering the Wilmington Arms in front

of them "because there is a lot of stuff I didn't want to talk about." (9 RT 1784.) She did not explain why it was alright to identify Mr. Livingston as a murderer, but identifying his car entering the complex was not to be talked about. She also admitted that she did not tell the detectives in January 1999 about Mr. Livingston's car going in and out a couple of times. (9 RT 1784.)

When asked about her sworn statements to the prosecutor two weeks before the trial that her boyfriend had dropped them off at her mother's apartment and then left (3 CT 820), Ms. Grant denied saying that. (9 RT 1785.)

During the January, 1999, interview, Detective Aguirre asked if she saw "these guys again," referring to Mr. Livingston and Mr. Sanders, whom she had described seeing enter and leave the complex earlier. Ms. Grant answered, "I seen one of them.... Goldie." (CT Supplemental III 20-21.) Soon she told the detectives that the only person she saw leave was Goldie. (CT Supplemental III 21.) After further questioning on what she saw and when, the detective finally asked her, "Did you see anybody else out there with Goldie?" Only then did she explain that she also saw Mr. Sanders outside the shack when she heard the shots. (CT Supplemental III 25.) When questioned about this at trial, she did not remember telling the officers first that she only saw Goldie leaving. (9 RT 1796-1797.)

She first explained that she had not told the detectives [in January 1999] about the third person because Goldie and Freddie were the only two she saw. Shortly she changed that explanation to she could not describe the third person and she did not want him after her. (9 RT 1803, 1804.) When talking with the prosecutor two weeks before trial, however, she was able to describe him as a tall, white Samoan with long hair. (3 CT 822-824.)

C. SUMMARY.

The instructions to the jury explained how to apply the reasonable doubt rule to circumstantial evidence, but omitted that explanation for direct evidence. That permitted the jurors to apply a lesser standard when evaluating direct evidence of Mr. Livingston's guilt.

Because most of the prosecution evidence connecting Mr. Livingston to the crimes was direct, this lesser standard permitted the jurors to return verdicts without making a full evaluation of all the inferences upon which that direct evidence rested. Reversal is required.

VIII

BY FAILING IN ITS SUA SPONTE DUTY TO INSTRUCT THE JURORS ON HOW TO EVALUATE THE EXTRAJUDICIAL STATEMENTS ENTERED INTO EVIDENCE, THE COURT VIOLATED MR. LIVINGSTON'S RIGHTS TO TRIAL BY JURY AND DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

A. INTRODUCTION AND STANDARD OF REVIEW.

A number of out-of-court statements by testifying witnesses were entered into evidence. The jurors were instructed that those statements may be considered not only for testing the credibility of the testifying witness, but also for the truth of the facts asserted in the statement. (14 RT 2558.) Despite a series of instructions to the jurors on how to evaluate the testimony of witnesses,[83] no additional instruction, or modification of the instructions given, addressed evaluating the credibility of the out-of-court statements.

In the argument below, appellant lists the extrajudicial statements

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[83] No. 2.20: Believability of Witness (14 RT 2559; 24 CT 6218);
No. 2.21.1: Discrepancies in Testimony (14 RT 2560; 24 CT 6219);
No. 2.21.2: Witness Willfully False (14 RT 2560-2561; 24 CT 6220);
No. 2.22: Weighing Conflicting Testimony (14 RT 2561; 24 CT 6221);
No. 2.23: Believability - Felony Conviction (14 RT 2561-2562; 24 CT 6222);
No. 2.27: Sufficiency - One Witness (14 RT 2562; 24 CT 6223);
No. 2.91: Prove Identity Solely Eyewitnesses (14 RT 2567; 24 CT 6233);
No. 2.92: Factors - Proving Identity by Eyewitness Testimony (14 RT 2567-2569; 24 CT 6234-6235).

accepted into evidence, analyzes the instructions given, and explains why the trial court had a sua sponte duty to instruct the jurors about evaluation of the extrajudicial statements, and how the court's failure in its duty prejudicially violated Mr. Livingston's right to trial by jury and due process.

Some of the extra-judicial statements which follow were also the subject of other arguments. This argument replaces none of the others, which address admission of some statements, but argues additionally that the trial court erred in permitting the jury to consider the statements without proper instruction.

Failure to give an instruction is reviewed under an independent, de novo standard. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

B. EXTRA-JUDICIAL STATEMENTS ACCEPTED INTO EVIDENCE.

1. Videotaped Police Interrogations.

a. Kim Grant.

Two of the videotaped police interrogations of Kim Grant were played to the jury and admitted into evidence, and their transcripts were available to the jury while viewing the videotape. (EXs 93 and 94, 12 RT 2212-2214, 2217-2218.) In addition, particular statements from those interrogations were frequently used during her trial examination.

b. Antwone Hebrard.

Dissatisfied with Mr. Hebrard's testimony at trial, the prosecutor played the videotape of his testimony to impeach him, but the transcript of that videotape was not made available to the jury.[84] (7 RT 1263-1268.)

2. Former Statements Entered Without Videotapes.

Portions of former statements during other police interrogations were admitted during the testimony of both the declarants and the interrogators.

a. Damien Perry.

Mr. Perry testified at trial about his identification of Mr. Livingston and Mr. Livingston's Cadillac during his January 6, 1999, police interrogation. (6 RT 1201-1202, 1205.)

b. Ray Richardson.

Officer Richardson testified about his interviews with Mr. Hebrard and Mr. Perry, in which they picked Mr. Livingston's photograph from a sixpack. (7 RT 1327-1328.)

c. Rodolfo Bombarda.

Mr. Bombarda testified about his description and identification of Mr.

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[84] The videotape played for the jury was never offered or accepted into evidence. The prosecutor's original intention was only to use the transcript to refresh Mr. Hebrard's recollection. (7 RT 1248.) Unable to elicit the testimony he desired from Mr. Hebrard, the prosecutor sought and received permission to play the videotape for the jury as impeachment. (7 RT 1264.)

Livingston during his police interrogation while he was in the hospital. (9 RT 1673-1674.) At that time, he testified, his arms were restricted by IVs, and his recollection of events may have been affected by the pain medication. (9 RT 1672, 1674.) He also testified about identifying Mr. Livingston in court at the preliminary examination. (9 RT 1675.)

d. Edward Aguirre.

Detective Aguirre testified that Kim Grant was reluctant to be videotaped because she was concerned for her safety and the safety of her mother and family members, and that she said she had seen Freddie [Sanders] and Goldie [Livingston] that night. (11 RT 2078-2080.)

Detective Aguirre also described his videotaped interrogation of Mr. Bombarda on January 14, 1999, and related Mr. Bombarda's statement that he recognized the shooter from at least 20 prior contacts, his description of Mr. Livingston, and that he remembered Mr. Livingston driving through the gate in October 1998 with two male blacks as passengers, shortly before the police arrived. (11 RT 2082-2083, 2085.)

Detective Aguirre testified that during his January 7, 1999, interview with Maribel Garcia [Lopez] she said that when she opened her door about two to three minutes after calling 9-1-1, she heard a female say, "Get the gun." She then saw Kim Grant and gave Detective Aguirre a description of

Ms. Grant. He then related that Ms. Garcia saw Ms. Grant walk up to the security shack. (11 RT 2087.) He also testified that Ms. Garcia [Lopez] told him that at about 11:45 the night before the shooting, she could hear people arguing outside as she was speaking with one of the security guards over the telephone. (12 RT 2280-2281, 2287.)

Detective Aguirre also testified that Michelle Lopez [Maribel's daughter] said she saw Kim after the shooting, and heard Kim say, "Get out of here." (12 RT 2281.)

C. THE TRIAL COURT ERRED IN NOT SUA SPONTE INSTRUCTING THE JURORS ON EVALUATING OUT-OF-COURT STATEMENTS AS THEY WERE INSTRUCTED ON EVALUATING THE BELIEVABILITY OF WITNESSES TESTIFYING IN COURT.

With respect to witnesses testifying under oath, the jurors were instructed per CALJIC No. 2.20 that among the factors to consider in determining the believability of the witness was the consistency or inconsistency of any statements previously made by that witness. (14 RT 2559-2560; 24 CT 6218.)

The jurors were also instructed per CALJIC No. 2.13, that those prior statements may be considered not only for the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion. (Evid. Code, secs. 1235, 1236; 14 RT 2558; 24 CT 6217.)

This instruction treated the prior statements as "testimony" (see *People v. Hill* (1993) 12 Cal.App.4th 798, 807-808, where the court of appeal regarded the former statement of an accomplice as the equivalent of testimony), even though "testimony" is commonly understood only as sworn testimony delivered live before the jury. (*People v. Belton* (1979) 23 Cal.3d 516, 524.)

CALJIC No. 2.13 transformed those prior statements into testimony akin to the live testimony uttered before the jurors. Yet the instructions did not inform the jurors of factors to consider in weighing the credibility of those prior statements. Mr. Livingston does not attack CALJIC No. 2.13, which merely implements sections 1235 and 1236 of the Evidence Code. Rather Mr. Livingston argues the trial court erred by leaving the jurors uninformed on evaluating the credibility of this other evidence given to them.

Once the jurors were informed that they could treat prior statements, whether consistent or inconsistent, as the equivalent of the live testimony they heard, that is, as evidence of the truth of the facts asserted in those statements, then the court should have also informed the jurors of the factors they should consider in determining the believability of those prior statements. This could have been done by modifying CALJIC No. 2.20 to include prior statements as "testimony," or by fashioning a separate

instruction to that purpose. The trial court did neither, and this was its error.

A trial court must instruct sua sponte on the general principles of law relevant to the issues in the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) While some cases, if contested and tried to a jury, will always require certain sua sponte instructions (*People v. Soldavini* (1941) 45 Cal.App.2d, 460, 463-464 [burden of proof and presumption of innocence]), not every jury trial will require all the sua sponte instructions. For example, a court must instruct sua sponte on the defenses raised (*People v. Stewart* (1976) 16 Cal.3d 133, 140), so long as the defense theory goes beyond merely negating an element of the charge. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117-1120.) Other examples of sua sponte statements required if the evidence raises them are: the definition of accomplice and the rules regarding accomplice testimony (*People v. Gordon* (1973) 10 Cal.3d 460, 470); the manner in which expert testimony is to be viewed (Penal Code, sec. 1127b); and most importantly for our purposes, a sua sponte duty to instruct jurors on factors to consider for the credibility of live witnesses. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884.)

In Mr. Livingston's case, the evidence included both live testimony and prior statements by some of those same witnesses. In a comparable situation, this Court directed that "statements" substitute for "testimony" in

the appropriate instructions when the prosecution relies in whole or in part on the out-of-court statements of an accomplice. (*People v. Andrews* (1989) 49 Cal.2d 200, 215, fn. 11.) Before this Court revoked the requirement for corroboration when a witness's extrajudicial identification was recanted at trial (*People v. Cuevas* (1995) 12 Cal.4th 252, 265-266), trial courts were required sua sponte to instruct the jurors that there must be corroboration for the extrajudicial statement. (*People v. Marquez* (1993) 16 Cal.App.4th 115, 122.)

Unlike CALJIC No. 2.20, there is no sua sponte duty to instruct per No. 2.13. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1026.) However, once the court has instructed the jurors, per No. 2.13, that prior statements apparently admitted either to support or challenge the credibility of a witness may also be considered as truth of the facts as stated by the witness on that prior occasion, the court should also sua sponte instruct the jurors on factors to consider in evaluating the credibility of those extrajudicial statements.

An analogous situation arises when the prosecutor argues to the jury a legally insufficient theory. There is then a sua sponte duty for the court to instruct the jury that the prosecution theory just argued does not constitute a crime. (*People v. Morales* (2001) 25 Cal.4th 34, 43, discussing *People v. Green* (1980) 27 Cal.3d 1, 68.) The sua sponte duty to deliver a preclusive

instruction to the jurors arises from the events within the case.

In the instant case, the jurors were instructed as to factors to consider when deciding whether to believe the live testimony of any witness. They were not instructed as to factors to consider when deciding whether to believe as true any of the facts asserted in prior statements. The absence of any such instruction left the jurors' discretion unfettered. The jurors could reasonably infer from the court's failure to instruct them on prior statements with the same detail as on live testimony that prior statements had greater believability than did live testimony, or certainly need not be scrutinized with the same rigor. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 557; *People v. Salas* (1976) 58 Cal.App. 3d 460, 474-475.)

D. THE ERROR VIOLATED MR. LIVINGSTON'S RIGHTS TO TRIAL BY JURY AND DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

The exclusion of evidence going to credibility of a key witness violates the Compulsory Process and Confrontation clauses of the Sixth Amendment. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273, overruled in nonpertinent part, *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, 1218 fn. 18.) These rights are applied to the states through the Due Process Clause of the

Fourteenth Amendment to the United States Constitution. When the trial court, through either instruction or failure to instruct, similarly impairs the jury's proper evaluation of the credibility of evidence before it, the defendant is again denied his fair trial. The trial court may not by instruction or the failure to instruct unconstitutionally augment or diminish the credibility of the evidence before the jury.

The failure to properly instruct the jurors on the factors affecting the credibility of extrajudicial statements is also a direct denial of Fifth Amendment due process.[85] Two matters must be considered: the importance of instructing the jurors with clear legal standards for their use in determining the facts, and the importance of credibility of the witnesses, both in court and out of court, from which comes the evidence used to determine facts.

1. Clear Standards for Jurors.

The United States Supreme Court has observed that the "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) When the

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[85] Applicable to the states through the Fourteenth Amendment.

government in *Bollenbach* suggested that the jury would recognize the judge's statement was not a correct rule of law, the Supreme Court retorted: "The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." (*Bollenbach*, 326 U.S. at pp. 613-614.)

When a trial court fails properly to respond to a jury's question about a matter of law, it violates the defendant's due process right to a fair trial. (*Beardslee v. Woodford* (9th Cir. 2003) 358 F.3d 560, 575.) As this Court said about the same trial judge comment: "[A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 [emphasis in original].) Inadequate guidance merely leaves the jury "floundering." (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 391.)

2. The Importance of Credibility.

The importance of credibility issues for proper jury determination of

the facts is emphasized time and again in both statutes and case decisions. Credibility as a subject for instruction to the jurors is expressly stated in statute. (Penal Code, sec. 1127.) An instruction such as CALJIC No. 2.20 or its substance must be given in every case sua sponte. (*People v. Rincon-Peneda* (1975) 14 Cal.3d 864, 883-884.)

The importance of credibility issues receives comment most often when evidence pertinent to credibility is excluded or not timely disclosed to the defense. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 447, 449 fn. 19; *In re Brown* (1998) 17 Cal.4th 873, 889; *In re Sixto* (1989) 48 Cal.3d 1247, 1265; *People v. Morris* (1988) 46 Cal.3d 1, 31, disapproved in nonpertinent part *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; *Slovik v. Yates* (9th Cir. 2008) 545 F.3d 1181 (Prejudicial denial of Sixth Amendment confrontation right when defendant not allowed to impeach witness); *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 833, disapproved in nonpertinent part, *Carey v. Musladin* (2006) 549 U.S. 70, 127 S.Ct. 649, 654; *United States v. Rockwell* (3d Cir. 1986) 781 F.2d 985, 989 [(regarding an exclusion of evidence relevant to credibility) "The law will not countenance a usurpation by the court of the function of the jury to decide the facts and to assess the credibility of the witnesses."].)

Leaving the jurors uninstructed on evaluating extrajudicial

statements, while instructing at length on factors affecting the credibility of in court testimony, implied to the jurors that prior statements merited a higher credence, thus lessening the prosecution's burden of proof.

E. THE FAILURE TO PROPERLY INSTRUCT THE JURY PREJUDICED THE OUTCOME OF MR. LIVINGSTON'S TRIAL.

By permitting the jury to consider prior statements of witnesses with less rigor and analysis than for live testimony, the court altered the burden of proof to the prosecution's benefit. Permitting the jury to apply a standard of proof below a reasonable doubt requires reversal per se. Since there is not a verdict of guilt beyond a reasonable doubt against which the effect of the error may be measured, it is impossible for an appellate court to conclude that the verdict of guilty beyond a reasonable doubt would not have been different absent the constitutional error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

If a harmless error test is applied, however, it must be that prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24, that the prosecution prove beyond a reasonable doubt that the error did not affect the verdict.

The prosecution's case that Mr. Livingston was the perpetrator in this case was based solely upon eyewitnesses. That the trial court so read the evidence was shown by its instructing the jurors per CALJIC No. 2.91:

Burden of Proving Identity Based Solely on Eyewitnesses. (14 RT 2567; 24 CT 6233.) Each witness who identified Mr. Livingston as the perpetrator also had prior statements admitted as to that same identification. When the court's omission permitted the jury to infer that those prior statements were not to be analyzed with the same rigor as the live testimony, this could only harm Mr. Livingston's case. The most crucial contested issue in the case was whether Mr. Livingston was correctly identified as the perpetrator. An instructional omission which tilted the scales against him cannot be proved harmless beyond a reasonable doubt.

IX

THE COURT'S INSTRUCTION PER CALJIC NO. 2.51 ON MOTIVE PERMITTED THE JURY TO INFER DEFENDANT'S GUILT FROM EVIDENCE OF MOTIVE ALONE, DENYING DUE PROCESS AND THE RIGHT TO TRIAL BY JURY UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE ONE, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

In instructing the jury, the trial court read CALJIC No. 2.51 on motive.[86] This instruction misled the jury by suggesting that motive alone could establish guilt, thereby reducing the prosecution's burden of proof and violating defendant's fundamental rights. No objection was made to this instruction at trial.

A. THE ISSUE HAS BEEN PRESERVED FOR APPELLATE REVIEW AND STANDARD FOR REVIEW.

Mr. Livingston may raise this issue on appeal despite his failure to object below because the instruction affected his substantial rights. (Penal Code, sec. 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Instructional error is reviewed under the independent, de novo

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[86] "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." (14 RT 2562; 24 CT 6224.)

standard of review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

B. IN PERMITTING A GUILTY VERDICT BASED UPON MOTIVE ALONE, THE INSTRUCTION DENIED DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

As a matter of law, motive alone is insufficient to prove guilt. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) Motive does not meet this standard, because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *People v. Hall* (1986) 41 Cal.3d 826, 833, 835 [motive alone insufficient to support third-party culpability defense]; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive to obtain money insufficient to prove guilt of robbery].)

"In assessing defendant's claim of error, we consider the entire charge to the jury and not simply the asserted deficiencies in the challenged instruction. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 649.) Context is important.

Of all the standard evidentiary instructions (CALJIC No. 2.00 et. seq.), No. 2.51 on motive alone identifies a single circumstance which "may tend to establish the defendant is guilty." Every other instruction covering

an individual evidentiary circumstance includes an admonition that it is insufficient to establish guilt.[87] "Instructing the jury that the People have introduced evidence 'tending to prove' appellant's guilt carries the inference that the People have, in fact, established guilt." (*People v. Owens* (1994) 27 Cal.App.4th 1155, 1158.)

To a juror the omission from No. 2.51 can appear intentional. If motive were insufficient by itself to establish guilt, No. 2.51, like other evidentiary circumstance instructions, would say so. The risk of this reasoning is heightened because immediately after the court instructed the

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[87] CALJIC No. 2.03 (Consciousness Of Guilt—Falsehood): "However, that conduct is not sufficient by itself to prove guilt ...."

CALJIC No. 2.04 (Efforts By Defendant To Fabricate Evidence): "However, that conduct is not sufficient by itself to prove guilt ...."

CALJIC No. 2.05 (Efforts Other Than By Defendant To Fabricate Evidence): "[T]hat conduct is not sufficient by itself to prove guilt ...."

CALJIC No. 2.06 (Efforts To Suppress Evidence): "However, this conduct is not sufficient by itself to prove guilt ...."

CALJIC No. 2.15 (Possession Of Stolen Property): "[T]he fact of that possession is not by itself sufficient to permit an inference that the defendant _____ is guilty of the crime of _____."

CALJIC No. 2.16 (Dog-Tracking Evidence): "This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crime of _____."

CALJIC No. 2.50.01 (1999 Revision) (Evidence Of Other Sexual Offenses): "However, . . . that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crime[s]."

CALJIC No. 2.50.02 (1999 Revision) (Evidence Of Other Domestic Violence): "However, . . . that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged offense[s]."

CALJIC No. 2.52 (Flight After Crime): "[F]light . . . is not sufficient in itself to establish [his] [her] guilt ...."

jurors with No. 2.51, it followed with No. 2.52, which includes such a cautionary admonition. (14 RT 2562; 24 CT 6225.)

"Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood, and if applied in this context could mislead a reasonable juror. . . ." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.).) This Court so reasoned in *People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another, the inconsistency may be prejudicial error].) The placement of No. 2.51 highlighted the omission from its text, so the jury learned it could use a motive finding to establish guilt.

No. 2.51 denied Mr. Livingston's federal and state constitutional rights to due process and jury trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and article I, sections 15 and 16 of the California Constitution. As explained above, in the context of defendant's trial and the other instructions, there is a "'reasonable likelihood that the jury . . . applied the [motive] instruction in a way' that violates the Constitution. [Citation.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) As

given, the motive instruction allowed the jury to infer a finding of guilt from evidence of motive. "Permissive inference jury instructions are disfavored because they 'tend to take the focus away from the elements that must be proved.' [Citation.]" (*Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1037.)

Nevertheless, a permissive inference instruction comports with due process unless, "under the facts of the case, there is no rational way for the jury to make the connection permitted by the inference." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) A rational connection does exist if the ultimate fact to be proved is "more likely than not to flow" from the permissive presumption. (*Id.* at p. 165.) Often, however, evidence of motive is not sufficient to support a "more likely than not" inference that the defendant committed the crime charged. (See, e.g., *People v. Hall* (1986) 41 Cal.3d 826, 833, 835 [motive insufficient to support third-party culpability defense]; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive to obtain money insufficient to prove guilt of robbery].)

When the test of constitutionality for the permissible presumption fails, there is an unacceptable "risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." (*Ulster County*

Court v. Allen, 442 U.S. at p. 157.) As noted above, courts have recognized that motive alone is not a rational basis upon which to infer guilt. Accordingly, the instruction effectively lowered the prosecution's standard of proof, violating due process. (*Ulster County Court v. Allen, supra*, 442 U.S. at 157 [60 L.Ed.2d at 792]; *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 315-316.)

C. CASE LAW DOES NOT RESOLVE, BUT IS SUPPORTIVE OF, DEFENDANT'S POSITION.

In *People v. Snow* (2003) 30 Cal.4th 43, this Court did not address defendant's contextual argument. But the opinion actually comes close to supporting his position: "If the challenged instruction somehow suggested that motive alone was sufficient to establish guilt, defendant's point might have merit." (30 Cal.4th at 97.) In the preceding section, defendant showed how in context, the motive instruction indeed made the improper suggestion.

This Court has rejected a contextual attack on the motive instruction by finding the claim "merely goes to [its] clarity[.]" And "[i]f the defendants thought the instruction should be clarified to avoid any implication that motive alone could establish guilt, they should have so requested." (*People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Appellant's complaint is not that the instruction lacked clarity, however, but that the instruction, in context with the following instruction on flight, is wrong and denied Appellant due

process. The instruction allowed the jury to infer Mr. Livingston was guilty based on motive alone.

After *Cleveland*, a pair of Court of Appeal decisions relied on the precise reasoning argued by Mr. Livingston, albeit in another context. In *People v. Bell* (2004) 118 Cal.App.4th 249, Division Three of the First District found prejudicial error in CALJIC No. 2.28 as given (regarding late disclosure of defense witness statements). Part of the court's analysis rested upon the role of No. 2.28 when considered with other instructions given the jurors. (*Id.* at pp. 256-257.) The other instructions referenced by the court of appeal in *Bell* advised the jurors that each of those evidentiary items was not sufficient in itself to find the defendant guilty. As in this case, the defective instruction in *Bell* lacked that admonition. Instead the instruction in *Bell* invited the jurors to speculate (*id.* at p. 256), and told them to evaluate the weight and significance of the evidentiary item "without any guidance on how to do so." (*Id.* at p. 257.)

The court in *Bell* found a comparative, contextual analysis "[s]ignificant[]" (118 Cal.App.4th at 256.) "[O]ther instructions [CALJIC Nos. 2.03, 2.04, 2.05, 2.06, 2.52] that address a defendant's consciousness of guilt 'ma[k]e clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while

also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered *decisively inculpatory*.'" (*Ibid.*, quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224 [emphasis added].)

No cautionary admonition was included in No. 2.51 in the instant case to preclude the jury from finding evidence of motive "decisively inculpatory." As a result, the jurors may have concluded they were free to find Mr. Livingston guilty merely because the evidence could be interpreted to find motive. (See also, *People v. Cabral* (2004) 121 Cal.App.4th 748 [reverse judgment for giving the same instruction No. 2.28 as found faulty in *Bell*].)

In view of the decisions in *Bell* and *Cabral*, Mr. Livingston requests this Court reexamine the reasoning in *Cleveland* regarding CALJIC No. 2.51.

D. THE CONSTITUTIONAL ERROR IS STRUCTURAL AND REQUIRES REVERSAL PER SE.

Because we are dealing with verdicts possibly rendered by a lower standard than beyond a reasonable doubt, and upon less than a consideration

of the evidence on all the elements, this is structural error and reversible per se. Since there is not a verdict of guilt beyond a reasonable doubt against which the effect of the error may be measured, it is impossible for an appellate court to conclude that the verdict of guilty beyond a reasonable doubt would not have been different absent the constitutional error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

If this Court holds this error not structural, the judgment is still reversible under either the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, or the reasonably probable more favorable result standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, because of the prosecutor's emphasis on motive in argument.

1. Prosecutor's Opening Statement.

In his opening statement, the prosecutor used the Cadillac impoundment incident on October 8, 1998, as the base from which he argued hostilities between Mr. Livingston and all the security guards escalated for the next three months. (6 RT 1148-1150.) The prosecutor never offered evidence of an increasing frequency or escalating intensity of hostile incidents, however. Nor did the prosecutor offer any evidence that Mr. Livingston was curious as to the identity of the other guards present that night or bore them any animosity.

The prosecutor argued that the four security guards attacked on January 3, 1999, were the guards who would enforce the rules rather than merely pushing the button to allow Mr. Livingston entrance. (6 RT 1148-1149.) The prosecutor offered no evidence that the security guards attacked adhered to the rules more strictly than other guards. Mr. Chavers testified that Mr. Livingston's status as a regular visitor gave him free passage any time unless the officer was new and did not know him. (7 RT 1395.) Mr. Bombarda testified that after he stopped Mr. Livingston once, Mr. Livingston cussed and explained his girl friend lived there and he is allowed in all the time. Thereafter, Mr. Bombarda always allowed him access. (9 RT 1591-1592.) Mr. Arcia testified that he stopped Mr. Livingston the first time he saw him, but his post commander explained that Mr. Livingston was going with one of the tenants and could go in. (9 RT 1691.) The prosecutor offered no testimony that Mr. Paz, Mr. Malinao, or Mr. Conner departed from this standard practice.

The prosecutor pointed to the alleged argument on the evening of January 2, 1999, as the final straw in the increasing tension. (6 RT 1151.) Elsewhere the prosecutor argued that the plan was already made. (14 RT 2685-2686.)

2. Prosecutor's Opening Argument on the Merits.

The prosecutor observed that Mr. Paz, found lying down dead outside the guard shack the next morning, was the same person Michelle Lopez saw arguing with Mr. Livingston the night before. (14 RT 2632.) While Michelle identified Mr. Livingston as present, she also testified that he was not the one arguing, using bad words, or threatening the guards. (14 RT 1460-1461, 1464-1465.)

Somewhat inconsistent with his argument of escalating hostilities for three months, the prosecutor also argued that hostility peaked around the time of the October 8, 1998, incident.[88] (14 RT 2671-2672.)

3. Prosecutor's Closing Argument on the Merits.

In his closing argument, the prosecutor pointed to the disagreement between Mr. Livingston and Mr. Chavers as highlighting the "real problem between Goldie and the guards," (14 RT 2790) but never referred to any evidence that the impoundment affected relations between Mr. Livingston and any guard other than Mr. Chavers.

The prosecutor again pointed to the argument on the evening of

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[88] During this argument the prosecutor referred to the testimony of Mr. Chavers and his understanding of a threat from Mr. Livingston at the time of the October 8 incident. While the prosecutor sought the admission of that testimony, over objection, as going to the witness's state of mind, under *People v. Olguin* (1995) 31 Cal.App.4th 1355, and the court admitted it under that authority and instructed the jury to consider it only on the witness's state of mind, the prosecutor used it in argument to support his theory of motive.

January 2 as evidence of motive (14 RT 2791) without discussing Mr. Livingston's nonparticipation in that argument.

Finally, the prosecutor referred to the gang evidence and disrespect toward one member being disrespect to all, with the towing of Mr. Livingston's car on October 8 apparently being the disrespect which motivated the attack on January 3. (14 RT 2791-2792.) The prosecutor cited no testimony by any gang expert or other witness supporting his "disrespect" argument. In short, the prosecutor sought to find "motive" in the widespread public apprehension that one incident of "disrespect" against a gang member can trigger an episode of violence against others not involved in the "disrespect" at a time far removed from the "disrespect," rather than in any expression by Mr. Livingston. In a case lacking any forensic evidence to support the charges, the prosecutor sought support in public fear rather than the evidence.

Respondent cannot prove beyond a reasonable doubt that this error did not affect all guilty verdicts but the count alleging possession of a handgun by a felon. Moreover, it is reasonably probable a more favorable result would have occurred if the instruction had been correct.

X

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

A. SUMMARY OF ARGUMENT.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Mr. Livingston on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that never can be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

B. THE INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, and 8.83.1)

1. The Constitutional Error in These Instructions.

At the guilt trial, the court instructed that Mr. Livingston was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the State the burden of proving him guilty beyond a reasonable doubt." (14 RT 2566, 24 CT 6232.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(14 RT 2566-2567; 24 CT 6232.)

The jury was given four interrelated instructions that discussed the

relationship between the reasonable doubt requirement and circumstantial evidence: CALJIC No. 2.01 ([sufficiency of circumstantial evidence] (14 RT 2554, 24 CT 6211); CALJIC No. 2.02 [sufficiency of circumstantial evidence to prove specific intent/mental state] (14 RT 2555, 24 CT 6212); CALJIC No. 8.83 [special circumstances – sufficiency of circumstantial evidence] (14 RT 2591-2592, 24 CT 6264); and CALJIC No. 8.83.1 [special circumstances – sufficiency of circumstantial evidence to prove required mental state] (14 RT 2592-2593, 24 CT 6265). These instructions, addressing different evidentiary issues in nearly identical terms, advised Mr. Livingston's jury that: "if . . . one interpretation of [the] evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (14 RT 2555, 2556; 24 CT 6212, 6213. See also 14 RT 2592, 2593, and 24 CT 6214, 6265 regarding the special circumstances allegations and their specific intent.)

These instructions informed the jurors that if Mr. Livingston reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to his guilt. This directive, repeated four times, undermined the reasonable doubt requirement in two separate but related ways, violating Mr. Livingston's constitutional rights to due process

(U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

First, the instructions not only allowed, but compelled, the jury to find Mr. Livingston guilty on all counts and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find Mr. Livingston guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (14 RT 2555, 2556, 2592, 2593; 24 CT 6211, 6212, 6264, 6265.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty...." [emphasis in

orig].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Mr. Livingston rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, all four instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." In *People v. Roder* (1980) 33 Cal.3d 491, 504, this Court invalidated an instruction that required

the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. A fortiori, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

2. The Prejudice from the Instruction.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. During his closing argument the prosecutor relied directly on the flawed directive in explaining reasonable doubt, which he equated to an unreasonable interpretation of the evidence (14 RT 2813-2816), and told the jury to "reject the unreasonable and accept the reasonable." (14 RT 2816.)

The circumstantial evidence instructions, as highlighted by the prosecutor's argument, permitted and indeed encouraged the jury to convict Mr. Livingston upon a finding that the prosecution's theory was reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Mr. Livingston in

another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has *no* burden of *proof* or *persuasion*, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215 (emphasis in original], citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.) The prosecutor, taking his cue from the instructions, asserted the reasonableness standard in his argument.[89] Reasonableness simply was not the issue. Rather, the question was whether Mr. Livingston's explanation was credible. The instructions, however, undercut the defense by requiring that Mr. Livingston prove his alibis to be reasonable before they could be believed.

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Mr. Livingston's guilt on a standard that is less than constitutionally required.

C. OTHER INSTRUCTIONS ALSO VITIATED THE REASONABLE DOUBT STANDARD (CALJIC Nos. 2.21.2, 2.22, and 2.27).

The trial court gave three other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 2.21.2 regarding willfully false witnesses (14 RT

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[89] "It is a certain relatively high or high level of burden of proof." (14 RT 2788. See also 14 RT 2813-2816.)

2560-2561; 24 CT 6220); CALJIC No. 2.22, regarding weighing conflicting testimony (14 RT 2561; 24 CT 6221); and CALJIC No. 2.27, regarding sufficiency of evidence of one witness (14 RT 2562, 24 CT 6223). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

1. Additional Problem with CALJIC No. 2.01.

As a preliminary matter, CALJIC No. 2.01 violated Mr. Livingston's constitutional rights (as enumerated in section X.B.1 of this argument) by misinforming the jurors that their duty was to decide whether Mr. Livingston was guilty or innocent, rather than whether he was guilty beyond a reasonable doubt or not guilty. (14 RT 2554, 24 CT 6211.) This diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. It encouraged jurors to find Mr. Livingston guilty because it had not been proven that he was "innocent."

2. CALJIC No. 2.21.2.

Similarly, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the whole testimony of a witness "willfully false in one part of his testimony" unless "from all the evidence, you believe the probability of truth favors his testimony in other particulars." (14 RT 2560-2561, 24 CT 6220.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 also improperly created – and elevated – Mr. Livingston's burden of proof. If the jury found some part of Mr. Livingston's testimony not to be true, he had not merely to create a reasonable doubt about the prosecution's case, but he had to establish that "the probability of

truth favor[ed] his [own] testimony." This requirement violates the well-established principle, noted in section B of this argument, that a defendant has no burden of proof, even as to his own defense. (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

The prosecutor anticipated this instruction in his cross-examination of Mr. Livingston, and emphasized its consequences in his argument. During cross-examination he frequently asked Mr. Livingston if the witnesses who testified contrary to his own testimony were lying. Concerning Mr. Walker's video statement and the testimony of Mr. Perry and Mr. Hebrard, he asked Mr. Livingston: "And so you're telling the jury they're lying and you're telling the truth?" (14 RT 2377.) The prosecutor returned to these same witnesses again. "In addition to Mr. Perry and Mr. Hebrard and Mr. Walker, who I think you already testified came to court and lied to the jury, is that your testimony? ... And as to those events, you're telling the truth, and they were lying?" (14 RT 2407.) The prosecutor continued on to other witnesses. Concerning security guard Arcia, "Are you saying that person is lying, also?" (14 RT 2407.) Concerning security guard Chavers, "He was also lying?" (14 RT 2408.) As a conclusion, "You're getting framed, right?" (14 RT 2424.) The prosecutor's posing Mr. Livingston the most stark, but by no means the only, explanation for conflicts in testimony with

these witnesses makes almost visible his arched eyebrow for the jury's benefit.[90]

Having laid this foundation, the prosecutor emphasized in argument that someone lied to the jury, either all these witnesses or Mr. Livingston. "All you have is Mr. Livingston's testimony. You have Mr. Bombarda, Ms. Grant, Michelle Lopez, and Mr. Chavers. They are all lying? Every one of them is lying? Every single person is lying but him?" (14 RT 2678.)

"In terms of him saying that Mr. Bombarda is lying, Ms. Grant is lying, Mr. Arcia is lying, Mr. Chavers is lying, and Michelle Lopez is lying, he has two convictions of crimes of moral turpitude." (14 RT 2679.)

"He is here in court sitting here. Again, maybe you didn't see it. Again, the whole package needs to be analyzed in determining his credibility because someone here lied to you. Bombarda, Arcia, Chavers, Lopez, Grant, either all of them lied to you or he lied to you. There is no other way of looking at it. I am not trying to be mean here at all." (14 RT 2680-2681.)

The prosecutor returned to the theme of lying in his closing summation. Of all the gang members who testified, he argued, only Mr.

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[90] The contrast is most dramatic when he permitted Mr. Livingston more graceful characterizations for testimonial conflicts between himself and his alibi witness, girlfriend Shantae Johnson. "Would she be wrong or lying?" (14 RT 2395-2396.) "So she was mistaken or lying?" (14 RT 2444.)

Livingston had a motive to lie (14 RT 2761), and one of the problems with liars is that they get caught.[91] (14 RT 2762-2764.)

The instruction completed and supported the prosecutor's argument. If the jurors concluded that Mr. Livingston was willfully false in any one of the incidents set forth above, they could then reject his entire testimony unless they found "the probability of truth" favored his testimony in other particulars. The burden was unconstitutionally shifted to Mr. Livingston.

3. CALJIC No. 2.22.

The jurors were instructed: "You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may

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[91] The series of questions were also prosecutorial misconduct because they "called for irrelevant and speculative testimony." (*People v. Chatman* (2006) 38 Cal.4th 344, 381, discussing *People v. Zambrano* (2004) 124 Cal.App.4th 228, 241.) Unlike *Chatman*, the instant case did not involve a defendant describing the same events as the prosecution witnesses but from a different point of view. (*Chatman, supra*, 38 Cal.4th at pp. 381, 382.) Mr. Livingston denied personal knowledge of the events described because he was not there. The prosecutor's questions were not attempts to give the defendant an opportunity to clarify his position and give a reason for the jury to accept his testimony as more reliable. (*Id.* at p. 382.) Rather the prosecutor's questions were argumentative: "a speech to the jury masquerading as a question." (*Id.* at p. 384.) The questions served no evidentiary purpose, but allowed the prosecutor to berate the defendant before the jury and to force him to call the prosecution witnesses liars "in an attempt to inflame the passions of the jury." (*Zambrano, supra*, 124 Cal.App.4th at p. 242.) The prosecutor's return to this subject during opening argument on the merits and in his closing summation compounded the misconduct. (*Ibid.*)

not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the number of witnesses, but in the convincing force of the evidence." (CALJIC No. 2.22; 14 RT 2561, 24 CT 6221.)

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

at p. 364.)

4. CALJIC No. 2.27.

CALJIC No. 2.27[92], regarding the sufficiency of the testimony of a single witness to prove a fact, likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." CALJIC No. 2.27, by telling the jurors that "testimony by one witness concerning any fact" which they believed is "sufficient for the proof of that fact" and that they "should carefully review all the evidence upon which the proof of that fact depends" – without qualifying this language to apply only to prosecution witnesses – permitted reasonable jurors to conclude that (1) Mr. Livingston himself had the burden of convincing them that he was not guilty and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.)

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[92] "You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." (14 RT 2562, 24 CT 6223.)

In *Turner*, this Court approved CALJIC No. 2.27 against a challenge that it should be limited to facts that the prosecution must prove. "[A]n accused is not entitled to a false and unique aura of veracity when his uncorroborated testimony is offered as evidence raising a reasonable doubt that he is guilty as charged. [Citations omitted.] When the accused offers his uncorroborated testimony for this purpose, the jury should weigh such evidence with the same caution it accords similarly uncorroborated testimony by a prosecution witness." (50 Cal.3d at p. 697.)

The Supreme Court's reasoning in *Turner* raises two issues for the instruction as given in this case. First, the concern for "a false and unique aura of veracity" is more a matter for argument of counsel on both sides, than for judicial instruction. Second, in the instant case, Mr. Livingston's testimony that he spent the night with Shantae Johnson, rather than shooting the guards, was not uncorroborated. Both Ms. Johnson and her mother corroborated his testimony with their own. Under the reasoning in *Turner*, No. 2.27 should not have been given. This Court's understated observation in *Turner* that the instruction could be worded in a more neutral fashion does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Mr. Livingston's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

The version of No. 2.27 given by this trial court suffered additional infirmities. The instruction as originally recommended by this Court read: "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact to be proved solely by the testimony of such a single witness, you should carefully review all of the testimony upon which proof of such fact depends." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) In that version the instruction emphasizes the relationship between the jury's belief and the particular testimony at issue rather than the relationship between the jury's belief and its overall attitude toward the witness. The jury may believe one part of a witness's testimony and not believe another part. The court below rearranged the phrases to tie the jury's belief to the witness rather than to the part of the witness's testimony at issue. "Testimony by one witness which you believe...."[93] (14 RT 2562.) The instruction thus ties into CALJIC No.2.21.2, discussed above, and the prosecutor's theme that Mr. Livingston must be the liar.

5. Prejudice from These Instructions.

"It is critical that the moral force of the criminal law not be diluted by

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[93] A purist may argue that the choice of "which" rather than "whom" makes clear to the jury the proper relationship despite the ambiguous rearranging of the phrases, but that is a thin reed upon which to support the death penalty.

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

D. THE COURT SHOULD RECONSIDER ITS PRIOR RULINGS UPHOLDING THE DEFECTIVE INSTRUCTIONS.

Although each of the challenged instructions violated Mr. Livingston's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 751 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing

circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that these instructions do not mislead jurors when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires

reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

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

references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Mr. Livingston's jury heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in CALJIC No. 2.90.

This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

E. REVERSAL IS REQUIRED.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. Mr. Livingston fiercely contested the evidence against him. Accordingly, the dilution of the reasonable-doubt requirement by the guilt-phase instructions, particularly when considered cumulatively with the other instructional errors set forth above, must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41.)

The guilt phase convictions, the special circumstance findings and the death judgment must be reversed.

XI

THE UNADJUDICATED CRIMES PRESENTED AS AGGRAVATION AND SO INSTRUCTED TO THE JURY LACKED SUFFICIENT EVIDENCE FOR ANY JURY TO FIND GUILT BEYOND A REASONABLE DOUBT, DENYING DUE PROCESS, THE RIGHT TO TRIAL BY JURY, AND A RELIABLE SENTENCING DETERMINATION, UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED CONSTITUTION.

A. INTRODUCTION AND SUMMARY OF ARGUMENT.

Through the testimony of prison records custodian, Otto Felske, during the sentence hearing the prosecution presented evidence of prison fist fights involving Mr. Livingston, Also presented was evidence of an assault upon prison inmate Allen Weatherspoon, allegedly by Mr. Livingston, through the testimony of prison guards Alfredo Salazar and Jose Garcia. The court instructed the jurors as to the significance of this evidence as aggravation under Penal Code, section 190.3, evidence of other criminal activity involving the use or threat of violence. While California law does not require the jurors to reach unanimous guilty findings before this aggravating evidence may be considered, any juror must find these allegations true beyond a reasonable doubt before he or she can be consider them in determining sentence. (CALJIC No. 8.87, 16 RT 3268-3269; 24 CT 6377; *People v. Robertson* (1982) 33 Cal.3d 21, 53-56 & fn. 19.)

As developed below, insufficient evidence was presented to support a finding by a rational juror that Mr. Livingston had engaged in criminal activity in these incidents.

Evidence presented under factor (b) may only be conduct made criminal by statute. (*People v. Lancaster* (2007) 41 Cal.4th 5, 93.) The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of any crime alleged against a defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) A criminal defendant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations, are violated when criminal sanctions are imposed based on legally insufficient proof of guilt. (U.S. Const., 5th, 6th, 8th & 14th Amends. & Cal. Const. art. I, §§ 1, 7, 12, 15, 16, & 17; *Beck v. Alabama* (1992) 447 U.S. 625, 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

A finding of commission of a crime will be sustained on appeal only where a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Only if a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations, satisfied. (U.S. Const., 5th,

6th, 8th & 14th Amends. & Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 324; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578.)

A review of the record in this case reveals that the evidence was legally insufficient to sustain a guilty finding beyond a reasonable doubt by any rational juror that Mr. Livingston had committed the crimes alleged. Those findings cannot be sustained without violating state and federal constitutional standards governing the sufficiency of evidence to support a guilty finding.

B. FIST FIGHTS AND THE INSUFFICIENCY IN THE EVIDENCE.

1. The Evidence Presented.

Prison records custodian Otto Felske testified that Mr. Livingston's CDC file contained incident reports of four fights over seven years of imprisonment, involving two or more participants. None of the reports indicated that Mr. Livingston had personally possessed or used a weapon, though another participant had a weapon in at least one of the fights. (15 RT 3055.)

Mr. Felske testified that these records were prepared by correctional officers, counselors, or supervisors soon after the events reported. (15 RT 3049.)

The events reported were:

(1) January 31, 1997. Lancaster Prison. A "typical" fist fight involving five inmates; one of the other inmates possessed a weapon. (15 RT 3050-3051.)

(2) August 5, 1996. California State Prison, Lancaster. A physical altercation. (15 RT 3052.)

(3) November 20, 1992. Calipatria State Prison. Fight with another inmate. (15 RT 3053.)

(4) October 18, 1991. Assault and battery with other inmates on a prisoner. (15 RT 3053.)

Throughout his testimony, Mr. Felske referred to these events as an "837 Incident Report" (15 RT 3049), "incident" (15 RT 3050, 3051, 3052), CDC 115 - Disciplinary Report or writeup (15 RT 3052, 3053), "physical altercation" (15 RT 3052), "fight" (15 RT 3053), "assault and battery" (15 RT 3053), "disciplinary infractions" (15 RT 3054), "disciplinary incidents such as fighting or batteries." (15 RT 3054.)

2. The Evidence Above Does Not Support a Finding Beyond a Reasonable Doubt that Mr. Livingston Committed an Assault During the Fist Fights.

Nowhere did Mr. Felske spell out what elements had to be found by prison authorities for the findings reported in the records. His testimony

amounted to a recapitulation of the reports of others that Mr. Livingston had been involved in four fights during six years in prison. Participation in a fight was, in itself, apparently a violation of prison rules. While it is reasonable for a prison, with its paramount interest in maintaining order, to make mere participation in an affray a disciplinary offense, that does not suffice for criminal law, with its concern over who instigated, initiated, or provoked violence, and who was merely defending against violence.

The trial judge informed the jurors that "evidence has been introduced for the purpose of showing that the defendant, David Livingston, has committed the following criminal acts: assaults with the use of fists upon other inmates; and two, assault upon Allen Weatherspoon which involved the express or implied use of force or violence." (16 RT 3268.) While the trial judge had earlier informed the jurors as to the elements of "assault," (14 RT 2594-2596; 24 CT 6267-6271), those elements were included among the instructions not repeated at sentencing and which the jurors were told to disregard. (16 RT 3265; 24 CT 6373.) While the jurors were informed that the allegations could only be considered as aggravation by any juror who found them true beyond a reasonable doubt (CALJIC No. 8.87, 16 RT 3268), they were not informed as to the elements of the alleged criminal acts, which must be found true beyond a reasonable doubt before than conclusion can be

reached on the criminal act.

The information denied the jurors concerning the fist fights were Mr. Livingston's role beyond that of a participant. Any victims of these alleged assaults were identified neither by name, age, gender, or any physical description. Nor was Mr. Livingston's role identified other than as a participant. The reports contained no information on whether he initiated or provoked the assault, or was a victim. The evidence was presented by a reader of the record, who summarized their contents by stating the prison in which each event occurred, the date, and that Mr. Livingston was found guilty of an "infraction," violation," "altercation," "disciplinary incident," and once, "assault and battery." The reader, Mr. Felske, was not present during these events and did not name the investigators or whether any of those submitting reports were witnesses of what happened. Nor did he present any narratives by witnesses to the events.

The evidence by which prison authorities in each case concluded that Mr. Livingston was guilty of "something" was not disclosed during Mr. Felske's testimony, just the bare fact that prison authorities had concluded that Mr. Livingston had committed a disciplinary infraction. Nor were the jurors informed, by instruction, by testimony, or by argument, that the findings by the prison authorities were by a standard far less than beyond a

reasonable doubt. The jurors were not presented evidence from which one could conclude beyond a reasonable doubt whether Mr. Livingston was guilty of the alleged crime of assault in these fist fights, only that Mr. Livingston committed a disciplinary infraction. This was not evidence by which any reasonable juror could conclude that Mr. Livingston had committed the crime of assault in any of those fist fights.

Nor did the evidence support that a crime had been committed, as required for a finding under factor (b). (*People v. Lancaster*, *supra.*)

C. THE WEATHERSPOON ASSAULT.

1. The Evidence Presented.

Deputy Alberto Salazar testified that after he and his partner separated Allen Weatherspoon from the other inmates waiting to go to breakfast, they asked him "who did this to you [cut his neck]?" (15 RT 2948.) According to Mr. Salazar, Mr. Weatherspoon answered "white guy. a white Crip," and further indicated his neck had been cut with a razor blade.[94] (*Ibid.*) Deputy Salazar and his partner then called for medical aid

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[94] Deputy Salazar also testified that Mr. Livingston was the only white of four inmates in cell C-11 (15 RT 2953), and was the only white Crip whom Deputy Salazar knew in the module (*ibid.*), which contained four rows of cells, 13 cells in each row. (15 RT 2958.) The reporter used quotation marks only for the segment quoted in the text above. The quotation marks make clear Deputy Salazar filled in cell C-11 from his knowledge of where Mr. Livingston, the only white Crip Mr. Salazar knew in the module, was assigned, rather than Mr. Weatherspoon stating his assailant resided in C-11. (15 RT 2947-2948.)

for Mr. Weatherspoon. (*Ibid.*)

During the subsequent search, Deputy Jose Garcia found Mr. Livingston hiding beneath his bunk in cell C-11. (15 RT 2962.) No weapon was ever found. (15 RT 2965.)

By stipulation, Mr. Weatherspoon was allowed to claim the Fifth Amendment so he would not have to testify. (15 RT 3012.) He was brought into the courtroom, and the judge described his scar for the jurors. (15 RT 3017-3020.)

2. The Evidence Is Insufficient For Any Reasonable Juror To Find Beyond a Reasonable Doubt that Mr. Livingston Is Guilty of Assaulting Mr. Weatherspoon.

No witness to the event described it. No witness testified as the contents of any investigative report of the incident, or whether any investigation was conducted. No weapon was ever found (15 RT 2965), meaning no fingerprint or DNA evidence was presented. No evidence of blood matching Mr. Weatherspoon was reported as found upon Mr Livingston or his clothing. The only evidence comes from the observations of Deputies Salazar and Garcia, and Mr. Weatherspoon's comments, as Deputy Salazar remembers them, that Mr. Weatherspoon was cut on his neck by a razor blade wielded by a white Crip, and that Mr. Livingston was the only white Crip in the module of whom Deputy Salazar had knowledge.

Deputy Salazar did not testify how long he had been working in that module, or the source or extent of his knowledge of the inmates housed in that module. There was no testimony that a lineup was ever conducted at which Mr. Weatherspoon or any witness to the assault identified Mr. Livingston. It is known that during the search for Mr. Livingston, he foolishly hid himself in his own cell under his own bunk. That might show a guilty conscience, or it might show an immature, young man who, shot in the back once by law enforcement authorities, now sought to evade all confrontations.

We do know that Mr. Weatherspoon did not identify Mr. Livingston by name, or by picking him out in a lineup, or in any subsequent viewing. We do know that Mr. Weatherspoon described his assailant as "a white Crip," implying one of others, rather than as "the white Crip," which would imply singularity.

It is not denied that sufficient evidence was presented to justify an investigation to find out who cut Mr. Weatherspoon, and to include Mr. Livingston among the "persons of interest." As outlined above, however, there was not sufficient evidence to support a finding beyond a reasonable doubt by any rational juror.

D. REVERSAL OF THE SENTENCE IS REQUIRED.

The lack of sufficient proof to sustain findings under factor (b) is a federal due process violation requiring reversal unless error is proved harmless beyond a reasonable doubt. (*Chapman v. Virginia* (1967) 386 U.S. 18, 24.) That conclusion is reached after a review of all the evidence adduced viewed in the light most favorable to the prosecution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

The evidence has been set forth above. Particularly relevant for the current inquiry was the prosecutor's emphasis upon the assault upon Mr. Weatherspoon. The prosecutor devoted three pages of his opening statement in the penalty phase to the assault upon Mr. Weatherspoon. (15 RT 2926-2928.) He described in detail the injuries suffered by Mr. Weatherspoon, (15 RT 2926) and referred to the problems that would occur if Mr. Livingston was given life in prison. (15 RT 2928.) He followed up with reference to Mr. Livingston's fights while in prison. (*Ibid.*) Nowhere, however, did the prosecutor advert to lack of proper evidence identifying Mr. Livingston as the perpetrator of the Mr. Weatherspoon's injuries.

In his closing argument, the prosecutor discussed whether Mr. Livingston was an evil man, and again referred to Mr. Weatherspoon's injuries.[95] (16 RT 3283.)

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[95] The prosecutor attributed Mr. Weatherspoon's silence and reluctance to show his face to the jury to Mr. Weatherspoon's reluctance to give the impression

Though the jury had but a single decision to make, whether to return a death sentence, the jury took four days of deliberation. (16 RT 3322-3329.) Given the difficulty of decision the length of deliberations disclosed, it cannot be said beyond a reasonable doubt that the evidence concerning Mr. Weatherspoon and of Mr. Livingston's prison fights did not affect the decision for death.

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he was hurting the defendant. (16 RT 3279.) This was not supported by any evidence of record, and would not be a valid basis for the court's accepting Mr. Weatherspoon's claim of the Fifth Amendment. If this was the prosecutor's belief, he should not have entered the stipulation accepting the Fifth Amendment claim.

XII

THE TRIAL COURT'S DENIAL OF THE POSSIBILITY OF DEADLOCK WHEN INSTRUCTING THE JURORS ON PENALTY DEPRIVED MR. LIVINGSTON OF DUE PROCESS AND OF EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND VIOLATED THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. INSTRUCTIONS GIVEN AND SUMMARY OF ARGUMENT.

In the instructions on the merits, the court informed the jurors that "each of you must consider the evidence for the purpose of reaching a verdict, **if you can do so**."[96] (CALJIC No. 17.40, 14 RT 2609; 24 CT 6293 [Emphasis added].) The court recognized that a jury may deadlock during their deliberations and be unable to reach one or more verdicts, in part, because of each juror's duty to decide the issues for him or herself, and not be influenced by the mere fact that a majority of the jurors may be opining the opposite. CALJIC No. 17.40 was not repeated in the instructions on penalty. Rather, CALJIC No. 17.40 was among the unrepeated instructions

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[96] The entire instruction CALJIC No. 17.40 read: "The people and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. [Par.] Each of you must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors. [Par.] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of jurors or any of them favor that decision. [Par.] Do not decide any issue in this case by the flip of a coin or any other chance determination."

from the merits phase which the jurors were expressly instructed to disregard. (16 RT 3265; 24 CT 6373.)

For the penalty phase, the court emphasized the jurors' collective duty to determine one of the two penalties, with no acknowledgment of the possibility of deadlock. "Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant." (CALJIC No. 8.84, 16 RT 3254; 24 CT 6355.) "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant." (CALJIC No. 8.88, 16 RT 3272; 24 CT 6389-6390.) These instructions to "determine" lacked the qualification found in No. 17.40, "if you can do so," with its recognition of the possibility of deadlock.

Finally, "[a] jury may decide, even in the absence of evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (16 RT 3270; 24 CT 6385.) By emphasizing the jurors collectively as a body, "jury," the court again negated the possibility that individual jurors could legitimately determine "the aggravating evidence [was] not comparatively substantial enough to warrant death;" that is, deadlock due to a holdout was not to be considered.

Missing from these instructions were the merits admonitions for each

juror to decide the case for himself or herself, and not to decide any question because a majority of the jurors favored a particular resolution. When jurors hear in the merits instruction an explicit emphasis upon their individual duty to decide each issue and not to be swayed by the mere fact of a majority leaning a different direction, and when that instruction is among those they are expressly told to disregard during their penalty deliberations, it is clear to them that their governing rules have changed. (See., e.g., *People v. Dewberry* (1959) 51 Cal.2d 548, 557.) On penalty, the majority rules.

The trial court's instructions are reminiscent of the Allen charge, banned in California since 1977. (*People v. Gainer* (1977) 19 Cal.3d 835, 852.) But this instruction operates to preclude a deadlocked jury, rather than blasting the deadlock after it has occurred. The trial court's instructions are subject to the same faults as the Allen charge.

As developed below, this instruction denied Mr. Livingston due process and equal protection of the laws under the Fifth and Fourteenth Amendments, and denied him a reliable sentencing determination under the Eighth Amendment, to the United States Constitution.

Mr. Livingston may raise this issue on appeal despite his failure to object below because the instructions affected his substantial rights. (Penal Code, sec. 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Instructional error is reviewed under the independent, de novo standard of review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

B. AN INSTRUCTION WHICH DENIES THE POSSIBILITY OF DEADLOCK IS UNCONSTITUTIONALLY COERCIVE AND VIOLATES THE EIGHTH AMENDMENT BY DENYING A RELIABLE DECISION, AND DENIES DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

1. Due process and a reliable sentencing decision is denied when the jurors are denied the possibility of individual determination and encouraged to accede to the majority.

"Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed.2d 78, 102 S.Ct. 940] italics added.) At the penalty phase, as well as the guilt phase of a capital trial, the jury "must stand impartial and indifferent"; its "verdict must be based upon the evidence developed at the trial;" it may not be influenced by any other external consideration. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727 [119 L.Ed.2d 492, 112 S.Ct. 2222].)

Coercion, whether by the court or by other jurors, is an external consideration which, if it affects a verdict, denies due process. Instructions which imply that the jurors must reach agreement on a penalty are unconstitutionally coercive and violate the Eighth Amendment and the Due

Process Clause of the federal constitution by denying the defendant a fair sentencing trial. (See e.g., *Wharton v. People* (1939) 104 Colo 260 [90 P2d 615] [death sentence reversed where majority pressured holdout juror to vote for death]; see, e.g., *Weaver v. Thompson* (9th Cir. 1999) 197 F.3d 359 [where, after four hours of deliberation following a full day of trial, the jury asked whether it must reach a verdict in all counts and the bailiff responded "yes," and where the jury returned a guilty verdict on all counts five minutes after the bailiff responded, the bailiff's comment amounted to a coercive Allen charge and violated Weaver's due process rights]; *Smalls v. Batista* (2d Cir. 1999) 191 F3d 272 [supplemental charge to jury divided 11 to 1 was unconstitutionally coercive because it "both (1) obligated the jurors to convince one another that one view was superior to another, and (2) failed to remind those jurors not to relinquish their own conscientiously held beliefs"].)

To offset that risk, where an Allen charge is still permitted (e.g., in federal courts), the courts must also admonish the jurors not to sacrifice their conscientiously held beliefs for compromise or expediency. It "is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party." (*United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268; *United*

States v. Scott (6th Cir. 1977) 547 F.2d 334, 337 ["one of the most important parts of the Allen charge"]; *Smalls v. Batista* (2nd Cir. 1999) 191 F.3d 272, 279 ["lack of any cautionary language which would discourage jurors from surrendering their own conscientiously held beliefs was a 'fatal flaw'"]; *Sartin v. State* (OK 1981) 637 P.2d 897, 898.)

CALJIC No. 17.40 contained such language for the jurors in the merits phase. "Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. Each of you must decide the case for yourself but should do so only after discussing the evidence and instructions with the other jurors." (14 RT 2609, 24 CT 6292.) In the penalty phase, however, the jurors were expressly instructed to disregard this and other unrepeated instructions from the merits. (16 RT 3265; 24 CT 6373.) Instead the penalty instruction emphasized their collective responsibility to reach a penalty determination, and lacked any reference to the individual duty of each juror to decide for him or herself the appropriate penalty.

2. Prior California Supreme Court Decisions.

This Court has rejected arguments that the "shall determine" language is erroneous, reasoning that *People v. Gainer* was inapposite in cases where the jury has not deadlocked, where the minority was never admonished that the case must sometime be decided, that they should reconsider their

opinions since a majority had decided to the contrary, and where the jurors were instructed per CALJIC No 17.40. (*People v. Harris* (1981) 28 Cal. 3d 935, 963-864. See also, *People v. Miller* (1990) 50 Cal. 3d 954, 1009; *People v. Miranda* (1987) 44 Cal. 3d 57, 105.) The first two reasons, however, overlook the possibility that instructional language such as in Mr. Livingston's trial may have succeeded in precluding any deadlock by emphasizing the jurors' collective duty, and by not recognizing the possibility of deadlock. The third reason does not apply in Mr. Livingston's case because the jury was expressly instructed to disregard the earlier instructions, including CALJIC No. 17.40.

C. THE TRIAL COURT'S DENIAL OF THE POSSIBILITY OF DEADLOCK WHEN INSTRUCTING THE JURORS ON PENALTY DEPRIVED MR. LIVINGSTON OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Mr. Livingston's guilt was determined in a joint trial with his co-defendant, Freddie Sanders. Since the jury did not find Mr. Sanders guilty of first degree murder, Mr. Livingston alone proceeded to a penalty jury trial. If Mr. Sanders had also proceeded to that trial, however, CALJIC No. 8.88, given in Mr. Livingston's trial, would have included the following language: "In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to

be inflicted on both defendants, but do agree on the penalty as to one of them, you must render a verdict as to the one on which you do agree."

The language for multiple defendants recognizes the possibility of deadlock. The deletion of that language for a single defendant denies equal protection of the laws.

The Equal Protection Clause requires that all persons similarly situated shall be treated alike. (*City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439 [87 L.Ed.2d 313, 105 S.Ct. 3249] [City ordinance requiring special use permit for group home for the mentally retarded, held invalid]; *Plyler v. Doe* (1982) 457 U.S. 202, 216 [72 L.Ed.2d 786, 102 S.Ct. 2382] [Texas statute withholding funds from local school districts for education of children not legally admitted into the United States and authorizing districts to deny enrollment to such children, held invalid].)

In drafting the solution to perceived problems, Legislatures have "substantial latitude to establish classifications" (*Plyler v. Doe*, *supra*), but distinctions between persons "must be correlated to `their relevant characteristics.'" (*Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 898, 911 [90 L.Ed.2d 899, 106 S.Ct. 2317] (emphasis in original) [New York state limit on civil service veterans' preference to only those veterans

who were residents of state when they entered military service, held invalid], quoting *Zobel v. Williams* (1982) 457 U.S. 55, 70 [72 L.Ed.2d 672, 102 S.Ct. 2309] (Brennan, J., concurring) [Alaska statute distributing income derived from state's natural resources to state's citizens in varying amounts based on length of residency, held invalid].)

Three separate standards of review are applied to suspect legislation. Under the least stringent standard, challenged legislation is presumed valid and will be sustained if the classification it draws is "rationally related" to a legitimate public purpose. (*Kadrmas v. Dickinson Pub. Schools* (1988) 487 U.S. 450, 457-458 [101 L.Ed.2d 399, 108 S.Ct. 2481] [Upholding North Dakota statute authorizing certain school districts, but not others, to charge school bus fee]; *City of Cleburne*, *supra*, 473 U.S. at p. 440; *Plyler v. Doe*, *supra*, 457 U.S. at p. 216.) At the other end of the spectrum, "strict scrutiny" will be applied if the statute interferes with a "fundamental right" or discriminates against a "suspect class." (*Kadrmas*, *supra*; *City of Cleburne*, *supra*; *Plyler v. Doe*, *supra*.) Between these two extremes, "heightened" or "intermediate" scrutiny is applied to certain classifications involving gender or illegitimacy. (*Kadrmas*, *supra*, 487 U.S. at p. 459; *City of Cleburne*, *supra*, 473 U.S. at pp. 440-441;

Plyler v. Doe, *supra*, 457 U.S. at p. 217

A right is fundamental, the infringing of which deserves strict scrutiny, if it derives, explicitly or implicitly, from the United States Constitution. (*Plyler v. Doe*, *supra*, 457 U.S. at p. 217 fn. 15 [72 L.Ed.2d at p. 799 fn. 15].) Where classification interferes with the exercise of such a right, "critical examination" is required of the state interests advanced to support the classification. (*Zablocki v. Redhail* (1978) 434 U.S. 374, 383 [54 L.Ed.2d 618, 98 S.Ct. 673] [Hold invalid Wisconsin statute requiring court permission before resident, having minor child not in his custody and which he is under obligation to support, may marry].) A statute which operates to penalize the exercise of a fundamental right may be upheld only if the classification is shown necessary to promote a compelling state interest. (*Soto-Lopez*, *supra*, 476 U.S. at p. 906; *Dunn v. Blumstein* (1972) 405 U.S. 330, 339 [31 L.Ed.2d 274, 92 S.Ct. 995] [Tennessee durational residence requirement for voting held invalid].)

In the instant case, no state interest appears to justify the distinction between a defendant alone before a penalty jury and multiple defendants. Under no standard can the difference in judicial instruction be maintained. Mr. Livingston was denied equal protection of the law in his penalty proceeding.

D. THIS DENIAL OF CONSTITUTIONAL RIGHTS REQUIRES REVERSAL OF THE PENALTY AND REMAND FOR A NEW PENALTY HEARING.

The right of which Mr. Livingston was deprived by this denial of equal protection was a fair and reliable determination of the penalty under the Eighth Amendment and due process under the Fifth and Fourteenth Amendments. Under the Due Process Clause, there is no higher liberty interest than life.

Moreover, the process by which this right was denied involved an error in the trial mechanism which defies analysis by harmless error standards, that is, structural error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *United States v. Noushfar* (9th Cir. 1996) 78 F.3d 1442, 1445.) The error operated by introducing an extraneous consideration into the jury's deliberations: pressure to accede to the majority by the court's expressly deleting the emphasis upon a decision by each individual and not recognizing any deadlock possibility. Since no deadlock occurred in Mr. Livingston's trial, e.g., the coercion may have been successful, there is no way to analyze for harmless error. Reversal is required.

Even if the error is evaluated for harmlessness, however, reversal is still required. Under the California miscarriage of justice standard, reversal

would be required. As this Court has found, "[b]ecause of the nature of the penalty trial, any substantial error. . . causes prejudice. (*People v. Hines* (1964) 61 Cal.2d 164, 166.) "We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment." (*Id.* at p. 169.) Any error for which reversal would be required under California's miscarriage of justice standard also requires reversal under the *Chapman* reasonable doubt test.

XIII

BY INSTRUCTING THE JURY NOT TO CONSIDER THE IMPACT OF MR. LIVINGSTON'S SENTENCE UPON HIS FAMILY, THE TRIAL COURT VIOLATED MR. LIVINGSTON'S RIGHTS UNDER THE EIGHTH AMENDMENT AND DENIED HIM DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS UNDER CALIFORNIA LAW.

A. THE RELEVANT FACTS AND SUMMARY OF ARGUMENT.

The prosecution called members of the decedents' families to testify both as to background information about each decedent (Mr. Paz, Mr. Malinao, and Mr. Conner, even though the latter was not alleged to have been killed by Mr. Livingston), and as to the impact upon their own lives and the lives of other family members of the loss of their father, husband, or grandfather. (15 RT 2967-2983 (Judy Paz Avalos, Letitia Paz Cortez, and Oscar Paz), 3021-3029 (Hermene Gilda Malinao), 3035-3040 (Miriam Malinao).) The prosecutor referred to their impending testimony in both his opening statement on sentencing and his argument. (15 RT 2929-2930; 16 RT 3278-3279, 3281.) He emphasized that evidence of the impact of these crimes upon the victims and their families was part of "factor A, the circumstances of the crime." (14 RT 2828-2829.) The court then instructed the jury, inter alia, to "take into account and be guided by...a) the circumstances of the crime of which the defendant was convicted." (16 RT

3265.)

Mr. Livingston called his mother, aunt, grandmother, sisters, and two friends to tell the jury about him. They testified about how supportive and considerate he had always been, even when corresponding from prison, and how good he was with their children. (15 RT 3066-3117, (Judy Lynn Gary), 3118-3121 (Sunita Dunn), 3126-3131 (April Theodora Morris), 3131-3141 (Mary Nordmann); 16 RT 3157-3162 (Christina Rossi), 3163-3170 (Donna Aitken), 3212-3217 (Rebecca Radovich).) Regarding this evidence, the court instructed the jury: "Sympathy for the family of the defendant is not a matter that you may consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character." (16 RT 3267.)

As the court was reviewing the instructions with counsel, defense counsel entered no objection to including this paragraph in CALJIC No. 8.85.[97] (16 RT 3238.) No objection is required to review this instruction on

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[97] The court gave the standard CALJIC No. 8.85, including the two optional paragraphs:

> In determining which penalty is to be imposed upon the defendant, you shall consider all the evidence which has been received from any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable.
>
> a) The circumstances of the crime of which the defendant

appeal, however, because the instruction affected Mr. Livingston's substantial rights. (Penal Code, sec. 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Instructional error is reviewed under the independent, de novo standard of review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

As more fully discussed below, this instruction was improper for two

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was convicted in the present proceeding and the existence of any special circumstances found to be true.

b) The presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceeding.

d) Whether or not the offense was committed while the defendant was under the influence of mental or emotional disturbance.

Next, whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

Next, the age of the defendant at the time of the crime.

Next, 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 which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. Sympathy for the family of the defendant is not a matter that you may consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character. (16 RT 3265-3267; 24 CT 6374-6375.)

reasons. First, the Eighth and Fourteenth Amendments require that the jury be permitted to consider sentence impact evidence, not only with regards to Mr. Livingston's personality and character, but also for the impact his execution would have upon his family. Here the trial court specifically told the jury they could not consider sympathy for Mr. Livingston's family in deciding whether to execute him, but permitted them to consider sympathy for the families of his victims. The death penalty must be reversed.

Second, in 1978 the electorate enacted Penal Code section 190.3 to govern admission of evidence at penalty phases in California capital cases. The language used in section 190.3 to describe the evidence admissible at such hearings had been used in the 1977 death penalty law and, in turn, other sentencing statutes as well, and had a well-recognized meaning which permitted consideration of sentence impact evidence in selecting an appropriate sentence. Under well-established principles of statutory construction, there is a strong presumption that the electorate intended this language to have the same meaning in section 190.3 as well. The defense was entitled to rely on that intent, and the trial judge had neither power nor discretion to act as a super-legislature and preclude consideration of this fact in mitigation.

B. WHERE THE STATE RELIES ON THE VICTIM FAMILY IMPACT IN ASKING FOR DEATH, THE EIGHTH

AMENDMENT AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRE THAT THE DEFENDANT BE PERMITTED TO RELY ON THE FAMILY IMPACT OF AN EXECUTION IN ASKING FOR LIFE.

1. The Jury Must be Permitted to Consider All Relevant Evidence, Including Sentence Impact upon a Defendant's Family.

As the United States Supreme Court has long noted, a state may not preclude the sentencer in a capital case from considering any relevant evidence in support of a sentence less than death. (*Abdul-Kabar v. Quarterman* (2007) 550 U.S. 233 [127 S.Ct. 1654, 167 L.Ed.2d 585]; *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285 [124 S.Ct. 2562, 159 L.Ed.2d 384]; *Payne v. Tennessee* (1991) 501 U.S. 808, 822 [111 S. Ct. 2597, 115 L. Ed. 2d 720]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S. Ct. 1669, 90 L. Ed. 2d 1]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [102 S. Ct. 869, 71 L. Ed. 2d 1]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S. Ct. 2954, 57 L. Ed. 2d 973].)

Indeed, it was precisely because of the broad latitude afforded capital defendants that the Supreme Court reversed its opposition to victim impact evidence and held that "evidence 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." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) Victim impact evidence was relevant so that the jury would have

before it "evidence of the specific harm caused by the defendant" when assessing a defendant's "moral culpability and blameworthiness." (501 U.S. at p. 835.)[98]

The counterpart to this is consideration of the impact of the sentence upon a defendant's family and friends. Courts throughout the country have reached this precise result, recognizing that impact evidence of a defendant's execution is relevant to the sentencing decision. (See, e.g., *State v. Mann* (1997) 188 Ariz. 220, 934 P.2d 784, 795 [noting mitigating evidence of "the effect on [defendant's children] if he were executed"]; *State v. Simmons* (Mo. 1997) 944 S.W.2d 165, 187 [noting mitigating evidence that defendant's "death at the hand of the state would injure his family"]; *State v. Rhines* (S.D. 1996) 548 N.W.2d 415, 446-447 [noting mitigating evidence of the negative effect [defendant's] death would have on his family]; *State v. Benn* (1993) 120 Wash.2d 631, 845 P.2d 289, 316 [noting mitigating evidence of "the loss to his loved ones if he were sentenced to death"]; *State v. Stevens* (1994) 319 Or. 573, 879 P.2d 162, 167-168 [concluding that the

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[98] In *Payne*, the Court overruled *Booth v. Maryland* (1986) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440], and held that testimony as to the impact of the murder on the victim's surviving family was relevant and admissible. (501 U.S. at p. 827.) In California, this relevance and admissibility also extends to the victim's "close personal friends." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183.)

Supreme Court's mandate for unfettered consideration of mitigating circumstances required consideration of the impact of an execution on the defendant's family]; *Lawrie v. State* (Del. 1994) 643 A.2d 1336, 1339 [noting that defendant's "execution would have a substantially adverse impact on his seven year-old son . . . and on [defendant's] mother"]; *Richmond v. Ricketts* (D. Ariz. 1986) 640 F.Supp. 767, 792 [noting trial court's consideration of testimony relating "the impact of the execution" on defendant's family], rev'd. on other grounds, *Richmond v. Lewis* (1992) 506 U.S. 40. Cf. *State v. Wessinger* (La. 1999) 736 So.2d 162, 192-193 [rejecting defendant's argument that an instruction precluded the jury from considering the impact of a death sentence on the defendant's family].)

This line of authorities from many states is consistent with the approach of the very expansive approach of the United States Supreme Court toward determining the relevance of mitigation evidence in capital cases.

> "When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy v. North Carolina*, 494 U.S. 433, 440-441, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990), we spoke in the most expansive terms. We established that the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context, and thus the general evidentiary standard--"'"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"'"--applies. *Id.*, at 440, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (quoting *New Jersey v. T.*

L. O., 469 U.S. 325, 345, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985)). We quoted approvingly from a dissenting opinion in the state court: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value'" 494 U.S., at 440, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (quoting *State v. McKoy*, 323 N. C. 1, 55-56, 372 S.E.2d 12, 45 (1988) (opinion of Exum, C. J.)). Thus, a State cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." 494 U.S., at 441, 108 L. Ed. 2d 369, 110 S. Ct. 1227.

"Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. *Boyde v. California*, 494 U.S. 370, 377-378, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); *Penry I*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)); see also *Payne v. Tennessee*, 501 U.S. 808, 822, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting Eddings, supra, at 114, 71 L. Ed. 2d 1, 102 S. Ct. 869))."

(*Tennard v. Dretke, supra*, 542 U.S. at pp. 284-285.)

As the prosecutor argued in his opening statement on penalty to the jury: "[The death penalty is] not aimed to bring the victims back. It's not aimed to or focused on trying to make people feel better about what happened, whether it be me, the victims' families, etcetera. It's -- it's aimed to act as a punishment, pure and simple, punishment." (15 RT 2915.)

Consistent with that statement, the prosecution introduced no evidence that execution of Mr. Livingston would cure or alleviate the loss suffered by the relatives of the deceased victims.

There was evidence supporting that the relatives and friends of Mr. Livingston would suffer a loss from his execution, beyond that from a life in prison. One or more reasonable jurors may have wished to consider whether to vote for an execution which would not cure or alleviate the loss suffered by the relatives of the victims, but which would create a new loss among Mr. Livingston's friends and relatives. As evidence which could support a punishment less than death, the loss which relatives and friends would experience from Mr. Livingston's execution is constitutionally relevant. The opportunity to consider that form of mitigation, however, was denied to the jurors by the court's explicit instructions.

The jurors were considering whether to sentence a defendant to death, the most weighty decision our system asks of any jury. Certainly relevant to that decision is the impact a defendant's death will have on his family and friends. Just as the jury is expected to consider all aspects of the "specific harm" caused by the defendant, the jury should not be precluded from considering all consequences of their decision.

To consider that evidence, federal constitutional law requires the jury

be provided an adequate "vehicle" for the consideration of the evidence. (See discussion in *Smith v. Texas* (2007) 550 U.S. 297 [127 S.Ct. 1686, 167 L.Ed.2d 632].) In our case, however, the trial court expressly prohibited the jurors from considering the evidence of the loss Mr. Livingston's relatives and friends would suffer from his execution.

Punishment for a criminal is, in part, because he or she failed to consider the consequences of their action or accepted those consequences. The judge's instruction orders the jurors not to consider all the consequences of their decision whether Mr. Livingston should be executed.

2. When the Prosecution May Use Victim Impact Evidence To Support a Death Penalty, Eighth Amendment Parity Requires that the Jury Also Be Allowed to Consider Sentence Impact Upon the Defendant's Family and Friends.

The underlying premise of the majority decision in *Payne* is that the sentencing phase of a capital trial requires an even balance between the evidence available to the defendant and that available to the state. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 820-826.) Indeed, in his concurring opinion, Justice Scalia explicitly noted that since the Eighth Amendment required the admission of all mitigating evidence on the defendant's behalf, it could not preclude victim impact evidence because "the Eighth Amendment permits parity between mitigating and aggravating factors."

(501 U.S. at p. 833.)

This result is especially appropriate in a case like this, where the state itself relies on *Payne* to introduce highly emotional testimony about the impact of the crime on the victims' families. At least when the state introduces such testimony, the "parity" concerns of *Payne* are plainly implicated, and the jury should also be permitted to consider sentence impact evidence as a counterweight to the emotionally charged victim impact testimony.

Practical concerns too support such an approach. In the area of victim impact, the practical reality is that more traditional methods of ensuring the reliability of testimony -- such as cross-examination -- are simply not feasible. (See *Booth v. Maryland* (1986) 482 U.S. 496, 506 [107 S.Ct. 2529, 96 L.Ed.2d 440] [noting that "it would be difficult--if not impossible" to use cross-examination to rebut victim impact evidence.].) Accordingly, since cross-examination cannot realistically serve to balance the scale when victim impact evidence is presented, it is only fair that sentence impact evidence be allowed.

3. Fourteenth Amendment Due Process Requires That Sentence Impact Upon the Defendant's Family and Friends Must Be Considered If the Prosecution Relies Upon Victim Impact Evidence.

Even under older United States Supreme Court jurisprudence, this

discrimination between prosecution and defense must be invalid on due process grounds. In *Wardius v. Oregon* (1973) 412 U.S. 470 [955 S.Ct. 2208, 37 L.Ed.2d 82], the Supreme Court noted that it has been "particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." (412 U.S. at p. 473, fn. 6.) In this case the court instructed the jurors to consider the circumstances of the crimes. (16 RT 3265.) The prosecutor informed the jurors that those circumstances included the impact upon the victims' families (14 RT 2828-2829), even though no evidence hinted that this impact was known to Mr. Livingston. The court also instructed the jurors, however, to disregard the impact of execution upon Mr. Livingston's family. Sympathy for them "is not a matter you may consider in mitigation." (16 RT 3267.)

A rule which so distinguishes between the prosecution and defense, to the latter's detriment, must deny due process.

4. California Supreme Court Decisions.

This Court has several times rejected arguments that the federal constitution required consideration of sentence impact upon a defendant's family. (See, e.g., *People v. Ochoa* (1998) 19 Cal. 4th 353, 455-456; *People v. Smithey* (1999) 20 Cal.4th 936, 999-1001; *People v. Bemore* (2000) 22

Cal. 4th 809, 855-856.) These earlier decisions, however, should not control. The trials in both *Ochoa* and *Bemore* occurred before *Payne v. Tennessee* had overruled *Booth v. Maryland*. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 455, fn. 9; *People v. Bemore*, *supra*, 22 Cal.4th at p. 856, fn. 21.)[99] Thus, the juries in those cases were not permitted to consider "sympathy for the victim or his family." (*Bemore*, 22 Cal.4th at p. 856, fn. 21.) As a consequence, the parity concerns of *Payne* -- which are implicated when a trial court permits victim impact evidence while at the same time precludes sentence impact evidence -- were plainly not implicated in those cases.

In addition, not only did the trials in *Ochoa* and *Bemore* pre-date *Payne*, but the appellate opinions in those cases pre-dated a series of United States Supreme Court cases emphasizing the "low threshold for relevance" imposed by the Eighth Amendment. (*Smith v. Texas* (2004) 543 U.S. 37, 43-44, [125 S.Ct. 400, 160 L. Ed. 2d 303]; *Tennard v. Dretke, supra*, 542 U.S. at pp. 284-285.) As these recent cases recognize, the Eighth Amendment does not permit a state to exclude evidence which "might serve as a basis for a sentence less than death." (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 285.) So long as a "fact-finder could reasonably deem" the evidence to have

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[99] *Smithey* merely followed *Ochoa* without noting the timing of the trial in relationship to the *Payne* decision. (20 Cal.4th at p. 1000.)

mitigating value, a state may not preclude the defendant from presenting that evidence. *(Smith v. Texas* (2004), *supra*, 543 U.S. at p. 43.) Nor should a jury be instructed to disregard the sympathy for a defendant's family that naturally flows from such evidence.

Execution impact evidence is plainly relevant under *Smith* and *Tennard*. *Ochoa*, *Bemore* and *Smithey* -- which were all decided prior to *Smith* and *Tennard* – do not control this case.

C. BECAUSE THE LEGISLATURE INTENDED THAT CAPITAL DEFENDANTS BE PERMITTED TO RELY ON THE IMPACT OF AN EXECUTION ON THEIR LOVED ONES, THE TRIAL COURT'S INSTRUCTION TO THE CONTRARY WAS FUNDAMENTALLY IMPROPER.

1. Summary of Argument.

The current law fixing the penalty for first degree murder -- Penal Code section 190.3 -- was enacted by voter initiative in November 1978. Once a defendant has been convicted of special circumstances murder, section 190.3 provides for a separate penalty phase to determine the appropriate penalty as between life without parole and death. Section 190.3 goes on to describe the evidence admissible at the penalty phase:

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of

> the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

Under the plain terms of this statute, the parties are permitted to introduce "any matter relevant" to three distinct areas: (1) aggravation, (2) mitigation, and (3) sentence. Under the express language of section 190.3, this "includ[es] but [is] not limited to" a number of areas, including "the defendant's character, background, history, mental condition and physical condition."

As discussed below, and for two separate reasons, basic principles of statutory construction compel a conclusion that the effect of a death penalty on the defendant's family is admissible under this section of the Penal Code. First, section 190.3 permits defendants to introduce "any matter relevant to . . . mitigation . . . ." At the time the 1978 law was enacted, the term "mitigation" had been used in previous sentencing statutes and had been recognized to include the impact of sentence on the defendant's family. Under well accepted principles of statutory construction, the electorate is deemed to have intended "mitigation" as used in section 190.3 to have the same meaning it had in these other statutes.

Second, section 190.3 also permits introduction of "any matter relevant to . . . sentence." Assuming the electorate's use of the phrase "any matter relevant to . . . mitigation" was insufficient to authorize the use of sentence impact information, such information was plainly admissible as a matter relevant to sentence.

2. The Sentence Impact Upon a Defendant's Family is Mitigating, and Its Consideration Should Have Been Permitted.

Because the term "mitigation" used by the electorate in section 190.3 had a recognized meaning in 1978 permitting consideration of the sentence impact upon the defendant's family, the electorate is presumed to have intended the same meaning in section 190.3.

The primary goal of statutory construction is "to ascertain and give effect to the intent of the Legislature." (*People v. Freeman* (1988) 46 Cal.3d 419, 425.) Of course, this principle applies with equal force to statutes passed by the electorate through the initiative process. (See, e.g., *People v. Jones* (1993) 5 Cal.4th 1142, 1146.)

In determining the intent behind any particular statute, a court looks first to the words of the statute. *(People v. Jones, supra.)* Where the language of a statute includes terms that already have a recognized meaning in the law, "the presumption is almost irresistible" that the terms have been

used with the same meaning, and this principle also applies to legislation adopted by initiative. (*In re Jeanice D.* (1980) 28 Cal.3d 210, 216.)

The 1978 initiative provided that the parties may introduce evidence "as to any matter relevant to aggravation, mitigation, and sentence . . . ." Before the 1978 law, "mitigation" had been used repeatedly in sentencing statutes and court rules governing sentencing. For example, when the electorate voted on the 1978 law, Penal Code section 1203, subdivision (b)(1), provided that where a person had been convicted of a felony, the probation officer would prepare a report to "be considered either in aggravation or mitigation." Subdivision (b)(3) of that section went on to provide that a grant of probation was appropriate if the trial court found "circumstances in mitigation . . . ." Similarly, Penal Code section 1170, subdivision (b) -- which governed a trial court's selection of sentence between upper, middle and lower terms of imprisonment when probation was denied -- provided for a middle term of imprisonment unless there were circumstances in "aggravation or mitigation."

These statutes were implemented by the Rules of Court. Rule 414 (now 4.414) set forth "criteria affecting probation," designed to implement the inquiry into aggravation and mitigation mandated by section 1203. In deciding whether to grant probation, the court was required to consider, inter

alia, the impact of the sentence "on the defendant and his or her dependents." Courts have long relied on this mitigating factor in determining an appropriate sentence. (See, e.g., *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 834 and fn.15.)

Similarly, Rules of Court 421 and 423 (now 4.421 and 4.423) set forth aggravating and mitigating factors to implement the inquiry mandated by section 1170. The advisory committee note to Rule 421 made clear that "the scope of 'circumstances in aggravation or mitigation' under section 1170(b) is . . . coextensive with the scope of inquiry under the similar phrase in section 1203." This would include the sentence impact upon the defendant's family.

In describing the type of evidence admissible at a penalty phase trial, the 1978 electorate used the very same term that was used in sections 1203 and 1170. At least one court has explicitly recognized that "the mitigating and aggravating circumstances set forth in the determinate sentencing guidelines are also proper criteria" in selecting a sentence under section 190.3. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149.) Because the term "mitigation" in sections 1203 and 1170 included the impact of a sentence "on the defendant and his or her dependents," it should be given the same meaning in section 190.3.

Many California courts have construed section 190.3 in this exact way. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 986 [jury told it could consider in mitigation "sympathy or pity for the defendant or his family"]; *People v. Osband* (1996) 13 Cal.4th 622, 705 [jury told it could consider in mitigation "the likely effect of a death sentence on [defendant's] family, loved ones and friends."].) Mr. Livingston was entitled to that same construction here.

To be sure, Mr. Livingston recognizes that in *People v. Ochoa* (1998) 19 Cal.4th 353, this Court held that neither the Due Process Clauses of the federal and state constitutions, nor the Eighth Amendment, required a capital sentencer to consider in mitigation the impact of an execution on the defendant's family. (19 Cal.4th at pp. 454-456. Accord, *People v. Smithey*, *supra*, 20 Cal.4th at pp. 999-1000 [holding there was no Eighth Amendment violation in telling jury that sympathy for the defendant's family was not to be considered]; *People v. Bemore, supra*, 22 Cal.4th at pp. 855-856 [same].)

But as this Court has noted, cases are not authority for propositions neither presented nor considered. (See *People v. Williams* (2004) 34 Cal.4th 397, 405.) In neither *Ochoa*, *Smithey*, nor *Bemore* was this Court presented with, nor did it resolve, the statutory construction argument presented

here.[100] As discussed above, applying well-established principles of statutory construction to section 190.3 compels a conclusion that the electorate intended that defendants in capital cases have the same ability as defendants in non-capital cases to rely on the impact of a particular sentence on the defendant's family. The trial court's instruction to the contrary was error.

In rejecting the argument that defendants were constitutionally entitled to rely on the impact of an execution on the defendant's family, *Ochoa* noted that state law permitted only "an individualized assessment of the defendant's background, record and character, and the nature of the crimes committed . . . ." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.) Section 190.3, however, authorizes evidence relevant to "aggravation, mitigation and sentence including **but not limited to** the nature and circumstances of the present offense. . . and the defendant's character, background [and] history . . . ." [Emphasis added.] In other words, *Ochoa*'s observation ignores the words "but not limited to."

3. Sentence Impact Upon a Defendant's Family Is Relevant to the Sentence, and Its Consideration Should Have Been Permitted.

Section 190.3's explicit provision that a defendant can introduce "any

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[100] Nor did this Court consider some of the federal constitutional arguments raised earlier.

matter relevant to . . . sentence" provides an additional reason supporting consideration of the impact of a death sentence on the defendant's family. Even if the phrase "mitigation" did not have a well-recognized meaning at the time section 190.3 was enacted by the electorate, or even if this Court were to hold that the electorate intended the term "mitigation" in section 190.3 to mean something distinct from "mitigation" in sections 1203 and 1170, the trial court's instruction in this case would still be erroneous. That is because section 190.3 permits evidence not only as to "aggravation" and "mitigation," but also as to "sentence."

In authorizing evidence "as to any matter relevant to . . . sentence," the electorate must have intended this to mean something different from evidence relating only to "aggravation" or "mitigation." "Otherwise, the clause would be mere surplusage and serve no purpose, in direct contravention of our rules of statutory construction." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 ["An interpretation that renders statutory language a nullity is obviously to be avoided"]. Accord, *People v. Gilbert* (1969) 1 Cal.3d 475, 480 ["A cardinal rule of construction is that ... a construction making some words surplusage is to be avoided."].) Supporting this interpretation is the breadth of the statute's reference to "any matter" relevant to the sentence.

As discussed above, at the time section 190.3 was enacted, the law generally permitted consideration of sentence impact on the family members of a defendant in selecting an appropriate sentence for that defendant. Assuming that use of the phrase "any matter relevant to . . . mitigation" was not intended to incorporate this same flexibility into section 190.3, such evidence would fall squarely within the phrase "any matter relevant to . . . sentence." After all, as the case law, statutes and court rules had recognized prior to 1978, the impact of a sentence on the defendant's family was not only relevant to the sentence, it was a factor which court rules themselves specifically required the trial court to consider. (See Rule 414, now 4.414.) And, as noted above, section 190.3 goes on to state that the evidence admissible at a penalty phase is "not limited to . . . the defendant's character, background [and] history." (Section 190.3.)

In deciding the intent behind this particular provision of section 190.3, another principle of construction is also relevant. When a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (See e.g., *People v. Garcia* (1999) 21 Cal.4th 1, 10.) Here, given the background against which section 190.3 was enacted in 1978 (which required consideration as to the impact of a sentence on the defendant's

family) and the electorate's use of the extremely broad phrase "any matter relevant to . . . sentence," it is certainly reasonable to assume that the electorate intended to permit defendants to rely on such evidence in capital cases as well as non-capital. Indeed, as noted above, several trial courts have apparently reached this very result, instructing the jury that in deciding whether a defendant should live or die, it can consider the impact of defendant's execution on the defendant's family. (See, e.g., *People v. Weaver*, *supra*, 26 Cal.4th at p. 986; *People v. Osband*, *supra*, 13 Cal.4th at p. 705.)

4. Reading Section 190.3 to Deny Consideration of Sentence Impact Evidence Would Deny Equal Protection for Capital Defendants Under the Fourteenth Amendment to the United States Constitution.

Interpreting section 190.3 to permit sentence impact would also avoid a serious constitutional question. When a statute is susceptible of two or more interpretations, one of which raises constitutional questions, the court should construe it in a manner that avoids any doubt regarding its validity. (*People v. Davenport* (1985) 41 Cal. 3d 247, 264, 266; *People v. Skinner* (1985) 39 Cal. 3d 765, 769 ["Mindful ... of our obligation whenever possible both to carry out the intent of the electorate and to construe statutes so as to preserve their constitutionality...."].) In selecting an appropriate non-capital sentence, California law explicitly requires the sentencer to consider the

impact of a sentence on the defendant's family. (See Rule 414, now 4.414.) Accepting the trial court's approach in this case distinguishes capital from noncapital defendants in a most discriminatory fashion.

California's current approach is squarely contrary to the thrust of the United States Supreme Court's capital jurisprudence. Recognizing the qualitatively different punishment involved in a capital case, the Supreme Court has repeatedly concluded that the protections afforded a capital defendant must be more rigorous than those provided non-capital defendants. (See *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 [105 S. Ct. 1087, 84 L. Ed. 2d 53] [Burger, C.J., concurring, and Rehnquist, J., dissenting. Both would limit a defendant's right of access to a psychiatrist to capital cases.]; *Eddings v. Oklahoma, supra*, 455 U.S. at pp. 117-118 [O'Connor, J., concurring]; *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606.)

Current California law singles out capital defendants for less protection. As such, embracing the trial court's interpretation of section 190.3, subdivision (b), to preclude sentence impact testimony in capital cases would deny equal protection under the Fourteenth Amendment. Such an interpretation of section 190.3 should be avoided.

D. THE TRIAL COURT'S REFUSAL TO ALLOW THE JURORS TO CONSIDER THE IMPACT OF EXECUTION UPON MR. LIVINGSTON'S FAMILY REQUIRES A NEW PENALTY PHASE.

1. Once There Is a Reasonable Likelihood that a Jury Believes It Cannot Consider Some Mitigating Evidence, a New Sentencing Hearing Is Required.

"[O]nce a state habeas petitioner establishes 'a reasonable likelihood that the jury believed that it was not permitted to consider' some mitigating evidence, he has shown that the error was not harmless and therefore is grounds for reversal. Id., at 786-788 (citing *Boyde v. California*, *supra*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990))." (*Smith v. Texas* (2007), *supra*, 127 S.Ct. at p. 1698, citing and quoting the Texas Court of Criminal Appeals in *Penry v. State* (2005) 178 S.W.3d 782, 786-788.) The United States Supreme Court then found that Smith had met this state standard for harmless error relief and remanded.[101] (127 S.Ct. at 1699.)

In the instant case, there can be no dispute that there is a reasonable likelihood that the jurors would find they could not consider in mitigation evidence of the loss Mr. Livingston's relatives and friends would suffer from his execution. The trial judge expressly told them not to consider that.

In the decisions where the United States Supreme Court found error in instructions limiting the jury's consideration of mitigation evidence (*Penry* error), the Supreme Court performed no harmless error review, nor

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[101] In his concurring opinion, Justice Souter observes in some future opinion the Supreme Court may need to address whether harmless error review is ever appropriate in cases of *Penry* error. (*Ibid.*)

did it remand expressly to determine whether prejudice followed from *Penry* error.

In *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [127 S. Ct. 1654, 167 L. Ed. 2d 585], the Supreme Court stated: "A careful review of our jurisprudence in this area makes clear that well before our decision in Penry I, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." (127 S.Ct. at p. 1664.)

That same day in *Brewer v. Quarterman* (2007) 550 U.S. 286 [127 S.Ct. 1706, 167 L.Ed.2d 622] the Supreme Court stated: "In more recent years, we have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence." (127 S.Ct. at p. 1710.) The Court continued: "It may well be true that Brewer's mitigating evidence was less compelling than Penry's, but, contrary to the view of the CCA, that difference does not provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case." (127 S.Ct. at pp. 1712.)

"The Constitution requires States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall....'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing.'" *Eddings v. Oklahoma*, 455 U.S., at 117, n. *, 102 S.Ct., at 878, n. * (O'CONNOR, J., concurring)." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 442 [110 S.Ct. 1227, 108 L.Ed.2d 369], quoting *Mills v. Maryland* (1988) 486 U.S. 367, 375 [108 S.Ct. 1860, 100 L.Ed.2d 384, predates *Penry I*].)[102]

The issue is not whether one or more jurors would have voted against death out of sympathy for Livingston's survivors. Such an issue would permit a weighing of the evidence to determine whether the error was harmless. Rather, the issue is whether the jurors, by court instruction or statute, were denied the opportunity to consider whether they would vote for life for Mr. Livingston out of sympathy for his survivors.

"The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a

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[102] See also, *Smith v. Texas* (2004) 543 U.S. 37 [125 S.Ct. 499, 160 L.Ed.2d 303], *Tennard v. Dretke* (2004) 542 U.S. 274 [124 S.Ct. 2562, 159 L.Ed.2d 384], *Penry v. Johnson* (2001) 532 U.S. 782 [121 S.Ct. 1910, 150 L.Ed.2d 9].

correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." (*Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.)

That reversal is required whenever the instruction precludes proper consideration of mitigating evidence is supported not only by Supreme Court practice in cases of *Penry* error, by also by the reasoning behind other per se reversals.

"'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' *Eddings v. Oklahoma*, 455 U.S., at 117, n., 102 S.Ct., at 878, n. (O'CONNOR, J., concurring)." (Quoted at *Mills v. Maryland, supra*, 486 U.S. at p. 375.) The normal test for reliability in a verdict, requiring proof beyond a reasonable doubt, is not required by California when a jury is determining death or life. Each juror is charged only to decide whether death is the "appropriate punishment." (16 RT 3271.) Under these circumstances, any error which preclude consideration by the jury of the full mitigating effect of evidence cannot be dismissed as harmless.

2. The Instruction Was Not Harmless Error.

If this Court does apply the federal constitutional harmless error test of reasonable doubt, or even the state standard of a preponderance of the evidence, reversal and a new penalty hearing is still required. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) Though the jury had but a single decision to make, whether to return a death sentence, the jury took four days of deliberation. (16 RT 3322-3329.) The primary non-ambiguous mitigating evidence was testimony from Mr. Livingston's family and friends -- how he maintained a relationship with them, and was always helpful towards his sisters' and other's children. The jury was permitted to consider the effect upon the families of the victims, but was expressly denied the opportunity to consider the impact upon Mr. Livingston's family and friends if a death sentence was returned.

A new sentencing hearing is required.

XIV

THE STANDARD CALJIC No. 8.88, AS GIVEN BY THE TRIAL COURT BELOW, CONTRASTS MORAL AND SYMPATHETIC VALUES, ALIGNING "MORAL" WITH AGGRAVATING FACTORS. THIS DENIED MR. LIVINGSTON DUE PROCESS, THE RIGHT TO A JURY TRIAL, AND A RELIABLE SENTENCING DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. SUMMARY OF ARGUMENT AND STANDARD OF REVIEW.

When instructing the jurors with CALJIC No. 8.88, the trial judge included the standard sentence: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (16 RT 3273, 24 CT 6389.) Casting "moral" and "sympathetic" value as alternatives equates "moral" with aggravating factors while limiting "sympathy" to the mitigating evidence. This is legally wrong, inconsistent with decisions of this Court and of the United States Supreme Court, and unfairly advantages the prosecution in the jurors' deliberations on sentence. This denies Mr. Livingston due process and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Instructional error is reviewed under the independent, de novo standard of review. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

B. IN CONTRASTING "MORAL" AND "SYMPATHETIC" VALUES, CALJIC No. 8.88 DEPARTS FROM BOTH CALIFORNIA LAW AND DECISIONS OF THE UNITED STATES SUPREME COURT.

1. California law and United States Supreme Court Opinions.

However inadvertently, a decision of this Court contributed to this language in No. 8.88. In 1985, this Court was reviewing a constitutional challenge to the 1978 Initiative that became section 190.3 of the Penal Code. At particular issue was the language that the "trier of fact ... shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (Penal Code, sec. 190.3.) This Court explained that "Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it."[103] (*People v. Brown* (1985) 40 Cal.3d 512, 541.)

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[103] The sentence comes from this paragraph: "Similarly, the reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. [Footnote omitted.] By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. [Reference to footnote omitted.] Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular

At the same time as *Brown* was decided, before the Court was a request that the Court adopt a specific jury instruction to guide jury determination of the penalty in future cases, along with a draft paragraph almost identical to the current fourth paragraph of CALJIC No. 8.88, as used by the court below. That draft paragraph included the sentence: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." This Court did not adopt the exact language of the proposed instruction or any other, but did state the language "would conform to our opinion." (*Brown, supra*, 40 Cal.3d at p. 545, fn. 19.)

In the sentence at issue: "you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider," the disjunctive use of "or"[104] informed the jurors that "moral" did not overlap with "sympathetic;" they were different and mutually exclusive alternatives.[105] A factor may be

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case. [Footnote omitted.]" (*People v. Brown* (1985) 40 Cal.3d 512, 541.)

[104] "In its ordinary sense, the function of the word 'or' is to mark an alternative such as 'either this or that....'" [Citations omitted]. (*Houge v. Ford* (1955) 44 Cal.2d 706, 712.)

[105] "1 -- used as a function word to indicate (1) an alternative between different or unlike things, states, or actions...; (2) choice between alternative things, states, or courses...." The first two definitions for "or" from Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002.

assigned a "moral" value or a "sympathetic" value. It implies assigning a "moral" value, or in contrast, a "sympathetic" value to each of the factors for consideration listed in CALJIC No. 8.85, or perhaps to each item of evidence introduced pertinent to those factors. Because sympathy[106] is associated exclusively with mitigation, the contrasting "moral" is associated only with aggravating factors.

"Moral," however, is not associated exclusively with aggravating evidence elsewhere in the *Brown* decision, in other decisions of this Court, nor in decisions of the United States Supreme Court. Under *Brown*, such an atomistic process as assigning "moral" or "sympathetic" value to each factor or item of evidence would be inconsistent with the "mental balancing process," (*Brown*, 40 Cal.3d at p. 541), a holistic process described by this Court to defend section 190.3 against the charge that "shall" deprived a jury of discretion by mandating a death penalty if the aggravating factors atomistically or mechanically outweighed the mitigating factors.

The year following *Brown*, this Court described the sentencing

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[106] "2a. The act or power of sharing the feelings of another. b. A feeling or an expression of pity or sorrow for the distress of another; compassion or commiseration...." (Second definition of "sympathy" from The American Heritage® Dictionary of the English Language, Fourth Edition. Copyright © 2000.)

See CALJIC No. 8.85, factor (k), 16 RT 3266 & 3267, 24 CT 6375; Special Instruction I, 16 RT 3270, 24 CT 6383; Special Instruction J, 16 RT 3271, 24 CT 6384; CALJIC No. 8.88, 16 RT 3273, 24 CT 6389.)

process, not the evaluation of individual factors or items of evidence, as "inherently moral and normative, not factual...." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) The *Rodriguez* opinion referred back to the *Brown* opinion. The *Brown* opinion had also said that "[i]t is not simply a finding of facts which resolves the penalty decision, "'but ... the jury's **moral** assessment of those facts as they reflect on whether defendant should be put to death ....'" (citing *People v. Easley* (1983) 34 Cal.3d 858, 880, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 863.) After the quoted section, the opinion in *Haskett* continued to explain that "at the penalty phase the 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. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*Haskett*, *supra*, 30 Cal.3d at p. 863.)

What each of these passages describes is not a process in which each juror applies either a "moral" value or a contrasting "sympathetic" value to each factor or, indeed, each piece of evidence available for consideration. Rather, as each juror determines facts from the evidence, he or she applies to the constellation of facts he or she has determined, their own understanding

of community values to determine the appropriate penalty. This is the "mental balancing process" described in *Brown.* "Moral" applies to this overall assessment of which penalty is appropriate given the constellation of facts for that juror.

This is also the understanding to be found in the decisions of the United States Supreme Court, which reviews the admission of evidence and the instructions to determine if they permit a "reasoned moral response" by which the jury applies societal values regarding culpability to the evidence to determine an appropriate sentence. The "reasoned moral response" of the United States Supreme Court equates to the "mental balancing process" described in *Brown.* "[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." (*California v Brown* (1987) 479 U.S. 538, 544 (O'Connor, J., concurring) [107 S.Ct. 837, 93 L.Ed.2d 934]. Quoted with approval at *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, 328 [109 S. Ct. 2934, 106 L. Ed. 2d 256].)

The introduction of a new dichotomy, moral versus sympathetic, was consistent with the other dichotomies running through the penalty instructions on the law: death versus life without parole, aggravating versus mitigating. As explained above, sympathy was obviously associated with

mitigation. "Moral" now was associated with aggravation. Akin to a prosecutor supporting death with passages from the Old Testament, now the judge was subtly informing the jury that death was the "moral," i.e., virtuous, decision.

2. Solutions for the future.

"Moral," as used in decisions of this Court and of the United States Supreme Court, is a term of art. It applies to the "mental balancing process" as used by this Court, described as a "reasoned moral response" by the United States Supreme Court. "Moral" as used in CALJIC No. 8.88 and by the court below matches neither of these understandings. "Reasoned moral response" as synonym for "mental balancing test" is akin to common first definitions of "moral" as an adjective.[107] When used as a contrast to sympathy and mitigating circumstances in CALJIC No. 8.88 and by the court below, "moral" is associated with aggravating factors, using the second[108] or

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[107] "adjective 1 concerned with the principles of right and wrong behaviour and the goodness or badness of human character." (on line Compact Oxford English Dictionary at askOxford.com)

"ADJECTIVE: 1. Of or concerned with the judgment of the goodness or badness of human action and character: moral scrutiny; a moral quandary." (The American Heritage® Dictionary of the English Language, Fourth Edition. Copyright © 2000.)

[108] "2 conforming to accepted standards of behavior." (on line Compact Oxford English Dictionary at askOxford.com)

third[109] definitions from common dictionaries. The association of "moral" with aggravating factors alone gives the prosecution an unfair advantage as jurors strive to reach to the virtuous, "moral" decision.

When a term of art has a technical meaning peculiar to the law not "commonly understood by those familiar with the English language," a definition of the term's meaning is required. (*People v. Anderson* (1966) 64 Cal.2d 633, 639; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52.) In this case, however, the standard instruction and the court below used "moral" in accord with a common meaning albeit not the first common definition, but in a way that is misleading and inconsistent with its meaning in decisions this Court and of the United States Supreme Court.

The best solution would be to delete that sentence from the paragraph in which it is found. Adding "moral" or "sympathetic" to the remaining discussion of aggravating factors and mitigating circumstances is not necessary to their discussion. And it misleads jurors into associating "moral," and hence virtuous conduct solely with the aggravating factors, thus pushing for a death sentence. This distorts the sentencing process.

C. THE ERROR REQUIRES REVERSAL OF THE SENTENCE.

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[109] " 3. Conforming to standards of what is right or just in behavior; virtuous: a moral life." (The American Heritage® Dictionary of the English Language, Fourth Edition. Copyright © 2000.)

A "reasoned moral response" involves consideration of both aggravating and mitigating factors in determining the proper community response. To associate "moral" only with aggravating factors, while relegating mitigating to sympathy, distorts the sentence-determining process against the defendant.

1. The error was egregious because it was presented as law binding upon the jurors and thus unconstitutionally restricting their discretion.

In this case, the error was particularly egregious. The court had properly informed the jurors that they were the sole judges of the believability of each witness and the weight to give the testimony of each. (16 RT 3258.) The court's division of the evidence and factors between "moral" and "sympathetic," and equating "moral" with aggravating, was guised as law. (16 RT 3273) The instruction was given in that section of the instructions the court characterized as "the law" which the jurors were required to accept as the court stated it. (16 RT 3264.) During the instructions on the merits, the judge disclaimed any intent to suggest his opinion as to the facts or believability of any witness, and informed the jury they should disregard anything he had done which seemed so to indicate and form their own conclusion. (CALJIC No. 17.30, 14 RT 2608-2609; 24 CT 6290.) That instruction was not repeated on sentencing, relegating it to the

others given earlier in the trial which the jurors were instructed to disregard unless repeated at sentencing. (CALJIC No. 8.84.1, 16 RT 3265, 24 CT 6373.)

The erroneous characterization of the evidence and the factors by the court below is akin to a judge's comments upon the evidence. While comment upon the evidence is constitutional, it must be done with extreme care.

> Our Constitution (Cal. Const., art. VI, § 10), as well as our statutes (Pen. Code, §§ 1093, subd. (f), 1127), grant trial courts the authority to comment on the testimony and credibility of witnesses. But there is a countervailing consideration. The Constitutions of both the United States (U.S. Const., Amend. VI) and the State of California (Cal. Const., art. I, § 16) also grant a criminal defendant the right to a jury trial, and that right requires that the jury be the exclusive arbiter of questions of fact and the credibility of witnesses. (See e.g., People v. Rodriguez (1986) 42 Cal.3d 730, 766 [230 Cal.Rptr. 667, 726 P.2d 113]; People v. Friend (1958) 50 Cal.2d 570, 577-578 [327 P.2d 97]; People v. Ottey (1936) 5 Cal.2d 714, 728 [56 P.2d 193].)
>
> There is an inherent tension between the authority of a trial court to comment on the evidence and the right of a criminal defendant to a jury trial. A court's exercise of its authority to comment on the evidence always poses the danger of a violation of the right to jury trial. Because a judge presiding over a trial necessarily has substantial influence on the jury (Bollenbach v. United States (1946) 326 U.S. 607, 612 [90 L.Ed. 350, 354, 66 S.Ct. 402]), every judicial comment on the evidence carries with it an appreciable risk that the jury may discount its own view of the evidence in deference to the judge's opinion. (People v. Cook (1983) 33 Cal.3d 400, 407 [189 Cal.Rptr. 159, 658 P.2d 86].) Therefore, in the interest of

> protecting the right to jury trial while giving efficacy to our state Constitution's grant of authority to comment on the evidence, appellate courts have imposed strict limitations on the trial court's authority to comment.
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> Thus, a trial court's comments on the evidence must be "necessary for a proper determination of the cause." (Cal. Const., art. VI, § 10.) They must assist, not coerce, the jury. (People v. Rodriguez, supra, 42 Cal.3d at pp. 767-768.) The court must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of witnesses. (Pen. Code, § 1127; People v. Brock (1967) 66 Cal.2d 645, 651.) (*People v. Proctor* (1992) 4 Cal. 4th 499, 556-557 (Kennard, J., concurring and dissenting.)

A jury must not only have the evidence before it, but must be permitted "to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Brewer v. Quarterman* (2007) 550 U.S. 286 [127 S.Ct. 1706, 1714; 167 L.Ed.2d 622].)

The trial judge and CALJIC tilted the scales in favor of the prosecution. That is not permitted.

2. Once There Is a Reasonable Likelihood that a Jury Was Not Permitted to Give a "Reasonable Moral Response" to the Evidence Before It, Reversal Is Required.

"[W]hen the jury is not permitted to give meaningful effect or a 'reasoned moral response'" to the evidence before it, the sentencing process is "fatally flawed" and reversal is required. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233 [127 S.Ct. 1654, 1675; 167 L.Ed.2d 585].)

When the constitutional error below interferes with the jurors' proper consideration of mitigating evidence, the strength of that evidence is not an issue in determining whether prejudice has occurred. (*Brewer*, *supra*, 127 S.Ct. at p. 1712.) Any toleration of such a tilting of the scale denies the "high requirement of reliability" required for a death sentence in a particular case. (*Mills v. Maryland* (1988) 486 U.S. 367, 383-384 [108 S.Ct. 1860, 100 L.Ed.2d 384].) Consequently, the error cannot be harmless, and reversal is required.

3. The Instruction Was Not Harmless Error.

If this Court does apply the federal constitutional harmless error test of reasonable doubt, reversal and a new penalty hearing is still required. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) Though the jury had but a single decision to make, whether to return a death sentence, the jury took four days of deliberation. (16 RT 3322-3329.) That length of deliberation indicates the trial court's contrast of a "moral" with a "sympathetic" sentence cannot be proved beyond a reasonable doubt not to have affected the outcome. Reversal is required.

XV

OMNIBUS ARGUMENT

TABLE OF CONTENTS

ARGUMENT

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.[110] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while

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[110] 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 equipose 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

comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim

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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.)

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.

I. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

To avoid the Eighth Amendment's proscription against cruel and

unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirty-two special circumstances[111] 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'

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[111] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow as one more was added. The number is now thirty-three.

declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The 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 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.

II. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[112] 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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[112] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2009), par. 3.

weeks after the crime,[113] or having had a "hatred of religion,"[114] or threatened witnesses after his arrest,[115] or disposed of the victim's body in a manner that precluded its recovery.[116] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), 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.

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[113] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[114] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

[115] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

[116] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

(*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (Ibid.) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

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.

III. 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.

A. 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* (2007) 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* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 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*, 549 U.S. at pp. 288-293.) 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.

(1) In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding

need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[117] 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 (16 RT 3273), 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

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[117] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also - and most important - to render an individualized, normative determination about the penalty appropriate for the particular defendant...." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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.[118] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[119]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226,

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[118] in *Johnson v. State* (Nev., 2002) 59 Pac.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.*, 59 P.3d at p. 460.)

[119] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[120] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether 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. 278-281.) That was the end

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[120] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi*, *Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type fo factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at p. 1253; *Cunningham*, *supra*, at p. 289.)

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*, at pp. 288-289.)

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. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra*, at pp. 290-291)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual*

findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), Ring imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[121] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but Cunningham recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places

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[121] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham*, *supra*, at p. 279.)

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 of effect, not form. 530 U.S., at 494, 120 S.Ct. 2348. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict. *Ibid*

(*Ring*, 536 U.S. at 586.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88, 16 RT 3274.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 549 U.S. at 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.

(2) Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, (Ariz. 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* (Nev. 2002) 59 P.3d 450.[122])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death

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[122] 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).

penalty is unique in its severity and its finality"].)[123] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

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[123] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that *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).)

B. 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.

(1) Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.)

Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

(2) Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in Santosky, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to

maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 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.

C. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to

Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's

wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[124] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*; Section IV, 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.

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[124] 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.)

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *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 III.A, 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.

D. 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* (1984) 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 I of this Argument, ante.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section III, ante), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section II ante). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case

proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

E. 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* (1988) 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 Mr. Livingston (15 RT 2943-2965, 3018-3020, 3043-3044, 3049-3056), and devoted a considerable portion of its closing argument (15 RT 2926-2928, 16 RT 3279-3280, 3283, 3284, 3286) to arguing these alleged offenses.

The U.S. Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

F. 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), and (h) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to

aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias*, *supra*, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522

[same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

IV. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE

EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (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*,[125] as in *Snow*,[126] 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.

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[125] "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.)

[126] "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.)

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 439, subd. (e) [now rule 4.420] provides: "The reasons for selecting the upper or lower term must be stated orally on the record, and must include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." (Amended in 2007 to change subd. (e).)

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 III.A&B, 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 III.C, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[127]

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[127] 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

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*.)

V. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death 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,

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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.)

J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty, among the total of 130 countries which have abolished the death penalty in law or in practice. (Amnesty International, *"The Death Penalty: List of Abolitionist and Retentionist Countries"* (1 Jan. 2007), 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. 113, 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*, *supra*, 536 U.S. at p. 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* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious

crimes."[128] 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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[128] G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. See Univ. of Minn. HumanRights Library, online at "www1.umn.edu/humanrts/instree/b3cpr.htm". See also, Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 30 (1995).

XVI

CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)

Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying

the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The guilt phase errors in this case include, inter alia, the introduction of highly unreliable testimony and extrajudicial statements, myriad instructional errors, and some verdicts unsupported by substantial evidence. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845, 847 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

The penalty proceedings were also riddled with error, both

instructional errors and evidentiary errors. As well, the jurors were instructed that all the evidence they heard during the guilt phase was also to be considered on sentence (16 RT 3264-3265; 24 CT 6373), repeating in the penalty phase the errors from the guilt phase. (Cf. *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137 ["If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed."]; see also *People v. Brown* (1988) 46 Cal.3d 432, 446-448 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error].)

Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt trial and repeated at the special circumstance trial, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, (1985) 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: 28 August 2009

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Robert Wayne Gehring, counsel for David James Livingston, certify pursuant to the California Rules of Court, that the word count for this document is 73,147 words, excluding the tables, this certificate, and any attachment permitted under Rule 8.630(b)(4). This document was prepared in WordPerfect X3, and this is the word count generated by WordPerfect 11 for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Robert Wayne Gehring
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