IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DANIEL NUNEZ** and WILLIAM TUPUA SATELE, Defendants and Appellants.	Supreme Court No. S091915 Los Angeles Superior Court No. NA039358

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE TOMSON T. ONG, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

on behalf of

DANIEL NUNEZ

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APPELLANT'S OPENING BRIEF

on behalf of

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STATEMENT OF THE CASE

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code Section 1239,[1] subdivision (b), from a conviction and judgment of death entered against appellant

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[1]. Unless otherwise indicated, all statutory references are to the Penal Code.

Daniel Nunez (hereinafter "appellant"), in Los Angeles County Superior Court on September 14, 2000. (39CT 11312-11323.)

The appeal is taken from a judgment that finally disposes of all issues between the parties.

INTRODUCTION

The single most compelling point about appellant's trial is that every verdict the jury returned assigning criminal liability to him, including the special circumstance finding that resulted in the judgment of death, is based on an incorrect instruction of law and/or an incorrectly stated verdict form. This is a harsh condemnation of the trial process and its participants, but it is an accurate one. The second most compelling point about appellant's trial is that these legal errors converged to obscure that most fundamental element of criminal liability – mens rea – and the jury's duty to first determine that appellant possessed the requisite mental state before holding him criminally liable on the charges.

Appellant will show below that the jury convicted him of two counts of "willful, deliberate, premeditated murder" based on a legally defective verdict form and an inconsistent and irreconcilable factual premise predicated upon a legally incorrect personal and intentional weapon use enhancement instruction that blurred the mental state requirements for the enhancement and the murders. The jury found the multiple murder special circumstance – the legal platform for appellant's judgment of death – to be true based on an instruction that incorrectly stated the mental state requirements for liability. The jury found that appellant committed the murders for the benefit of a criminal street gang based on an instruction that incorrectly substituted the elements of the substantive offense of street gang participation for the elements of the gang benefit enhancement and thus further obscured the mental state determinations the jury was required to make in order to properly return a true finding. Finally, the jury found that appellant personally and

intentionally discharged the murder weapon killing the victims based on an instruction that incorrectly stated the law regarding the enhancement and the mental state requirements for that enhancement. The incorrect statement of law contained within the instruction was echoed in the prosecutor's argument and in the legally incorrect verdict forms for that enhancement.

These errors individually and cumulatively constituted error of constitutional dimension such that appellant was denied due process of law.

PROCEDURAL HISTORY

Appellant[2] was charged by felony complaint dated March 12, 1999, and subsequently by amended felony complaint filed on June 22, 1999, alleging two counts of murder (Pen. Code, § 187, subd. (a)), the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)), and gang benefit (Pen. Code, § 186.22, subd. (b)(1)), weapons (Pen. Code, §§ 12022, subd. (a)(1), 12022.1, 12022.53, subd. (d)), and hate crime in concert (Pen. Code, § 422.75, subd. (c)) enhancements. (2CT 379-384, 397-402.)

The preliminary hearing was held on June 22 and 23, 1999. (1CT 90, 97, 101-288, 2CT 289-377.) The court found the evidence showed the charged offenses had been committed and that there was sufficient cause to believe appellant and Satele had committed the crimes. The court ordered both defendants to be held to answer. (2CT 375-376, 401-402.)

On July 7, 1999, appellant was charged by information with the premeditated murders of Edward Robinson (Count 1) and Renesha Ann Fuller (Count 2). Multiple murder and hate crime special circumstance allegations attended each

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[2]. Codefendant Satele was similarly charged in the same charging documents as appellant.

count. (Pen. Code, § 190.2, subds. (a)(3), (a) 16).) As to each count, the information further alleged enhancements pertaining to weapons (Pen. Code, §§ 12022, subd. (a)(1), 12022.53, subds. (b), (c), (d)); that the crime was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)); that the crime was a hate crime committed voluntarily and in concert (Pen. Code, § 422.75, subd. (c)); and that the crime was committed while appellant and Satele were released from custody before the final judgment on separate prior felonies (Pen. Code, § 12022.1). (2CT 385-388.)

On August 27, 1999, the prosecution announced it intended to seek the death penalty against appellant and codefendant Satele. (2CT 424; 1RT 14-31.)

On April 19, 2000, the court granted the prosecution's motion to dismiss all but one of the gun enhancement allegations arising from the Robinson/Fuller shooting (Pen. Code, §§ 12022, subd. (a)(1), 12022.53, subds. (a)(1), (b), (c)). The remaining gun enhancement under Penal Code section 12022.53, subdivision (d), was left to be resolved by the jury. The court also granted the prosecution's motion to dismiss enhancement allegations related to appellant and codefendant Satele's commission of an offense while they were on release from custody (Pen. Code, § 12022.1), which allegations arose in connection with separate charges filed against appellant and Satele in cases NA038581 and NA038597. (2RT 323.)

Jury selection in the murder case began that same day, April 19, 2000. (2RT 325.) Appellant was arraigned on the amended information, which reflected the dismissals set forth above, on April 21, 2000. (37CT 10674-10676; 2RT 325, 479-481.)

Opening statements and the evidentiary portion of the trial began on May 1, 2000. (37CT 10699-10700; 4RT 883-920.)

At the conclusion of the prosecution's guilt phase case on May 15,

2000, defense counsel moved to dismiss all charges and special allegations pursuant to Penal Code section 1118.1. The motion was denied. (10RT 2196-2197.)

On June 2, 2000, the jury returned verdicts convicting appellant of the "willful, deliberate, premeditated" murders of Robinson and Fuller. (38CT 10925, 10926.) As to each count, the jury found the multiple murder special circumstance to be true. However, the jury found the hate crime special circumstance and the related hate crime enhancement to be *not* true. (38CT 10927, 10928.) The jury further found the gang benefit enhancement and the firearm use enhancement to be true as to both counts. (38CT 10928, 10929; 15RT 3457-3458, 3459-3461.)

Identical guilt verdicts were returned for codefendant Satele. (38CT 10930-10934; 15RT 3458, 3461-3463, 3463-3465, 3467, 3474-3481.)

Trial on the penalty phase began on June 13, 2000.

The jury began penalty phase deliberations on June 26, 2000. (18RT 4434.) On June 29, the jury foreman advised the court the jury was at a 10-2 impasse and further reported that Juror No. 10 had discussed the case with her mother and her friend. (38CT 11132.) On June 30, following a hearing, the trial court discharged Juror No. 10 for misconduct and replaced her with an alternate juror. (18RT 4459, 4470.) That same day, the jury foreman informed the court that the jury vote was 11-1. (38CT 11133.) On July 3, 2000, Juror No. 9 sent a note to the court in which she cited the effect of stress upon her unborn child and asked to be discharged from further service. (18RT 4475.) Following a hearing, the court discharged Juror No. 9 over the objection of appellant. (18RT 4485.) Appellant's subsequent motion for mistrial was also denied. (18RT 4482.) An alternate juror was seated as the new Juror No. 9 and the jury was excused to begin its deliberation at 10:45 a.m. Fifty minutes later, the jury announced it had reached its verdicts. The court ordered the trial recessed until July 6. (38CT 11139.)

On July 6, 2000, the jury's verdicts were read setting the penalty for

appellant at death in counts 1 and 2. (38CT 10941, 10942; 18RT 4497.) The jury similarly imposed the death penalty for codefendant Satele. (38CT 10943-10944; 38RT 4498.)

Appellant's case was called for sentencing on September 14, 2000. Appellant moved for new trial, which was denied. (39CT 11171, 11194-11200; 18RT 4581-4598.) The trial court denied appellant's motion for modification of the judgment (Pen. Code, § 1181.6) and motion to strike the special circumstances. (39CT 11220-11225; 18RT 4579-4580.)

On September 14, 2000, the court sentenced appellant to the penalty of death in both counts 1 and 2. The court imposed and stayed a term of 25 years to life for each of the personal firearm use enhancements. (18RT 4606-4607; see judgment of death commitment and death warrant (39CT 11312-11323) and abstract of judgment (39CT 11346-11348).)

The notice of appeal was timely filed. (Nov. 6, 2000, RT 4615-4616.)

STATEMENT OF FACTS

A. THE PROSECUTION'S GUILT PHASE CASE

1. THE SHOOTING

Edward Robinson and Renesha Ann Fuller were shot and killed around 11:30 on Thursday night, October 29, 1998. Fuller had spent the afternoon and evening at the Harbor City townhouse where Robinson lived with his sister Bertha Robinson Jacque (Bertha)[3], her husband Frank Jacque (Frank), and her two sons. The Jacque townhouse was at 254th and Frampton streets. (5RT 979-981, 997.)

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[3]. Where witnesses shared the same surname, given names have been used to avoid confusion.

Bertha and Frank were in their bedroom on the second floor when they heard the sound of gunshots. Minutes before, Bertha had looked downstairs and found it dark. She then looked out onto the street from her bedroom window. Fuller's burgundy car was at the curb. Bertha concluded Robinson and Fuller were outside talking. She turned and walked toward her bed. Gunshots sounded. Bertha ran back to the window and saw the tail lights of a "big car, old car like." She heard the sound of a car speeding down Frampton Street toward the Pacific Coast Highway. (5RT 983-987, 991, 1031, 1037.) Bertha told Frank to call 9-1-1. (5RT 988-989.)

When Bertha reached the street, Robinson was on the ground. Fuller was slumped over behind the wheel of her car. Just then, a light blue compact car appeared at the corner of 254th Street and made a right turn onto Frampton. (5RT 992-994.) The car stopped and a bearded man Bertha identified at trial as Ernie Vasquez stepped out. Vasquez pointed out that the engine of Fuller's car was running. When Bertha reached in to turn the engine off, the car began to roll. Bertha grabbed the steering wheel and Vasquez held on to the car to stop it from rolling. Vasquez spoke briefly with Frank and then said he had to leave before the police arrived because he was wanted on outstanding warrants. (5RT 1002-1003.) Vasquez was in the company of a white woman who stayed in the car and who kept urging Vasquez to leave. (5RT 1000, 1003.)

The paramedics arrived and pronounced Fuller dead. They transported Robinson to Harbor General Hospital, where he died that night. (5RT 1003-1004.)

Bertha placed the time of the shooting around 10:45 because the Jerry Springer show, which she planned to watch, was to begin at 11:00 p.m. (5RT 1016-1017.)

Los Angeles Police Sergeant Jeffrey Pailet was the first responder to arrive at the scene at 11:32 p.m. Robinson was on the ground, unconscious, and Fuller in the driver's seat of a red car. (5RT 1091.) To get to the scene, Pailet had driven northbound on Frampton from the Pacific Coast Highway. No cars speeding

southbound had passed by him. (5RT 1100.)

Detective Robert Dinlocker arrived at the crime scene about two hours after the shooting. (8RT 1867.) After that, he began looking for Ernie Vasquez and about two months later found him in the county jail. (8RT 1869.)

Two nights later, around 3:40 in the early morning of October 31, 1998, Officer Adam Greenburg and his partner Vinh Nguyen decided to cite a car driving northbound on Ronan Street with its lights darkened. Before Nguyen could activate the unit's lights, the car pulled to the curb and three men got out. (8RT 1795-1798.) Greenburg made eye contact with appellant, the car's driver, who turned and walked away. (8RT 1800.) Appellant was wearing dark knee-length short pants and a dark jersey-type shirt. He was not wearing a cap. (8RT 1823.) All three men began running southbound. Greenburg caught up with Satele, who had been seated in the car's front passenger seat. Satele was arrested. (8RT 1801-1802.)

Greenburg recovered an AK-47-type assault rifle, identified at trial by the nickname "Monster," from the area between the driver and front passenger seats, an ammunition clip holding several jacketed hollow point rounds, a dark blue Nike baseball cap from the right rear seat, and a baseball cap inscribed "~~Sp~~eedy" from the driver's seat. (8RT 1803-1807.) At the time of his arrest, Satele was wearing a cap almost identical to the one on the driver's seat, except Satele's cap had "Bone" written on the back. (8RT 1823.)

Ruby Feliciano was the owner of the car from which Satele and two men fled. (8RT 1172.) She said she had left the car with appellant in mid-October so he could fix a problem with the alternator. (7RT 1774-1777, 8RT 1779-1781, 1787, 1878.)

Some time after October 31, 1998, at a time when appellant was in jail, Feliciano received a conference call from appellant and his girlfriend Yolanda. They asked her to tell police that she knew appellant had not been in the car when it was

stopped because she had spoken with him at his home where he was with Yolanda. (8RT 1784-1785.)

On February 9, 1999, Detective Dinlocker met with both appellant and Satele. He indicated to each of them he had information about the car that had been used in the shooting. (8RT 1890.) On February 11, 1999, Dinlocker arranged to have appellant and Satele brought from the county jail to the Long Beach Courthouse in a van equipped with a tape recorder to record their conversations. Before they were put in the van and driven to the Long Beach Courthouse, appellant and Satele were told they were being taken to court to be arraigned on murder charges. Their conversations to and from the courthouse were recorded and portions played to the jury.[4] (8RT 1890-1893, 9RT 2167; exhibits 52, 53.)

Around noon on January 26, 2000, Detective Knolls and the prosecutor drove from the scene of the shooting at 254th and Frampton to appellant's home in the Dana Sands Projects at the normal flow of traffic to get an estimate of the travel time. The drive took approximately 15 minutes. (9RT 2163.)

2. ERNIE VASQUEZ

For several hours before they heard the gunshots that brought them to the shooting scene, Ernie Vasquez and Kathy Romero drove through the area smoking crack cocaine and trying to sell a videocassette recorder so they could buy more crack cocaine. On several occasions, Vasquez encountered an older model burgundy Buick Regal also driving through the area. The car had either three or four occupants and Vasquez claimed that on one of the occasions he had a good look at the driver. (5RT 1138-1142; 6RT 1152, 1247-1252.) Vasquez and Romero were smoking crack

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[4]. The recorded conversation, though enhanced through law enforcement efforts, was indistinct and the parties could not agree upon a transcription. (8RT 1890-1893; 9RT 2167.) Exhibit 54, a "transcription" of the audio recording played for the jury, was not moved into the record. (9RT 2189.)

cocaine in the driveway of a hotel on 254th Street when the gunshots sounded. Vasquez drove down 254th Street and turned on to Frampton. He stopped when he saw a man lying on the ground. (5RT 1121-1125, 6RT 1256-1258.)

Vasquez got out and helped. (5RT 1126.) While he was doing so, he thought he saw two Hispanic males standing behind the gate of the warehouse across the street. (5RT 1130.)

Following the Robinson and Fuller shootings, in November or December 1998, Vasquez was taken into custody on outstanding warrants. At the time he was arrested, Vasquez used a false name and identified himself to officers as John Vasquez; he was booked in the county jail under this false name. (6RT 1171.)

On January 6, 1999, a little over two months after the shooting took place, and while he was still in custody, Vasquez identified Satele from a photographic six-pack and told Detective Dinlocker about a conversation he had with Satele in the jail's holding tank. He also identified Juan Carlos Caballero as the driver of the burgundy Buick Regal he saw on the night of the shooting. (6RT 1157-1160, 7RT 1367.) After that, Vasquez asked to be transferred. The detectives arranged his transfer (sub nom. John Vasquez) the same day from the downtown jail facility to the Lynwood jail facility, where appellant was housed. Vasquez later told Dinlocker appellant had confessed to him. (6RT 1213-1220, 8RT 1876-1878.)

Two days later, on January 8, 1999, Vasquez appeared in the Long Beach Courthouse on his felony possession of cocaine for sale case. Dinlocker spoke on Vasquez' behalf. As a result, the court ordered Vasquez released that day from the drug case, but he remained in custody on a pending Torrance Courthouse case. (8RT 1869-1871.)

On January 12, 1999, Detectives Dinlocker and Knolls accompanied Vasquez to the Torrance Courthouse and spoke on his behalf at a sentence modification hearing. As a result, the judge reduced Vasquez' sentence from 365

days to 54 days. (6RT 1163-1166.) Dinlocker also helped Vasquez by providing him with transportation to courts for other cases, by getting him reinstated in his lapsed court-ordered domestic violence classes, and by providing him with police department money, including $80 for food, $160 for a week in a hotel, and $80 to reinstate his driver's license. (6RT 1166; 8RT 1873.) Vasquez could not remember the total amount of money given to him by the police. (6RT 1166.)

Vasquez had been taken into custody on outstanding warrants after Torrance police stopped him in a car with unlawfully tinted windows. The car, which belonged to Vasquez' aunt, had been impounded. Dinlocker got the car out of impound for Vasquez. (8RT 1872.) At the time of trial in this case, Dinlocker was attempting to place Vasquez in a drug treatment facility. (6RT 1168-1169.)

At Dinlocker's request, the Los Angeles City Council moved to offer a reward of $50,000 for information leading to the arrest and prosecution of a suspect in the case. (8RT 1875-1876.) The identification evidence Vasquez provided to police made him eligible for the $50,000 reward. Vasquez learned of the reward from the detectives and said at trial he was hoping to collect it. (6RT 1160, 1308.) When the detectives first contacted Vasquez, they knew he was at the scene of the shooting because his prints had been lifted from Fuller's car. They knew about his pending cases and offered to help him if he cooperated with them. They showed him a paper describing the $50,000 reward and told him he might receive the reward if he helped them. (6RT 1314-1317.) Dinlocker notified the responsible persons that Vasquez was a claimant for the reward. (8RT 1875-1876.)

Vasquez testified he met Satele when they were placed in the same jail holding tank. Satele told Vasquez he was called Wil-Bone. Satele had a tattoo on his forearm that read "West," which Vasquez recognized stood for West Wilmington ("WSW"). (6RT 1205, 7RT 1461-1464.) When Vasquez was in his twenties, he had been a member of the rival Harbor City gang. (6RT 1172, 1174.) He was able to speak with Satele, however, because gang rivalries are not observed in the jail system,

where rivalries are based on ethnic lines. (6RT 1174-1178, 1180.)

At trial, Vasquez said "something clicked in his mind" about Satele's facial features when he saw him in the holding tank. Later, he realized that he had seen Satele in the burgundy car on the night of the Robinson/Fuller shooting. (6RT 1206, 1208.) According to Vasquez, during their conversation in the holding tank, Vasquez told Satele he was "from Harbor City," whose neighborhood includes the area where the shooting occurred. Satele asked whether Vasquez had heard about the shooting that had occurred there. Vasquez indicated he had, but did not say he had come upon the scene right after the shooting. Vasquez claimed Satele said either, "Well, we did that," or "I did that." Supposedly, Satele also said, "I AK'd them," or "We AK'd them." (6RT 1210.) Vasquez advised Satele to "keep it on the low quiet like." (6RT 1211.)

Vasquez also testified that appellant confessed to him while they were both in the Lynwood jail facility. Vasquez had been moved to Lynwood by detectives after he reported Satele's confession to them. The Lynwood jail features a housing structure in which groups of inmates are housed in pods. Vasquez was housed in pod 172; appellant in pod 171. (6RT 1219-1220. 7RT 1420-1421, 1425.) Access between pods is normally restricted, but, according to Vasquez, appellant was a trustee and able to move easily between the pods. (6RT 1219-1220; 7RT 1485-1486.)

Vasquez said he was housed in the same pod with WSW members Anthony Sannicolas and Frank Martinez. Purportedly, appellant came up to Vasquez as he stood near Martinez' bed and asked if Vasquez was from Harbor City. Vasquez said he was. Appellant introduced himself as Speedy. Vasquez claimed that appellant asked, "Did you hear about those niggers that got killed in your neighborhood." Appellant continued, "I did that shit." (6RT 1223-1225.) As he said this, appellant raised his hands as though he were holding a gun. Vasquez testified appellant said he was driving down the street and the guy looked at him wrong so he turned back and blasted him. Vasquez told appellant to keep quiet about the crime.

(6RT 1226.)

On January 20, 1999, Vasquez identified appellant's picture from a photographic six-pack shown to him by Detectives Dinlocker and Knolls. (6RT 1229.) At trial, he looked at prosecution photographs of a burgundy Regal and said the car was similar to the one he saw on the night of the shooting. (6RT 1229-1230.) Vasquez also denied that either Dinlocker or Knolls sent him to Lynwood to speak to appellant. (6RT 1226.) Knolls similarly testified he did not move Vasquez to the Lynwood facility to get a statement from appellant. (9RT 2164.)

At trial, Vasquez testified he was not sure either appellant or Satele were in the burgundy Regal the night of the shooting. In a February 1999 interview, however, Vasquez told detectives he thought Wil-Bone was in the front and Speedy was seated behind the driver. (7RT 1394-1398.)

3. JOSHUA CONTRERAS

Joshua Contreras, aka Tweety, was 15 years old and serving a sentence of 25 years for a conviction of 1999 attempted murder when he testified. (7RT 1492-1493.) He stated he was not afraid to testify at trial. (7RT 1525-1527, 1531.)

Contreras, a WSW member, testified he knew appellant and Satele as Daniel and William and not by the names Speedy and Wil-Bone. (7RT 1498-1502.) At the time of the charged crimes, Contreras lived in a house on F Street in the Dana Strands Projects, near the corner of F Street and Wilmington Boulevard. (7RT 1493-1495.) Around 7:00 on the night of the Robinson/Fuller shooting, Contreras, Juan Carlos Caballero or Curly, and appellant were together on the street across from Contreras' home. Satele was riding his bike nearby. (7RT 1505-1507, 1509-1510, 1512.)

Around 8:00 p.m., Contreras and appellant bought food from a taco stand on Anaheim Street and brought it back to Contreras' home. Around 9:00 p.m.

appellant's girlfriend Yolanda came to get appellant because of a problem with their baby. Appellant and Yolanda left around 9:10 p.m. Contreras went into the house and to sleep. (7RT 1513-1516.)

On several occasions, detectives and/or the prosecutor and his investigator, Jeff Neff, interviewed Contreras to determine what he knew about the Robinson/Fuller killings. The first interview occurred on February 5, 1999, at the Eastlake juvenile facility where Contreras was housed. (8RT 1880-1881, 9RT 2164.) During that interview by Detectives Robert Dinlocker and Charles Knolls, Contreras asked to have either an attorney or his mother present, but he was provided with neither. The detectives talked to him for four hours, "messing with him," and saying they were going to "mess with" his mother. Detectives told him he was going to stay in prison if he didn't talk. One detective went so far as to put his hands on Contreras' mouth and chin, moved his head from side to side, and hit his head on the table three or four times while telling him to talk. During the entire interview, Contreras never saw a tape recorder and he did not observe the detectives taking notes. (8RT 1749-1756.)

On February 23, 1999, Dinlocker again interviewed Contreras, this time at the Los Padrinos juvenile facility. During the interview the detectives showed him pictures of Fuller's body and asked him how he would feel if his mother looked like that. (8RT 1757-1758.) The detectives offered his mother one-half of the reward money and said Contreras would be released if he did what they asked. (8RT 1759.) They told him they had talked with someone who knew him in juvenile camp. This person knew about the shooting and so the detectives knew that Contreras knew about the shooting. (8RT 1760.)

Detectives visited Contreras once more at Los Padrinos and spoke with him for two hours. After the interview, he reported to the staff that the detectives had harassed him. (8RT 1760.) Contreras further testified the detectives interviewed him one more time when he was in a regional correction facility and the prosecutor also

interviewed him on another occasion. (8RT 1760-1765.) The interview with the prosecutor and his investigator John Neff was conducted in the presence of California Youth Authority (CYA) caseworkers. Contreras' mother had been notified of this interview, and arrived 30 to 45 minutes after the interview had begun. (8RT 1826-1833, 1836.)

During this interview, the prosecutor expressed concern about Contreras' safety and talked to him about the witness protection program, the relocation of Contreras' family, and the relocation of Contreras to a federal prison outside California. (8RT 1833-1836.) CYA workers Martinez and Rainey disputed Contreras' testimony that he had been coerced and threatened into giving a statement to the prosecutor and his investigator. District Attorney's investigator John Neff said Contreras said Juan Carlos Caballero had been murdered by gang members after he talked to police about the charged murders. Contreras said he and his family were fearful of retaliation by gang members. (9RT 1957-1959.)

During the interviews when Contreras believed he was being harassed and threatened, he told detectives and/or the prosecutor and his investigator the following:

When he, appellant, and Caballero were contacted by police in the early evening of the night of the shooting, Satele was also there but evaded police contact. Later that night Contreras walked to a park within the Dana Strands Project. Appellant, Caballero, and Satele arrived there about midnight, bringing with them food from Taco Bell. Contreras and Caballero went to the swings and talked. (7RT 1517, 1522-1525, 1533, 1535, 1564-1565, 1567, 1568-1569.)

While he and Caballero were on the swings, appellant and Satele were next to the benches. Lawrence Kelly aka Puppet then showed up. (7RT 1603-1604.) Satele, appellant, and Puppet sat and talked in the bench area for one minute. Puppet then left. Satele and appellant ate Taco Bell while Caballero just held his burrito and did not eat it. (7RT 1593-1594.) Contreras heard Satele tell Puppet, "We were out

looking for niggers," and heard either appellant or Satele say, "I think we got one of them." (7RT 1597, 1599-1600, 8RT 1629-1630.) Appellant and Satele left the park together, after saying they were going to pick up Satele's brother, G-Boy, and that they would be back. (7RT 1605-1606.) Before Satele left, he asked Caballero for the dark blue Nike baseball cap Caballero was wearing because G-Boy wanted to use the cap. Caballero gave the cap to Satele. (7RT 1607.) Contreras also said appellant told him on the night Satele was arrested and "Monster" was seized that Satele had been caught and that appellant and G-Boy had gotten away. (9RT 1959.)

Contreras said Satele and appellant bought the weapon known as "Monster." (8RT 1633, 1636.) Contreras saw Satele put "Monster" in the car around 2:00 on the early morning Satele was arrested. He later saw appellant, Satele, and G-Boy, who was still wearing Caballero's cap, together in the car at 3:00 A.M. (8RT 1730-1740.)

Contreras and Caballero were at his neighbor April's house around 9:00 p.m. on the night after the shooting (i.e., Friday, October 30) when Satele arrived in a shiny black Honda Civic. Satele told Contreras and G-Boy in April's kitchen that Dominick had told him the murders were on the television news. Satele was nervous and told G-Boy he had shot a black guy and a black girl in Harbor City on the night he left by himself and the murders were now on the news. Appellant was outside selling dope when Satele made these statements. (7RT 1608-1611, 1613-1615, 1616-1622, 8RT 1627-1628, 1700-1705, 1746-1749.)

Contreras said "R" on WSW graffiti stood for "Rider," or people in the gang who kill gang enemies. Contreras said he, appellant, and Satele are riders. (9RT 1960.) Contreras claimed Caballero had been murdered by gang members because he had talked to police about this case. Contreras said Caballero's murder did not make him afraid to testify. (7RT 1561-1563.)

At trial, Contreras denied making any of the above remarks to detectives and/or the prosecutor and his investigator.

Contreras further told detectives that he and appellant both bought caps on the day before the Robinson-Fuller shooting and that appellant's cap had "W~~ES~~T" and "~~SPEE~~DY" written on it with the letters S, P, E, and S crossed out and that appellant's cap still had the tag on it. (8RT 1725-1728.)

At trial, Contreras was presented with the cap and asked the meaning of "W~~ES~~T UP," which was written on the underbill. Contreras said West Up meant the Westside Wilmas are number one, but denied that the crossed-out ~~ES~~ was a reference to the Eastside Wilmas, a rival gang. (7RT 1572-1573, 8RT 1730.) Contreras testified that WSW did not view African-Americans as their enemy. (7RT 1581.)

Contreras also told detectives in a taped interview that Satele said he was alone and driving in Harbor City when he saw a black guy and girl hugging and kissing and he shot them. Satele also told Contreras that appellant was in his home when this happened. (8RT 1707.)

4. FORENSIC EVIDENCE

Edward Robinson had four grouped gunshot wounds to the left side, one of which was fatal. The coroner recovered one intact projectile and fragments of a second projectile. (9RT 2013, 2024.)

Renesha Fuller was struck twice by bullets. A bullet that hit Robinson may have also hit Fuller. Fragments of a bullet were recovered from Fuller's body. (9RT 2041, 2053-2055.)

Fingerprint expert Denise Griffin matched left middle and left ring finger latent prints she lifted from the driver's side window of Fuller's car to Ernie Vasquez. (5RT 1115-1119.)

Forensic print specialist Daniel Woo testified he was unsuccessful in lifting usable latent prints from the assault rifle seized at the time of Satele's arrest. (9RT 1946.)

Firearms examiner Patrick Ball identified the seized weapon as a Norinco Mak-90, a semiautomatic manufactured in China. Ball was not sure when this actual weapon was made, but said it could have been as long as 20 years earlier and that Norinco has produced millions of these weapons. (9RT 1987-1989.)

The weapon's magazine held 30 rounds. Ball conducted test fires and found the cartridges are ejected to the right and forward at a 45 degree angle. (9RT 1972.) Ball examined one of the 7.62 x 39 cartridges. The bullet had a small steel rod or penetrator inside and was armor-piercing. (9RT 1972, 1978.)

Ball examined expended cartridges recovered from the crime scene and concluded they were discharged from the Mak-90 to the exclusion of all other weapons. He examined recovered coroner's bullet fragments and concluded they were fired from the Mak-90 to the exclusion of all other weapons. (9RT 1979, 1986.) The gun was capable of shooting four shots in milliseconds. (9RT 2007.) Each shot fired required a separate trigger pull. (9RT 1965.)

5. GANG EVIDENCE

Sheriff's deputy Scott Chapman of the county jail's gang unit known as Operations Safety Jail Office (OSJO) testified that South Siders is a reference to Hispanic gangs from the Southern California area. In the county jail system, a member of the Harbor City gang would interact with a member of the Westside Wilmas because they shared the common bond of being South Siders. (9RT 1937.) Chapman said Hispanic gangs sometimes include Samoans. (9RT 1936.) In Chapman's experience, inmates commonly brag about the crimes they have committed to give them status within the county jail system. Status is important because status shows the inmate is a veteran. (RT 1939.)

At 6:20 P.M. on the evening of the shooting, Los Angeles Police Officer and gang expert Julie Rodriguez watched as Caballero, Contreras, and appellant were

detained by two gang force police officers at the corner of F Street and Wilmington Boulevard. The officers completed field investigation cards on the three men and released them 15 minutes later. Rodriguez detained Satele, who was circling the area on a bike. (9RT 2075-2079.)

According to police, both appellant and Satele were WSW members in October 1998. Rodriguez characterized appellant and Satele as gang members midway between the "youngsters" and the "veterano shotcallers on the top" and Contreras and Caballero as "youngsters." (9RT 2097-2091.)

On the date of the shooting, there were approximately 750 WSW members in police files. Rodriguez estimated there were between 125 and 150 WSW members active on the streets. (9RT 2093.) Of these, two, brothers Jason and Jonathan Brooks, are African-American and four, Satele, George Kapo or Kapon aka G-Boy, and brothers William and Ruben Amparosa, are Samoan. (9RT 2096-2097.) Rodriguez named and identified other WSW members – Lawrence Kelly aka Puppet; Ruben Figueroa aka Cranky; Brian Martinez aka Rocky or Roco or Dominic. (9RT 2098-2100.)

The gang expert testified that the primary activities of WSW are the doing of things that will benefit the gang, including committing the crimes of narcotic sales, robbery, assault with a deadly weapon, and murder. (9RT 2093.)

The following gangs are rivals of WSW – the Eastside Wilmas; Rancho San Pedro; Dodge City Crips in San Pedro; Harbor City Boys; Harbor City Crips; and the Water Front Pirus. The latter two gangs are black gangs. (9RT 2101.)

The scene of the shooting at 254th and Frampton is within the area claimed by Harbor City Boys and Harbor City Crips. Rodriguez has never seen a WSW member in the area of 254th and Frampton. (9RT 2101-2102.)

Rodriguez claimed that although WSW associates Jonathan and Jason Brooks are African-Americans, WSW does not care for African-Americans and does

not want them in their neighborhood. (9RT 2016.) Rodriguez said it was her opinion that if Caballero, Satele, and appellant killed Robinson and Fuller, the crime was committed for the benefit of WSW. (9RT 2110.)

Rodriguez said she had had between five and ten contacts with appellant. Each contact occurred on the east side, i.e., on the Dana Strands Projects side, of the Harbor Freeway and not to the west where the shooting occurred. Appellant had never expressed racial animosity in her presence. (9RT 2112-2113.)

6. HATE CRIME EVIDENCE[5]

On September 16, 1996, Esther Collins lived on "D" Street in Wilmington across the street from the Dana Strand Housing Project. Appellant approached her as she was barbecuing with friends in her garage and demanded money or drugs. Appellant was drunk. When she said she had none, he cussed at her and she cussed at him. Appellant called her a "nigger." He threw an object at her that hit her mouth. (4RT 922-928.)

Collins had known appellant for six or eight years and considered him a good friend. (5RT 957.)

Los Angeles Police Officer Jim Perkins saw Collins two days later. Her face was swollen on the left side. She did not tell him appellant was drunk at the time he threw something at her. (5RT 967.)

Prior to trial, Collins told District Attorney's Investigator John Neff she was afraid to testify in the case because veiled threats had been made against her son,

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[5]. Although hate crime evidence played a prominent role in the prosecution's case against appellant, it is given summary treatment here because the jury declined to find either the hate crime special circumstance or the hate crime enhancement to be true. (38CT 10927, 10928.)

who was also in custody at the time of trial. (5RT 971-972.)

B. APPELLANT'S GUILT PHASE DEFENSE

1. THE ROBINSON-FULLER SHOOTING

Appellant was 24 years old when he testified in his defense at trial. He had been born in National City near San Diego. He was a member of the Westside Wilmas. (12RT 2782.)

Appellant was eight or nine years old and in elementary school when he first learned about WSW. He lived in Wilmington at the time with his mother, brother, uncle, aunt, and grandmother. (12RT 2782-2784.) At ten, appellant claimed the gang. He hung out, played sports, went to the swap meet, and rode bikes they had stolen with other ten- to 12-year-old gang "wannabes." (12RT 2782-2790.)

When he was 12 years old, appellant became a WSW member. He began selling rock cocaine. (12RT 2791-2795.) In the housing project where he lived there were cars known as smoker's cars, rented out in connection with the drug trade. At 14, appellant was convicted of grand theft auto in connection with a smoker's car and of cocaine sales. He spent the next six years in eight juvenile facilities in Southern California. Fights occurred daily in the facilities and those who did not fight were picked on by everyone. Appellant was convicted of fighting with another Latino while in custody. (12RT 2796-2802.)

Appellant was 20 years old when he was released. He went to live with his mother, her husband, and his brother and sister in Norwalk. He got a job working in a warehouse and stayed away from all narcotics activity. He was accepted at Cerritos College and waiting for the college semester to start when he decided to leave. Appellant did not get along with his mother's husband. He did not want to "mess up" the new life his mother had made for herself. He left Norwalk and his

warehouse job after two months and returned to his old Wilmington neighborhood and to the home of one of his homeboys near the Projects. (12RT 2803-2808.)

Appellant tried to get a regular job, but found that he needed documents to show he was legally here, which he did not have. He tried to get his birth certificate through the Los Angeles county records department, but was told he would have to go to San Diego, the county of his birth. (12RT 2834-2836.) He began selling dope. (12RT 2812.) He hung out with gang members who lived nearby. During this time, he was arrested and entered pleas to two gun charges, a drug sale, and to a charge of assault and battery involving Esther Collins. As to the incident involving Esther Collins, appellant explained that he was drunk when he threw a handball at Collins after she refused to pay him on a month-old drug debt. (12RT 2827-2830.) Appellant explained that both gun charges arose from activities related to drug sales. Appellant said he and other sellers kept a gun close by as a normal practice so that buyers would see it and not try to rob them of the drugs. Appellant was selling dope with others in Wilhall Park when police arrested him. The police found the gun in the bushes, but not the dope appellant had thrown away. (12RT 2813-2816.) The second gun incident came about as appellant and others were leaving a drug sales area with the guns. Appellant was on a bike and acting as lookout when police caught him. (12RT 2818.)

In October 1998, appellant made a living by selling drugs. As a matter of conscience, he never sold drugs to anyone 13 years old and younger and did not sell to an adult with a child. (12RT 2834.)

Appellant said he was with Satele, Caballero, Lawrence Kelly, and Joshua Contreras at the Dana Strands park on the night of October 28, which was the night before the shooting, rather than on the 29th. Appellant remembered this because on October 29 his son was sick and Guajaca had to drive the baby to the clinic for treatment. (12RT 2847-2848.)

At the time, appellant was living with Guajaca and their infant son in

the home of Guajaca's mother Sandra Lopez.. That day, appellant's son had a rash on his bottom. Appellant provided the keys to Ruby Feliciano's car so that Guajaca could take the baby to the clinic. He did not drive them or take the baby himself because the clinic was in an area claimed by the Eastside Wilmas, a WSW rival, and he did not want to endanger the baby by his presence. Around 9:00 that night, Guajaca came for appellant at Contreras's house. They stopped to buy dinner for people at the house, which they took home. (12RT 2836-2838.)

After dinner, appellant played with his son on the bed. He later placed the baby on his chest with the baby's bottom in the air and fell asleep. (12RT 2839.)

Some time that night, a woman named Angela awakened appellant and asked him to give her some marijuana. Appellant did not sell or keep drugs at the house and had none to give her. (12RT 2840.)

Appellant went back to sleep. He got up around 5:00 A.M. and fed the baby while Guajaca drove her brother to work in Feliciano's car. Appellant explained that Feliciano's car was a "neighborhood car." When Ruby Feliciano was short of money, she rented her car in trade for dope. The car was there to be used by people in the projects, who only had to ask the keyholder. There were four sets of keys to the car. Appellant had one of the sets. (12RT 2840-2842, 2904-2905.) Appellant said he did not use Feliciano's car on October 30th or 31st and he did not participate in a three-way conversation with Guajaca and Feliciano after his arrest. (12RT 2906.)

He did not drive around Harbor City in a Buick Regal with Caballero and Satele on the night of October 29. Appellant had seen the murder weapon in the projects. It was a "neighborhood gun" and was kept at LaShawn's house, a safe house where WSW stored guns. He did not purchase it with Satele. It did not belong to him. He had held it at times, but never used it. (12RT 2901-2902.)

When appellant was arrested, the police told him he was arrested for grand theft auto and gun possession. Appellant asked Guajaca to call Feliciano and

ask her to tell the truth – that she had given appellant use of the car in exchange for dope. (12RT 2842-2843.)

Appellant said the cap inscribed with "~~Sp~~eedy" with "Sp" for San Pedro crossed out and "West" with the "e" for Eastside crossed out was his. (12RT 2873-2874.) The cap was brand new. He had never used it. He had left it in Feliciano's car. (12RT 2907.) He said he saw Satele, a WSW member, often. (12RT 2878, 2889.)

Appellant confirmed that his voice was on the covertly recorded van conversation heard by the jury. (12RT 2864.)

Appellant never told anyone while he was in jail that he had killed someone. (13RT 2972-2974.) He had been jailed long enough to know not to talk to anyone about his case. In jail, someone is always trying to get out of custody by using information about someone else. (13RT 2975.)

Yolanda Guajaca[6] testified that in October 1998 she and appellant had one child, a son named Daniel. They now have a second son named Robert. In October 1998, she and appellant lived in her mother's home on Wilmington Boulevard. (11RT 2545, 2602-2603.)

On a Thursday in October, the baby had a rash on his bottom. Her mother went out to look for appellant, who returned and gave Guajaca keys to a car. She took the baby to the Avalon Community Clinic, about 1.5 miles from her home, and signed in about 6:00 or 6:30 P.M. She was there about two hours. The clinic gave her medication for the baby. On her way home, Guajaca picked up appellant. They stopped to buy some burgers and brought the food home. (11RT 2611-2614; 12RT 2694-2697.) When they finished eating around 10:00, appellant took the baby

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[6]. The Reporter's Transcript reflects variant spellings (e.g., Guaca, Guataca) for Guajaca. Appellant has standardized the spelling to Guajaca in the brief.

and went upstairs. When Guajaca went up a half hour later, appellant and the baby were asleep. (11RT 2616-2620.)

Guajaca awoke appellant and asked him if her brother could borrow the car to drive to work the next morning. Appellant agreed. (11RT 2620.) A woman named Angela came by and stayed for a few minutes. Guajaca watched television upstairs until 12:30. Appellant never left the house. (11RT 2621-2624.)

The next morning, Guajaca got up at 5:00 and drove her brother to work. Appellant and the baby were on the bed with her when she awakened. Appellant was still sleeping when Guajaca returned at 7:00. (11RT 2626-2628.)

After appellant was arrested, the police took Guajaca to the Avalon Community Clinic to get proof that she had taken the baby there on October 29. The officers refused to accompany her into the clinic so she went in alone and asked about the date when she was there. The clinic said she was there on the 29th. She went out and reported this to the officers, who then took her home. (11RT 2629-2633.)

Sandra Lopez, Guajaca's mother, testified that Guajaca and appellant returned to her home with food between 8:45 and 10:00 on the night of October 29. Guajaca put medicine on the baby's rash and Guajaca, appellant, and the baby went upstairs around 10:30 or 11:00. Lopez stayed downstairs. (11RT 2547-2552.) On cross-examination, Lopez said she was not sure whether the baby had the rash on October 28 or October 29. (11RT 2567-2568.) However, on redirect, Lopez testified the baby had a rash and was taken to the clinic on Thursday night, October 29. (11RT 2589.)

Lopez said her son Louis Wajuka came by the house after appellant had gone upstairs. Wajuka was having problems with his truck and asked if appellant would give him a ride to work in the morning. Guajaca went upstairs to speak with appellant. Lopez heard appellant's voice upstairs. (11RT 2553-2555.) After Wajuka left, two girls arrived. One stayed in the car while the other asked for appellant.

Guajaca told her appellant was asleep. (11RT 2552.) There were no visitors after that. (11RT 2555.)

Lopez went to bed. She could hear the baby whining upstairs and appellant's response. (11RT 2556.) Sometime around the middle of the night, Lopez heard the upstairs bedroom door open. She called out for Guajaca. Appellant answered and said he was going to the bathroom. (11RT 2560-2561.)

Lopez got up around 4:30 or 5:00 and left for work around 5:45. The front screen door to the house was broken. At night Lopez secured it with a string knotted on the inside. When she left the house that morning, the door was still tied up on the inside with her string knotted as she had left it the previous evening. The house had a back door, but it was inaccessible because Lopez had clothes, videotapes, and other things piled up against it. Lopez testified that appellant did not leave the house that night after he and Guajaca arrived with dinner. (11RT 2559, 2563-2564, 2590, 2592.)

Expert firearms examiner David Butler reviewed the police reports and examined the murder weapon, which he described as a high capacity rapid fire semiautomatic rifle manufactured in China. (10RT 2201-2202, 2208-2209.) Butler examined the recovered shell casings and the reports and photographs concerning their placement on the street. Butler determined the gun was fired from the street or across the street and that the bullets traveled in an east-to-west direction. The expended casings were grouped, indicating the shooter or the vehicle in which the shooter was seated was somewhat stationary when the shots were fired. (10RT 2211-2213, 2227.) All four cartridges appear to have been fired from this particular weapon. (10RT 2234.)

At the time of trial, Vondrea Williams had known appellant about eight or nine months. Both men were housed in the "high power" tier in county jail. (10RT 2247-2248.) In all of the time he had spent in locked facilities, Williams had talked to a thousand people. None of them had told him on meeting him for the first time that

they had committed a couple of murders. No one would do this because it is common for people to snitch. Three people have snitched on Williams during his time in custody. (10RT 2255-2258.)

Byron Wilson occupied a cell next to appellant in county jail. He explained that in jail people don't discuss their cases with others they don't know. (12RT 2772.)

The parties stipulated that if called to testify, Los Angeles Police Officer Simmons would state that she interviewed Bertha Robinson at the place of and near the time of the shooting and that Robinson told her she heard seven or more shots and then saw a small gray-colored car driving southbound on the street. She did not see its occupants. (10RT 2361-2362.)

2. HATE CRIME EVIDENCE[7]

Vondrea Williams testified he is an African-American and has experienced prejudice against African-Americans. Appellant has never demonstrated any prejudice toward African-Americans. Rather he treats them with respect. At the time of trial Williams was a trustee and he recommended that appellant also be made a trustee. When there is racial tension on the jailhouse tier, Williams speaks to each of "his people" to work out a compromise to settle the differences. Appellant does the same with "his people." Appellant is "a cool person. He's an all right dude." (10RT 2259-2265.)

Jesus Esparza testified that appellant occupied a cell next to his for a few months. Esparza never heard appellant use the "N word" as a racial comment.

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[7]. As earlier noted, the jury declined to find the hate crime enhancements and the evidence is therefore given summary treatment in the briefing.

Appellant spoke with black people in the same manner he spoke with Esparza, a Latino. (10RT 2363-2368.)

During the time he and appellant were in adjoining cells, Esparza crafted a spear-like object from tightly rolled magazines and newspapers, which he wet and let harden. (10RT 2385.) On December 2, 1999, an inmate yelled, "Keys on row," signaling a cell inspection. (10RT 2383.) Esparza threw his rolled paper spear out of his cell and onto the row. The sergeant blamed appellant, who never redirected the blame at Esparza. Appellant was given 20 days in the "hole." (10RT 2372-2373.)

Byron Wilson was walking down the tier and saw who threw the jailhouse spear out onto the row. It was not appellant. (12RT 2765.) Wilson, who is black, said appellant never used the "N word" and never engaged in wrongful conduct with the African-Americans on the row. (12RT 2762.)

Jacqueline Oree is African-American and the mother of twin 16-year-old sons Jason and Jonathan Brooks. Both Jason and Jonathan are WSW members. Appellant and Satele have both come to her house for parties, swimming, and for meals. She never saw appellant doing anything she thought was improper and had faith in appellant's handling of her sons. She is aware of the charges and still thinks appellant is a good person. (10RT 2285-2294.)

Jason Brooks testified he has known appellant and Satele for three or four years. Jason and his brother Jonathan are black members of WSW. Typically, every Saturday, they would all play basketball at Wilhall Park, then barbecue and swim. (10RT 2311-2318.) Appellant has said to him, "What's up, my Nigga?" but not to exhibit prejudice. "Nigga" is a hip-hop word, meaning you're cool, you're my friend. (10RT 2323.) Jason never heard appellant use the "N word." (10RT 2322.)

C. SATELE'S GUILT PHASE DEFENSE

Gang expert Lewis Yablonski said he and other criminologists around the country have found that gangs engage in three kinds of activities. These include social activities generally relevant to adolescence, including hanging out, driving around in cars, and talking about sports. Some members, often unbeknownst to the others, commit crimes. The third activity is gang-banging or fighting with other gangs. (11RT 2479-2480.) It is not typical for gang members to attack people not involved in a gang, i.e., to go around shooting people indiscriminately. Gangs retaliate when there is a sense that someone in the gang has been violated. A potential side effect is that innocent people are injured. (11RT 2480.)

Many gangs lack money and so have communal weapons bought for self-defense and, occasionally, for offensive use. (11RT 2481.) "Monster," the murder weapon, is a gang gun. (11RT 2487.)

Yablonski investigated the WSW gang and interviewed Satele, Lawrence Kelly, and Jonathan and Jason Brooks. He found that WSW fits the model of gangs in general. WSW has 15 to 20 core members. Street gangs are not as coherent and cohesive as people think and members of a gang do not necessarily know each other. The police, who have a different perspective, often project large numbers on street gangs. (11RT 2482.) Yablonski concluded that WSW did not harbor an abnormal hatred toward blacks. The Brooks brothers told Yablonski that Satele ate at their house. (11RT 2483.)

In general, kids who join gangs are alienated from the larger society, from school, from their families. They join gangs in search of succoring or positive reaction from others. Because these individuals own nothing, they exaggerate the prize of owning certain territories. (11RT 2479.) Most gang members have low self-esteem. As a consequence they may brag about or exaggerate reports of their behavior in order to impress other gang members. (11RT 2485.)

Yablonski found it very unlikely that a person who has committed two murders would relate that to a stranger. He found it very unlikely that Satele would confess one day and appellant the next day to a stranger. (11RT 2496-2497.)

Lawrence Kelly, a WSW member known as Puppet, said WSW members are white, black, Samoan, and Mexican. (10RT 2393-2396.)

According to Kelly, WSW had "Monster" for a long time. "Monster" was kept at LaShawn's house and was used to protect the neighborhood from rivals and to protect people dealing in narcotics as a show of force. Any WSW member could go to LaShawn's and take the gun for any purpose. No one was specifically responsible for the weapon. (10RT 2402-2404.)

Kelly said he saw Joshua Contreras or Tweety almost every day in 1998. On nearly every occasion, Contreras was under the influence of methamphetamines. Contreras is very paranoid. His mind plays tricks on him. (10RT 2048-2049.)

Around midnight on October 28, 1998, Kelly met Satele, Contreras, Caballero, and appellant at the playground area in the projects. Kelly was on his way to his girlfriend's house 100 yards away. Satele went with him. Kelly did not hear the conversation between Satele and appellant that Contreras reported overhearing. (10RT 2410-2411, 2442-2444.)

Darnell Demery is the husband of Satele's cousin Adel. In 1998, Demery saw Satele three or four times a week. (10RT 2454-2455.) Demery has never known Satele to fight, or to have a temper, or to say derogatory things about black people. (10RT 2451-2452.)

Richard Satele, the father of codefendant Satele, never saw Satele exhibit racial bias. Satele was taught as a child to respect all races. (11RT 2467-2468.)

William Guillory, a teacher, has known the Satele family for over 30 years. He said Satele was never a problem in school. He never heard Satele use the "N word." (11RT 2525-2526.)

D. REBUTTAL

Sheriff's deputy John Kepley conducted a random search of the cells where appellant was housed on December 2, 1999. While he was standing in front of cell 14, he saw the inmate in cell 16 throw a tightly wrapped paper spear onto the walkway. Jail records show that appellant was assigned to cell 16. At trial, however, Kepley identified Satele, rather than appellant, as the person he saw throw the paper spear out of cell 16. (13RT 3106-3111.)

Sheriff's deputy Larry Arias testified that on November 9, 1999, Satele assaulted a waist-chained and -escorted black Blood gang member inmate who was being moved from his cell. (13RT 3119-3125.)

Defense investigator John A. Rice, Jr., interviewed Sandra Lopez on March 17, 2000. Lopez told him that appellant was involved with dope. She also said she awoke on October 30, 1998, at 5:00 a.m., left the house for a short time after 6:00 a.m. and returned around 7:00 a.m. (13RT 3104.)

In November 1999, Lawrence Kelly went to the home of Glenn Phillips and asked Warren Battle, an African-American, if he wanted to make $100. Kelly said, "I need you to testify we get along with black people." (13RT 3001.)

E. SURREBUTTAL

Appellant did not present evidence in surrebuttal. (14RT 3153.)

F. THE PROSECUTION'S PENALTY PHASE CASE

At the time of her death, Renesha Fuller was 21 years old and living at home with her mother and stepfather, Roberta and Simon Hollis, and her sister Lakeesha. She was a good student and a good daughter. (16RT 3660-3665.) She worked as a teacher's aide. After Fuller's death, the children at the school sent pictures and a sentiment to Roberta. (16RT 3888.)

Her death affected family members. Her mother no longer celebrated Halloween, discontinued some of the family's Christmas traditions, and no longer had Fuller's wedding to plan. Fuller's grandmother no longer visited the Hollis home. Her sister Lakeesha's son and daughter, whom Fuller had cared for, missed her. Friends found it hard to talk to Roberta because of her loss. (16RT 3677-3889.)

Simon tried to fill the space of Fuller's natural father. He had a good relationship with her. He taught her to drive and helped her buy a car. (16RT 3893-3896.)

The jury saw photographs and a videotape of Fuller dressed for her school prom and at a party with friends and family. (16RT 3669-3674.)

Lea Robinson raised her stepson Edward Robinson from the age of three months after his natural mother died in childbirth. Robinson's father, Albert Robinson, had four other children and Lea had two children. (16RT 3943-3944.)

Robinson was a good student. He enjoyed football. Religion was important to him. (16RT 3947, 3951-3953.) He was the church drummer and led a prayer group. (16RT 3947, 3951-3953.) The jury saw a videotape depicting Robinson playing drums and singing in church. (16RT 4006.)

Robinson's death affected the family. Robinson's father Albert did not sleep well and was very quiet. (16RT 2960.) Albert missed Robinson. He had taken a lot of pride in raising Robinson to respect himself and others. Robinson worked

with Albert to make money to go to school. Albert now found holidays difficult. (16RT 3999-4004.)

Lea is not the same person. Lea has difficulty sleeping and no longer walks in the neighborhood or stays out after dark. Family gatherings are not the same. (16RT 3957-3958.)

Robinson's sister Rosa Robinson Morris was 16 years his senior and tried to be a mother to him. In turn, he tried to be a role model for her two daughters and son. (16RT 3976-3978.) Rosa finds herself unable to sleep and terrified of the dark. She frequently visits Robinson's grave. (16RT 3983-3985.)

Rosa Robinson Morris' daughter Renesha was two years younger than Robinson. He was technically her uncle, but really her best friend. (16RT 3987-3988.)

On August 17, 1999, Sheriff's deputy Randall Shickler was one of two deputies on a bus transporting appellant and 43 other inmates from the Long Beach Courthouse to the jail in Lynwood. At a point, Shickler heard a chain rattling and the distinctive sound of a loose handcuff being cycled. He alerted the other deputy and looked into the large rear-view observation mirror. Appellant was standing in a hunched-over position. All other inmates were seated. (16RT 3913-3916.)

When the bus trip began, appellant was on a four-man chain with one hand cuffed and one hand free. When Shickler looked back, appellant had no cuff on either wrist. He ordered appellant to sit down and cuff himself. Appellant laughed and continued to work at the handcuffs of other inmates. Then, appellant laughingly performed jumping jacks to show he was free of cuffs. (16RT 3916.)

The bus was divided into three sections. Appellant ignored Shickler's directive to stop and continued to walk around in his section for approximately 25 minutes. (16RT 3911-3912, 3919.) When they reached the jail in Lynwood, appellant recuffed himself before getting off the bus, as did the ten other inmates

whose cuffs appeared to have been altered. There was no incident or confrontation. (16RT 3917, 3923-3924.)

Sheriff's deputy Lisa Estes worked in the lockup of the Long Beach Superior Court during appellant's trial. One morning during the trial, appellant, who was on a single-man chain, was taken off the bus and put in the lock-up. Estes found a razor blade, approximately ½-inch wide and 2 inches long, from a disposable razor in the binding between pages of a Bible held by appellant. (16RT 3927-3933.)

On May 8, 2000, Sheriff's deputy Ronald Baltierra searched appellant on his arrival at the Long Beach Courthouse. Appellant had a heavy duty staple in his mouth under his upper lip. Such a staple can be used to unlock handcuffs. (16RT 3936-3940.)

G. APPELLANT'S PENALTY PHASE DEFENSE

Appellant's uncle Antonio Nunez and appellant's mother Betty share the same mother, but have different fathers. Their mother had either nine or ten children. Antonio and Betty were raised in Mexico and the United States. Antonio described the family as lacking stability. They were essentially homeless and stayed either with relatives or at wherever place they could afford. (16RT 4020-4021.)

When Antonio was in the seventh grade, Betty, who is four or five years older than he, gave birth to appellant. She was not married and did not know how to be a mother. She did not know how to change a diaper and almost drowned appellant when she and Antonio first tried to bathe him. (16RT 4023-4024.)

Antonio left school when he was in the eighth grade with the intention of helping the whole family. He got a job as a janitor and rented a studio apartment in Carson. His mother moved in with him. Then, Betty and appellant came. Next, his sister Rosa, who is in a wheelchair, moved in. There were ten, and at times as many as 20, people living in the one-room apartment. (16RT 4032-4033.)

During this time, Betty and Antonio's mother had a drinking problem and was unable to help. There was constant bickering and fighting in the home because everyone was exhausted. Appellant would cry because his diaper was wet or he was hungry, but there was no money for diapers or food. (16RT 4025-4027.)

Antonio said their mother has had a drinking problem as long as he can remember. There was never any normalcy in their lives. Their mother was never there for them. (16RT 4028.) Just as their mother had been emotionally distant from them, Betty was emotionally distant from appellant. She did not bond with appellant. She would take him to Mexicali or Guadalajara and leave him with relatives. Betty had difficulty finding work because her skills were limited and she was unable to speak English. (16RT 4029-4031.)

One day, Antonio could not take the home situation anymore and asked everyone to leave. By now, Betty had a second son. Betty, appellant, and Betty's second son all went to San Diego. But Antonio reconsidered and told Betty they could return if she spent time with the boys and helped with the expenses. Betty and Antonio worked and rented an apartment in Wilmington. (16RT 4035.)

Once, appellant's father came to Los Angeles and stopped at the home in Carson for a drink of water. He borrowed Antonio's car to look for a job and never returned. Appellant was then four or five years old. (16RT 4036.)

Antonio said appellant was a normal little kid before they moved to Wilmington. But when appellant started elementary school in Wilmington, appellant began ironing his clothes because he wanted a crease in his pants. He put mousse in his hair. In retrospect, Antonio thought this was the first sign of outside influence on appellant's behavior. (16RT 4047-4048.)

Betty began working. She told her sons they should come home from school, eat something, and stay in and do their homework. Antonio found out that appellant was not staying in and doing his homework. He spoke to appellant about

this, but wanted Betty to take responsibility for her children. There were times when Betty would go away for the weekend, leaving the children behind or with a relative. (16RT 4037.)

When appellant was eight or nine, Antonio bought a house on Gulf Avenue in Wilmington. Appellant went to elementary school down the street. Betty was working at night. Antonio's mother lived there also, but she was always under the influence of alcohol or prescription drugs. Appellant and his brother were essentially unsupervised and out at night. No one knew what to do. Appellant participated in Little League and was excited about it. No one from the family ever went to his games. (16RT 4037-4043.)

Antonio had a job at an Army-Navy store where gang members bought their clothes. Appellant began wearing baggy clothes. Antonio thought appellant was trying to fit in with the American style, but then the police began bringing appellant home and calling him a gang member. Antonio realized there were repercussions to wearing baggy clothes and talked with appellant, telling him that baggy clothes would get him into trouble. But, it may have been too late. (16RT 4050-4051.)

At some point when appellant was between 12 and 14, five or ten police with guns drawn raided the house just before daybreak. Antonio was taken out of the house in his underwear and handcuffed. The police turned the house upside-down looking for gang members. Antonio and his wife moved out of the house. (16RT 4052-4053.)[8]

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[8]. At this point in Antonio Nunez' testimony, the trial recessed for the day. The next day, defense counsel reported that he had learned that Antonio was ill and not physically able to come to court. The prosecutor advised the court he did not intend to cross-examine Antonio. The court then excused Antonio from further proceedings. (17RT 4059-4061, 4104, 4148-4150.)

Jorge Flores testified he is the natural father of appellant and his brother. Flores never married Betty. Their on-and-off relationship lasted two years. (17RT 4151-4152.)

Flores said he had met appellant a total of seven or nine times for brief periods. He has never provided appellant with counseling or guidance. (17RT 4152.) He last saw appellant in Carson in 1980 or 1981. He borrowed a car from appellant's uncle and never returned it because he experienced problems related to exposure to Agent Orange and was hospitalized. (17RT 4153-4154.)

Yolanda Guajaca is the mother of appellant's sons – two-year-old Daniel and one-year-old Robert. Guajaca loves appellant and does not want him to be executed. (17RT 4160-4162.)

Psychiatrist Dr. Saul Neidorf spoke with appellant, Guajaca, appellant's uncle Antonio, and his mother Betty, and read Antonio's testimony. (17RT 4246.)

Neidorf described appellant's childhood as difficult because Betty was distant, aloof, and absent. Antonio was the only one who was consistently available. Then, when appellant was around ten or 11, he began to focus away from the immediate family. About this time, Antonio was starting his own life with his wife and child, so there was a distancing between appellant and Antonio. Appellant attached himself to a group of older teen-agers, i.e., a gang, at a time when attachment is most important to people. (17RT 4248-4249.) Neidorf found appellant's loyalty to the gang to be akin to the kind of spirit you see in the military or in law enforcement where individuals bond with their buddies. (17RT 4251.)

Appellant spent time in the juvenile justice system and in later adolescence was transferred to the California Youth Authority. When he was released, he could not fit into his mother's home, could not find employment, and drifted into illegal drug sales. But, appellant applied himself in this effort in the same social and psychological way a person would apply himself to a job. He kept certain

hours and sold from a certain place. He made a consistent investment in his job, which affected his girlfriend and children. He had a business ethic related to work. For example, he did not sell to children; he did not like to extend credit; he always delivered the goods to his customers. Neidorf found appellant to be very consistent, methodical, and focused about what he was doing. (17RT 4249-4250, 4254.) Appellant's manner of speaking, his methodical way of presenting and describing himself, the fact that even his tattoos are artistically, methodically, thematically developed, suggest the sparseness, the economy of a compulsive and obsessional personality. These are traits shared by accountants, pharmacists, lawyers, and surgeons. (17RT 4251-4253.)

Since appellant's arrest, there have been incidents in which appellant has shown a sense of defiance or spirit. The acts of defiance took the form of antics, performed in a non-confrontational way, in order to keep a sense of esteem for himself. He believes he is innocent and the only way he can feel good about anything is to resist. (17RT 4251-4253.)

The most important part of appellant's personality is his identification with Antonio Nunez. Appellant is a very tender and caring father – his son could sleep on his chest if he was sick. This shows a capacity for reasonable and tender attachment. (17RT 4253.) Neidorf found appellant's background shows no problems related to ethnicity, drugs, sexual improprieties, or abuse. Yolanda Guajaca said nothing derogatory about appellant. (17RT 4263-4264.)

H. SATELE'S PENALTY PHASE DEFENSE

Satele's father and mother Richard Satele and Esther Tufele said Esther left the marriage and their son Willie when Willie was two years old. She did not return until Satele was either five or seven years old. (17RT 4072-4073, 4091-4092.)

Esther told the jury she had not been a good mother. She had not been there to help Willie with life. (17RT 4101.)

Richard took Willie on yearly trips and attended all of Willie's practice sessions when he became interested in sports. (17RT 4073-4074.)

The discipline Richard imposed upon Willie was physical and never verbal. He used either a belt or slapping. When Willie was caught tagging when he was 11 or 12, Richard beat him with a belt. When Willie was caught tagging a second time, the school reported the beating to child protective services and Richard was cautioned by police. (17RT 4073, 4075-4077.)

Willie was sent to juvenile camp for three months when he was 15 years old. At 16, police caught him with a .25 caliber firearm in his pocket and Willie was sent to military boot camp for four months. (17RT 4081-4085.) After he was released, Willie enrolled in continuation school, but then dropped out and moved out of Richard's house. Richard later learned Willie was living in Wilmington. He left Willie to fend for himself. (17RT 4086-4087.)

Psychiatrist Samuel Miles evaluated Satele and tests performed upon him. His diagnostic impression was of amphetamine and alcohol abuse, probable psychosis not otherwise specified, and of borderline personality disorder. (17RT 4119.) Testing showed that Satele was on the borderline between average intelligence and mentally retarded. (17RT 4117.) Satele said he was drinking heavily and using methamphetamines daily at the time of his arrest. (17RT 4117.)

Satele was 20 years old but had the emotional maturity of a 12 year old when Miles first interviewed him. (17RT 4120.)

ARGUMENT

GUILT PHASE ISSUES

I.

THE COURT'S ERRONEOUS INSTRUCTION AS TO THE PERSONAL FIREARM USE ENHANCEMENT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BECAUSE IT AND OTHER ERRORS RELIEVED THE STATE OF THE BURDEN OF PROOF ON THE CRITICAL QUESTION OF MENTAL STATE AND FAILED TO DEFINE ESSENTIAL ELEMENTS OF THE ENHANCEMENT. MOREOVER, THE ENHANCEMENT IS NOT SUFFICIENTLY SUPPORTED BY EVIDENCE THE MURDERS WERE COMMITTED FOR THE BENEFIT OF A CRIMINAL STREET GANG UNDER THE INSTRUCTIONS GIVEN. THE ERRORS DESCRIBED HEREIN PRODUCED FACTUALLY INCONSISTENT AND IRRECONCILABLE FINDINGS, WHICH WERE USED TO CONVICT APPELLANT AND TO OBTAIN A HARSHER SENTENCE IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS. REVERSAL OF THE JUDGMENT IS REQUIRED.

A. INTRODUCTION

In conjunction with the substantive offenses alleged in Counts 1 and 2, the amended information alleged that appellant and Satele personally and intentionally discharged a firearm causing the deaths of Robinson and Fuller, respectively (Pen. Code, § 12022.53, subd. (d)). (2CT 385-388.) The jury determined each enhancement to be true in special findings stating, in the language of the forms provided to it by the court, that appellant Daniel Nunez "personally and intentionally discharged a firearm" thereby causing the death of Edward Robinson in Count 1 and Renesha Fuller in Count 2 "within the meaning of subdivisions (d) and (e)(1) of Penal Code section 12022.53 (hereinafter subdivision (d) and subdivision (e)(1),"

respectively). (38CT 10929.) As to codefendant Satele, the jury returned identical special findings specific to him by name.

As appellant will explain more fully below, subdivision (d) imposes additional punishment upon the defendant convicted of murder who intentionally and personally discharged a firearm proximately causing death. (Pen. Code, § 12022.53.) Subdivision (e)(1) operates to hold those who aid and abet such a defendant vicariously liable for the weapon enhancement when the crimes are committed in furtherance of the objectives of a criminal street gang, i.e., when violations of Penal Code sections 12022.53 and 186.22, subdivision (b), are both pled and proved. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176.)

Appellant will show below that the jury's findings that both he and codefendant Satele personally and intentionally discharged the Norinco MAK-90 was irreconcilably in conflict with substantial evidence adduced at trial that a single shooter shot and killed Robinson and Fuller. The jury's special findings were the product of a defective jury instruction, defectively phrased verdict forms, and the prosecutor's misapprehension of and uncorrected incorrect statement of the law to the jury in argument.

The instruction given appellant's jury was in error because it failed to distinguish between the proof requirements for the actual shooter and the aider and abettor and failed to define the term "intentionally and personally discharged a firearm" as used in the instruction and thus failed to define critical elements of the enhancement. (37CT 10788; 14RT 3200-3201.) The instruction was also in error because, in language proposed by the prosecution, it created a presumption that relieved the prosecution of proving that appellant was in fact a principal in the commission of the crime, either in the capacity of the shooter who intentionally and personally discharged the firearm proximately causing death or as the accomplice who possessed the required mental state to be held liable for the enhancement. Instead, the jury was instructed that it was required to find appellant was in fact a

principal in the commission of the offense and subject to the enhancement if it found appellant had been *charged* as a principal in the commission of the offense and the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) had been pled and proved. (37CT 10788; 14RT 3200-3201.) Finally, the instruction was subject to an interpretation that the jury could find the personal weapon use enhancement to be true as to appellant based on alternate legal theories, one of which was legally incorrect. Reversal of the enhancement is required on that ground because it is not possible to determine that the jury did not rely on that incorrect legal theory in finding the enhancement to be true as to appellant.

The verdict forms prepared for the jury's use were defective because in each case the language set forth on the form provided only for appellant's liability as the actual shooter and failed to provide appellant's jury with the legally available range of verdict options, which would have included findings related to appellant's liability in the capacity of an accomplice in the commission of the crimes. (38CT 10929.)

The prosecutor misapprehended the law governing liability under the enhancement and incorrectly argued to the jury that it could find the enhancement true as to both appellant and Satele despite the "personal use" requirement because they were vicariously liable as the result of the gang enhancement. (14RT 3223.) The prosecutor's incorrect statement of the law to the jury was not corrected and was particularly prejudicial because it forcefully asserted that the law was as the incorrect presumption in the instruction regarding the enhancement stated it to be.

As a result of this combination of errors, the jury found that appellant and Satele both intentionally and personally discharged the Norinco MAK-90 proximately causing the deaths of Robinson and Fuller. The constitutionally infirm jury instruction and the circumstances described herein require that the section 12022.53 enhancement be stricken.

In addition, the section 12022.53 enhancement must also be stricken because, under the instruction given, the jury's finding regarding the weapon use enhancement was dependent upon the jury's first finding the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) to be true. Appellant has explained in Argument IV in this brief that the trial court created error of federal constitutional proportion with regard to the gang benefit enhancement because it instructed the jury as to the substantive offense of participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) rather than as to the sentence enhancement pertaining to the commission of the crime for the benefit of the gang (Pen. Code, § 186.22, subd. (b)(1)). As a result, the section 12022.53 enhancement is not sufficiently supported by evidence the murders were committed for the benefit of a criminal street gang and must be stricken.

The section 12022.53 enhancement must also be stricken because the jury's determination that both appellant and Satele personally and intentionally shot and killed Robinson and Fuller is in conflict with the factual evidence adduced at trial. The prosecution's case established through physical and forensic evidence and the testimonies of percipient witnesses that there was but a single shooter. The trial prosecutor's statements in colloquy with court and counsel and in argument to the jury repeatedly and consistently demonstrate that the prosecution's theory unvaryingly was that a single shooter shot and killed both Robinson and Fuller. Moreover, the prosecutor readily and repeatedly admitted to the court, counsel, and the jury that he had failed to prove the identity of the actual shooter. (13RT 3048-3049, 3214.) Although the prosecutor's assessment of the evidence in his case is not itself evidence, from the standpoint from which a review is taken it serves inferentially as an indicator of the weight of the evidence. In these factual circumstances, the findings that appellant was the actual shooter and that Satele was the actual shooter necessarily rested on different and irreconcilable factual theories. The findings thus offend due process by unjustifiably attributing to each defendant an

act only one could have committed. (*In re Sakarias* (2005) 35 Cal.4th 140, 156-160; *Mitchell v. Stumpf* (6th Cir. 2004) 367 F.3d 594, 611.)

Finally, the section 12022.53 enhancement must be stricken because the defective weapon use instruction, the prosecutor's associated misstatement of the law, the flawed language of the verdict forms undermined the reliability of the special findings. Did the jury follow in the mental steps of the prosecutor and conclude that while the evidence did not prove the identity of the actual shooter beyond a reasonable doubt, it could nonetheless find the enhancement to be true as to Daniel Nunez on a finding he was *charged* as a principal in the commission of the murders? Or, did the jury find the evidence showed beyond a reasonable doubt that appellant personally and intentionally discharged the firearm as stated on the face of the verdict? The combination of errors makes it impossible to state which occurred. What we do know is – if the former, the jury reached such a conclusion in the absence of an instruction requiring it to first determine that the actual shooter had the requisite mental state and then determine whether appellant had the requisite mental state to be held liable as an accomplice in the commission of the murders. If the latter, we know that the jury reached that conclusion in the absence of instructional language defining the term "intentionally and personally discharged a firearm" as used in the instruction. And, in either circumstance, we know that the jury, under compulsion of the instructional presumption, was relieved of determining whether appellant was in fact a principal in the commission of the crime because it was required to make that finding because appellant had been *charged* as a principal in the crime. In addition, in view of the substantial evidence there was but one shooter, substantial argument can be made that special findings that appellant and Satele were both the actual shooters are inherently suspect.

The consequences of the errors described above reached into the jury's determinations at both guilt and penalty phases to affect their outcome.

As appellant explains below, the guilt phase verdicts lack reliability because the jury's conclusion that both appellant and Satele shot and killed Robinson and Fuller, contrary to the substantial evidence there was but one shooter, necessarily means the jury, having found both defendants were actual shooters, failed to consider in the determination of guilt whether the non-shooting defendant possessed the requisite mental state to be held liable as an accomplice. Moreover, the court instructed the jury with a legally incorrect theory of accomplice liability in connection with the special circumstance, which allowed the jury to find the special circumstance to be true as to appellant without determining that he possessed an intent to kill. (See Argument V regarding CALJIC No. 8.80.1.)

The penalty phase verdicts lack reliability because, in addition to other factors discussed below, the jury was instructed that it could consider guilt phase as well as penalty phase evidence (CALJIC No. 8.85) and each of the two alternate jurors who were eventually seated as penalty phase jurors were instructed they must accept as having been proven beyond a reasonable doubt the guilt verdicts and findings already rendered in the trial (CALJIC No. 17.51.1), which were the product of the errors described here. (38CT 11086, 11118, 11119.) In addition, in denying appellant's motion for new trial and for modifications of the degree of the offense and the penalty verdict, the trial court relied on the determination that appellant personally and intentionally shot and killed Robinson and Fuller.

Appellant begins by demonstrating that substantial evidence established that only a single shooter shot and killed Robinson and Fuller, then moves to a discussion of subdivisions (d) and (e)(1) of Penal Code section 12022.53, the prosecution's incorrect interpretation of the law, the resulting defects in the instruction sought and obtained and argued by the prosecution, the defects in the language of the verdict forms the jury was instructed it was required to use, and the impact of these errors on the jury's guilt and penalty phase verdicts and the trial court's imposition of the sentence of death.

B. SUBSTANTIAL EVIDENCE ESTABLISHED ONLY ONE SHOOTER SHOT AND KILLED ROBINSON AND FULLER

Appellant begins with the observation that the prosecutor's own statements establish that in his assessment the evidence showed only one person shot and killed Robinson and Fuller: "I will be the first to admit that I have not proven which of the two defendants was the actual shooter." (13RT 3048-3049, and see further discussion in Subsection D below.) Appellant reiterates once more that while the prosecution's evaluation of the weight of his case does not constitute evidence of guilt, it is an indicator of the weight of the evidence.

The trial record supports the accuracy of the prosecutor's evaluation of the evidence. Substantial evidence established that only one shooter committed the charged crimes.

The right to due process of law includes the right to a verdict based on sufficient evidence. The federal standard for sufficiency of evidence is set out in *Jackson v. Virginia* (1979) 443 U.S. 307, 319:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

This requires that there be "substantial evidence from which a jury might reasonably find that an accused is guilty beyond a reasonable doubt." (*Id.*, at p. 319, n. 12, quoting *United States v. Jorgenson* (10th Cir. 1971) 451 F.2d 516, 521.) The standard set out in *Jackson* is applicable to California cases. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The requirement that the trier of fact draw "reasonable inferences" from the evidence mirrors other due process prohibitions against irrational State action. "As a substantive limitation on governmental action, the due process clause precludes

arbitrary and irrational decision-making." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1183.) For the same reason, illogical presumptions violate due process of law. (*County Court of Ulster County* (1979) 442 U.S. 140, 166; *Leary v. United States* (1969) 395 U.S. 6, 36.)

Any person accused of a crime is presumed innocent unless and until the jury finds that every essential fact necessary to prove the charged crime and every element of the crime has been proved by the prosecution beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *United States v. Gaudin* (1995) 515 U.S. 506; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-281.) California courts have consistently expressed the prosecution's burden in terms of proving each and every element of the charge. (See, *e.g.*, *People v. Cole* (2004) 33 Cal. 4th 1158, 1208 (substantive offense) ["The prosecution has the burden of proving beyond a reasonable doubt each element of the charged offense"]; *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128 (special allegation).)

In this case, there was some evidence that might support a finding that both appellant and Satele were the shooters in the statements prosecution informant Ernie Vasquez claimed both defendants made to him. However, substantial evidence requires more than "some" evidence. In *In re Teed's Estate* (1952) 112 Cal.App.2d 638, the court explained the concept of "substantial evidence" as follows:

> The sum total of the above definitions is that, if the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case. (*Id.*, at p.644.)

Substantial, significant, and credible evidence in this case reasonably points to a shooting committed by only one shooter.

First, Bertha Robinson Jacque testified to a timeline that indicates a sequence of rapidly fired shots. Bertha said she looked downstairs after she finished her shower and saw that the lights were out. She then looked out of her bedroom window and saw Renesha's car parked at the curb. She thought to herself that Robinson and Fuller were out there talking. Bertha turned away from her window and walked toward her bed, but stopped at the sound of "all these gunshots" and "immediately" ran back to the window. (5RT 983-984, 988.) Right after the gunshots, Bertha heard the sound of a car accelerating. However, by the time she got to her window she could only see the tail lights of the car down the street. (5RT 989-990.) Although no evidence was received at trial about the distance between Bertha's bed and window, it is a reasonable inference that all of these events took place within mere seconds.

The reasonableness of the inference that the shooting occurred instantaneously is corroborated by the coroner's testimony concerning the placement of wounds on Robinson and Fuller. Robinson had four gunshot wounds. (9RT 2014.) Wound No. 1 entered his upper left arm and passed through his lung and heart. (9RT 2016.) Wound No. 2 entered his left forearm. (9RT 2018-2019.) Wound No. 3, which may have been caused by the same bullet as Wound No. 2, entered his left hip. (9RT 2021, 2024.) Wound No. 4, shown in exhibit 59-E, appears to be a wound to the left thigh. (9RT 2022.) At least one of the two wounds sustained by Fuller appears to have been caused by a bullet that passed through Robinson's body. (9RT 2044-2045.) Nothing in the coroner's observations caused him to conclude that the firearm that caused the wounds had been moved between shots. (9RT 2027.) A reasonable inference to be drawn from this evidence is that the shots occurred in such rapid succession that Robinson did not even have time to fall to the ground or turn between shots.

In turn, the inferences to be drawn from Bertha's testimony and the autopsy evidence comports with firearms analysis evidence presented at trial. The

rifle called "Monster" was described as a "high capacity rapid fire semiautomatic" weapon that could fire up to four rounds per second. (10RT 2208.) The expended casings were found in a cluster, leading reasonably to the inference "Monster" was not moved any distance between shots. (10RT 2212-2214.) The evidence here establishes a drive-by shooting. Under such conditions, the expended casings would have been spaced if two persons within the car used "Monster" to shoot and kill Robinson and Fuller, so it is reasonable to infer "Monster" was not moved between the car's occupants. And, it is reasonable to further infer the shots were fired in rapid sequence because Bertha said all she saw by the time she returned to the window were the car's tail lights down the street.

All of this evidence establishes the shots were fired from one position and in rapid succession, so rapidly in fact that the position of Robinson's body was not significantly altered between the first and last shots that hit him and so quickly that the shooter's car was down the street by the time Bertha got back to her window.

In the context of this evidence, a finding that a shooter seated, e.g., in the front seat fired "Monster," then passed "Monster" to a second shooter seated in the back seat, who then aimed and fired "Monster" is contrary to any reasonable interpretation of the facts. The same assessment would apply to a scenario in which the first shooter was seated in the rear seat. Such a factual hypothesis serves to illustrate why this experienced trial prosecutor never sought to argue that the evidence in his case proved Robinson and Fuller were shot and killed by two separate shooters.

In this case, in the event Ernie Vasquez's extraordinary claims that both appellant and Satele separately admitted their individual role as shooters to him are given any weight, the reasonableness of a finding there was but one shooter must be balanced against the likelihood appellant and Satele both made false confessions.

False confessions are a well-documented occurrence in the law. Indeed, this circumstance is such an established characteristic of criminal investigations that the corpus delicti rule was developed to prevent convictions based on false

confessions. (*People v. Jones* (1998) 17 Cal.4th 279, 320.) Interestingly, the rule was not only designed to deal with coerced or misrepresented confessions, but with voluntary false confessions as well. (*Ibid.*, citing *City of Bremerton v. Corbett* (1986) 106 Wash.2d 569, 576-577, detailing the history of the rule.)

The question of whether these "admissions" constitute reliable, credible evidence may be subject to other tests. For one thing, the dual "admissions" Vasquez claimed were made to him while he, appellant, and Satele were in custody were suspect by their very nature and the jury was advised that such was the case.[9] Evidence at trial established that investigating detectives provided extraordinary benefits to Vasquez. (See Statement of Facts, section A.2., *supra*.) In turn, Vasquez testified to the extraordinary dual "admissions" it was his good fortune to receive. Evidence that Vasquez received substantial benefit for his contributions to the investigation directly undercuts the reliability and credibility of the facts to which he testified because they establish the existence of "bias, interest, or other motive," for his testimony. (See CALJIC No. 2.20, with which appellant's jury was instructed (37CT 10729).)

The reliability of these claimed "admissions" is further undercut by the fact that, in the expert opinion of prosecution jailhouse gang expert Deputy Scott Chapman, in-custody gang members typically brag about their crimes to other gang members as a means of gaining status because status is important in the jailhouse

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[9]. The jury was instructed with CALJIC No. 3.20, as follows: "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case. [¶] 'In-custody informant' means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by a defendant while both the defendant and the informant are held within a correctional institution."

setting. (9RT 1938.) Thus, even if we were to accept that appellant actually made such an "admission," the truth of the matters asserted in the admission must be viewed in light of Deputy Chapman's testimony that jailed gang members are motivated to brag about crimes.

Although a reviewing court generally will not disturb factual findings made at the trial level, an appellate court may hold that the prosecution's evidence was demonstrably false, inherently improbable, or for some other reason of insufficient substantiality to support the judgment. (9 Witkin, Cal. Proc. 4th (1997), Appeal, § 367, p. 416.)

In this case, the evidence compels a conclusion there was a solitary shooter. The evidence supporting a theory there were two shooters is suspect for the reasons set forth above. Accordingly, although the jury could have found that one of the two defendants fired the shots, the verdicts finding that both appellant and Satele shot and killed Robinson and Fuller are factually and irreconcilably inconsistent.

C. PENAL CODE SECTION 12022.53 EXTENDS LIABILITY TO THOSE WHO AID AND ABET CRIMES COMMITTED BY PRINCIPALS WHO PERSONALLY AND INTENTIONALLY DISCHARGE A GUN WHEN THE CRIMES ARE COMMITTED IN FURTHERANCE OF THE OBJECTIVES OF A CRIMINAL STREET GANG

"Enacted in 1997 as part of the so-called 10-20-life bill . . . , [Penal Code] section 12022.53 imposes sentence enhancements for firearm use applicable to certain enumerated felonies. [Citation.] These enhancements vary in length, corresponding to various uses of a firearm." (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

Under Penal Code section 12022.53, subdivision (d),[10] as relevant here, a defendant convicted of murder who "personally and intentionally discharges a firearm and proximately causes . . . death," is subject to an additional term of 25 years to life. (Pen. Code, § 12022.53.)

Subdivision (e)(1) of section 12022.53 imposes vicarious liability under this section upon aiders and abettors who commit crimes in furtherance of the objectives of a criminal street gang. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 11-12.) "The enhancements provided in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of [Penal Code] Section 186.22 are pled and proved." (Pen. Code, § 12022.53, subd. (e)(1).) As appellant has discussed in Argument IV, pertaining to instructional error regarding the gang enhancement, Penal Code section 186.22, subdivision (b)(1), sets forth a sentence enhancement or increased penalty 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 conduct by gang members. . . ."

Thus, "section 12022.53, subdivision (e)(1), expressly extends liability to aiders and abettors to crimes by a principal armed with a gun, for crimes committed in furtherance of the purposes of a criminal street gang." (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176.)

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[10]. Section 12022.53, subdivision (b), provides that a person convicted of a specified felony, who "in the commission of that felony personally used a firearm," shall be subject to an additional and consecutive 10-year term. Subdivision (c) of Section 12022.53 increases the enhancement to an additional and consecutive 20-year term if the person "in the commission of that felony intentionally and personally discharged a firearm." (Pen. Code, § 12022.53.)

Appellant discusses in the next section, in the context of this case, the separates proofs required to prove the enhancement true for the actual shooter and the non-shooter accomplice.

D. THE PROSECUTION MISAPPREHENDED THE APPLICABLE LAW AND ITS BURDEN OF PROOF REGARDING THE FIREARM USE ENHANCEMENT AND OBTAINED AN INSTRUCTION AND SUCCESSFULLY ARGUED THAT APPELLANT WAS LIABLE FOR THE ENHANCEMENT ON THE BASIS OF THAT MISTAKE ABOUT THE LAW

During the colloquy among court and counsel over jury instructions, the prosecutor said he was requesting only one weapons use enhancement and that was CALJIC No. 17.19. The prosecutor said, "I will be the first to admit that I have not proven which of the two defendants was the actual shooter. Therefore, I included the language, 'This allegation, pursuant to Penal Code section 12022.53 (d) applies to *any person charged as a principal in the commission of an offense* when a violation of Penal Code sections 12022.53 (d) and 186.22 (b) are pled and proved.'"[11] (13RT 3048-3049; italics added.) The prosecutor attributed his proposed modification to Penal Code section 12022.53, subdivision (e).[12]

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[11]. The phrase "any person charged as a principal in the commission of an offense" in the modification proposed by the prosecutor is taken from Penal Code section 12022.53, subdivision (e)(1), as it existed in 2000, when appellant's case was tried. In 2002, that particular phrase in subdivision (e)(1) was amended by the Legislature to read, as it does today, "any person who is a principal in the commission of an offense." Although the Legislative Counsel's Digest does not offer a specific reason for the change in language to this statute, among the reasons given in the digest is: "This bill would make various clarifying changes and would make additional technical changes." (See the website of the Legislative Counsel of the State of California (http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_21512200/ab_2173_bill_20020709_chaptered.html).

[12]. The prosecutor said: "I would note on that one, your Honor, I ask the court if they [defense counsel] have my correction. I inserted a sentence in there that I think applies which was that this allegation – I will be the first to admit

Three things are noteworthy about the prosecutor's assertions reported above. First, the prosecutor's words make clear that within his contemplation the evidence established there was but a single shooter. This view is borne out by the prosecution's evidence, which appellant has described above.

Second, the prosecutor's words make clear that he had failed to prove which of the two defendants, i.e., appellant or Satele, was the actual shooter, and, by extension, the words reveal the absence of credible evidence that appellant was in fact the actual shooter. By parity of reasoning, the prosecutor's words reveal that under his theory of the case he had also failed to prove which defendant was the aider and abettor.

Third, the prosecutor's words make clear that he sought by his proffered instruction to impose liability under this weapon use enhancement upon both appellant and codefendant Satele without proving that the actual shooter intentionally and personally discharged the firearm and without proving the non-shooter was an accomplice with the requisite mental state.

This Court has recognized that in proving a subdivision (d) enhancement against either the actual shooter or the aider and abettor the prosecution must necessarily prove that the actual killer, i.e., the actual shooter, intentionally and personally discharged the firearm proximately causing death or great bodily injury.

In *People v. Garcia* (2002) 28 Cal.4th 1166, this Court considered whether the actual shooter's conviction was a prerequisite to the imposition of the section 12022.53 enhancement upon the aider and abettor to a drive-by shooting, a

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that I have not proven which of the two defendants was the actual shooter. Therefore, I included the language, 'This allegation, pursuant to Penal Code section 12022.53 (d) applies to any person charged as a principal in the commission of an offense when a violation of Penal Code sections 12022.53 (d) and 186.22 (b) are pled and proved.' The reason being was pursuant to 12022.53 (e)." (13RT 3048-3049.)

question not in issue here. (*Id.*, at p. 1170-1171.) In its analysis, however, *Garcia* identified the separate proofs needed in order to impose liability upon a defendant/shooter and a defendant/aider and abettor under subdivisions (d) and (e)(1), and that is a matter in issue here.

Garcia explained, "Applied to a defendant/shooter, this enhancement is arguably unambiguous: a defendant who is convicted of a specified felony and is found to have intentionally and personally discharged a firearm proximately causing great bodily injury or death when committing that felony, is subject to section 12022.53, subdivision (d). (*People v. Martinez* (1999) 76 Cal.App.4th 489, 493.)" (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1173.)

This Court held that in order to find an aider and abettor who is not the shooter liable under subdivision (d), "the prosecution must plead and prove that (1) a principal committed an offense enumerated in section 12022.53, subdivision (a), section 246, or section 12034, subdivision (c) or (d); (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; (3) the aider and abettor was a principal in the offense; and (4) the offense was 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." (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.)

Garcia thus makes clear that in proving the liability of both the actual killer and the aider and abettor under subdivisions (d) and (e)(1), the prosecution has the burden of proving beyond a reasonable doubt that each was a principal and that a particular principal, i.e., the actual killer as opposed to the aider and abettor, "intentionally and personally discharged a firearm proximately causing great bodily injury or death."

Garcia also makes clear that the liability of the aider and abettor requires proof that he was a principal in the offense, i.e., that he knew of the criminal

purpose of the person who committed the crime and he intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of this crime. (Pen. Code, § 1111; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.)

> . . . Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom. (*People v. McLain* (1988) 46 Cal.3d 97, 106; *People v. Hoover* (1974) 12 Cal.3d 875, 880.)
>
> The fact that a witness has been charged or held to answer for the same crimes as the defendant and then has been granted immunity does not necessarily establish that he or she is an accomplice. (*People v. Garrison* (1989) 47 Cal.3d 746, 772; *People v. Tewksbury* [(1976)] 15 Cal.3d [953], 960.) Nor is an individual's presence at the scene of a crime or failure to prevent its commission sufficient to establish aiding and abetting. (*People v. Harris* (1985) 175 Cal.App.3d 944, 954; *People v. Gibson* (1976) 56 Cal.App.3d 119, 131.) Indeed, as we explained in *People v. Beeman* (1984) 35 Cal.3d 547, 560: "[T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (Original italics; accord *People v. Croy* (1985) 41 Cal.3d 1, 11-12.) (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.)

Appellant's surmise that the prosecutor sought the stated modification to the instruction to compensate for a failure of proof regarding the mental state and identity of the actual killer (i.e., the necessity of proving a particular "principal intentionally and personally discharged a firearm") and for a failure of proof regarding the question of whether the other defendant was in fact an accomplice is borne out in the prosecutor's argument to the jury. The prosecutor told the jury it could hold both appellant and Satele liable for the subdivision (d) personal use

enhancement because his proof of the gang enhancement[13] made it unnecessary for him to prove that a particular principal had intentionally and personally discharged a firearm. "The reason being is because the law says that they are both liable if it's a gang allegation proven." (14RT 3223:11-12.)

The prosecutor told the jury:

> Now, this [proof of the gang enhancement allegation] is also important for another reason. The last allegation. Penal Code section 12022.53 (d). This is the gun allegation.
>
> That gun allegation requires that I prove that a defendant personally and intentionally discharged a firearm that proximately caused someone's death. Obviously, it proximately caused someone's death. Renesha and Edward.
>
> You know this was intentional. This wasn't an accident.
>
> Then we have the words "personal use." I told you, I don't know how long ago it was now I've been going on, that I did not prove to you which of the two defendants personally used a gun. So you're going to say, "I'm going to find that allegation not true, because Mr. Millington [the prosecutor] did not prove who personally shot the gun." But if you look in that instruction, I think it's 17.19, there's a paragraph that is important. It's towards the bottom. What it says is that gang members are vicariously liable. They are all liable for that personal use if that gun has been intentionally discharged and proximately caused death and there is a gang allegation that has been pled and proven.
>
> I've told you I pled and proved that, because I proved that Dominic Martinez, Ruben Figueroa – we had Julie Rodriguez. So that gang allegation is proven.[14]

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[13]. Appellant has claimed in Argument IV in this brief that the Penal Code section 186.22, subdivision (b), enhancements were found against him under a constitutionally infirm jury instruction.

[14]. Prosecution gang expert Julie Rodriguez testified to the convictions and gang membership of WSW members Martinez and Figueroa to prove WSW is a criminal street gang within the meaning of Penal Code section 186.22. (9RT 2100.)

> Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury, find the allegation that the defendants personally, intentionally used a firearm . . ." dah, dah, dah, "to be true or not true," please circle the true. The reason being is because the law says that they are both liable if it's a gang allegation proven. (14RT 3222-3223.)

In so arguing, the prosecutor incorrectly stated the law, misdirected the jury, and substantially reduced his burden of proving appellant's liability for the enhancement as either the actual killer or the aider and abettor accomplice.

In short, the prosecutor misapprehended the statutory extension of liability contained within subdivision (e)(1) of Penal Code section 12022.53 and explained it to the jury as a reduction in his burden of proving the enhancement allegation to be true. This Court has made clear in *Garcia* that such is not the case and that in proving the truth of the subdivision (d) enhancement against either the actual killer or the aider and abettor the prosecution is required to prove that a particular principal intentionally and personally discharged a firearm and proximately caused death. As well, the prosecution is required to prove the aider and abettor was an accomplice with the requisite mental state. (*People v. Garcia*, *supra*, 28 Cal.4th at pp. 1173-1174.)

E. THE INSTRUCTION GIVEN THE JURY OMITTED CRITICAL ELEMENTS OF THE ENHANCEMENT, CREATED A MANDATORY PRESUMPTION, AND WAS SUBJECT TO INTERPRETATION AS PRESENTING ALTERNATE LEGAL THEORIES, ONE OF WHICH WAS LEGALLY INCORRECT. EACH OF THE ERRORS WAS REINFORCED BY A SEPARATE DEFECT IN THE FLAWED INSTRUCTION, THE PROSECUTOR'S ARGUMENT, AND THE LANGUAGE OF THE SPECIAL FINDINGS THAT WAS NOT REBUTTED BY OTHER INSTRUCTIONS GIVEN AT TRIAL

As noted above, the prosecution presented a modified version of CALJIC No. 17.19 to be given to the jury. The prosecutor explained that the

proposed modification to the instruction was added pursuant to subdivision (e). Neither counsel for appellant nor counsel for Satele objected to either the language of the proposed modification or to the instruction itself. (13RT 3049.) The instruction was problematic on three levels. First, the pattern instruction that was furnished by the prosecutor and eventually given to the jury was the wrong pattern instruction for the enhancement charged. As such, it omitted critical elements of the enhancement. Second, the modification to the instruction sought and obtained by the prosecution impermissibly created a presumption that reduced the prosecution's burden of proving, as required by this Court in *Garcia*, that either defendant was a principal, of proving the shooter intentionally and personally discharged a firearm proximately causing death, and of proving the aider and abettor possessed the requisite mental state to be held liable for the enhancement as an accomplice.[15] Third, the instruction could be interpreted as offering alternate legal theories, one of which was a legally incorrect theory.

Appellant first observes that trial counsel's failure to object to the instruction does not prevent this Court's review of appellant's claims. In addition to the trial court's stated instructional obligations set forth below in another subsection within this argument, Penal Code section 1259[16] provides that challenges to jury

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[15]. The defense requested a pinpoint instruction, which the trial court declined to give, that would have instructed the jury that being in the company of someone who had committed the crime was an insufficient basis for proving appellant's guilt as an aider and abettor. Appellant contends in Argument VIII of this brief that the failure to give the requested instruction deprived him of the right to due process of law and the Eighth Amendment right to a reliable determination of the facts in a capital case.

[16]. Penal Code section 1259 states: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any

instructions affecting substantial rights are not waived for review even when no objection is made at trial. Moreover, although the failure to state the correct grounds for an objection generally will not preserve the issue for review, trial courts have a sua sponte duty to correctly instruct on the elements of the offense, which negates the need for an objection. (*People v. Castillo* (1997)16 Cal.4th 1009, 1015.) Each of appellant's claims here relate to either an element of the enhancement or to the prosecution's burden of proving the truth of the enhancement and thus to appellant's substantial rights.

E.1. THE INSTRUCTION OMITTED CRITICAL ELEMENTS

The following version of CALJIC No. 17.19, as modified on request of the prosecutor, was given to appellant's jury:

> [1.] It is alleged in Counts One and Two that the defendants Daniel Nunez and William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, during the commission of the crimes charged, in violation of Penal Code section 12022.53(d).
>
> [2.] If you find the defendants Daniel Nunez or William Satele guilty of one or more of the crimes charged, you must determine whether the defendants Daniel Nunez or William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, in the commission of those felonies.
>
> [3.] The word "firearm" includes a Norinco MAK-90.
>
> [4.] Death is a proximate cause of the discharge of a firearm if it is a direct, natural, and probable consequence of the discharge of the

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instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

firearm, and if, without the discharge of the firearm, death would not have occurred.

[5.] This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved.

[6.] The 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.

[7.] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose. (37CT 10788; 14RT 3200-3201; bracketed paragraph numbers added.)

Here, rather than instructing the jury in the language of CALJIC No. 17.19.5, the designated CALJIC instruction for a subdivision (d) enhancement allegation, the trial court instead gave the jury a modified version of CALJIC No. 17.19, the CALJIC instruction applicable to a Penal Code section 12022.53, subdivision (b), enhancement, among others. (CALJIC Nos. 17.19, 17.19.5 (CALJIC (6th ed.) January 2000 Pocket Part, the edition current at the time of appellant's trial), and annotations regarding usage thereto; *cf.* CALCRIM No. 3149 (CALCRIM Fall 2006 ed.).) Thus, the trial court administered the wrong pattern instruction, albeit in modified form, to the jury. This error is manifested on the cold face of the record on appeal in the head notes to the instruction, which expressly identifies it as CALJIC No. 17.19, the instruction to be used when "personal use of firearm" pursuant to "Penal Code §§ 667.5(c)(8), 1203.06(a)(1) and 12022.5(a)" is alleged. (See 37CT 10788.)

The correct pattern instruction that should have been given was CALJIC No. 17.19.5, which was expressly identified by its head note in the January 2000 Pocket Part to the sixth edition of CALJIC, the edition current at the time of appellant's trial, as the designated instruction for Penal Code section 12022.53, subdivisions (c) and (d), allegations.

As with the modified version of CALJIC No. 17.19 given to appellant's jury, CALJIC No. 17.19.5 advises the jury that if it finds appellant guilty of one or more of the charged crimes, it must then determine whether appellant intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes. [17] The instruction administered to appellant's jury, however, is fatally flawed because it failed to instruct the jury that in order to find the enhancement true it was first required to find that a particular principal must have intentionally discharged the firearm. In the language of CALJIC No. 17.19.5, "The term 'intentionally and personally discharged a firearm,' as used in this instruction, means that the defendant himself must have intentionally discharged it."[18] Thus, the

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[17]. CALJIC No. 17.19.5 (CALJIC 6th ed., January 2000 Pocket Part) states: "[¶] It is alleged in [Count[s] ___ that the defendant[s] ___ intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] [or] [death] to a person] [other than an accomplice] during the commission of the crime[s] charged. [¶] If you find the defendant[s] ___ guilty of [one or more] of the crime[s] thus charged, you must determine whether the defendant[s] ___ intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] [or] [death] to a person] [other than an accomplice] in the commission of [that] [those] [felony] [felonies]. [¶] The word "firearm" includes [a ___.] [any device designed to be used as a weapon from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.] [¶] The term "intentionally and personally discharged a firearm," as used in this instruction, means that the defendant [himself] [herself] must have intentionally discharged it. [¶] The term "great bodily injury" means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury.] [¶] [A [proximate] cause of [great bodily injury] [or] [death] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [great bodily injury] [or] [death] would not have occurred.] [¶] The 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. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

[18]. CALCRIM No. 3149 (CALCRIM Fall 2006 ed.) states in relevant part: "To prove this allegation, the People must prove that: [¶] 1. The defendant personally discharged a firearm during the commission [or attempted commission] of that crime; [¶] 2. The defendant intended to discharge the firearm; [¶] and [¶] 3.

instruction given appellant's jury omitted to define what the jury was required to find, i.e., that a particular principal personally and intentionally shot and killed Robinson and Fuller.

Instead, the instruction given to appellant's jury contrarily informed the jury in the modification sought and obtained by the prosecutor that it could find the subdivision (d) enhancement to be true for appellant if it found appellant was "*charged* as a principal in the commission of" the offense "when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved." (37CT 10788.)

Under this instruction, in lieu of deciding whether appellant was in fact a principal in the commission of the murders under the separate proofs for the actual killer and the aider and abettor described by this Court in *Garcia*, the jury had only to look to the pleading or, for that matter, around the courtroom to determine whether appellant had been *charged as a principal* to determine his liability under the enhancement. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.) The instruction informed the jury it could hold both appellant and Satele vicariously liable for the personal firearm use enhancement, despite the "personal" characterization attending the enhancement because they had been "charged as principals." And, as we have seen, the prosecutor's argument eliminated any ambiguity in this area a juror might have entertained as to whether appellant was in fact a principal in commission of the crime.

> Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury, find the allegation that the defendants personally, intentionally used a firearm . . ." dah, dah, dah, "to be true or not true," please circle the true. The reason being is because the law says that they are both liable if it's a gang allegation proven. (14RT 3222-3223.)

The defendant's act caused (great bodily injury to/[or] the death of) a person [who was not an accomplice to the crime]."

E.2. THE INSTRUCTION CREATED AN IMPERMISSIBLE MANDATORY PRESUMPTION

An objective review of the modification to the instruction obtained by the prosecution reveals that the language of the modification created a mandatory presumption that violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. (*Sandstrom v. Montana* (1979) 442 U.S. 510; *In re Winship* (1970) 397 U.S. 358.)

"A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." (Evid. Code, § 600.) A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (Evid. Code, § 601.)

> The analysis is straightforward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." ([*Sandstrom v. Montana*, *supra*, 442 U.S.] at 514.) The court must determine whether the challenged portion of the instruction creates a mandatory presumption [see *id.*, at [pp.] 520-524] or merely a permissive inference [see *Ulster County Court v. Allen* [(1979)] 442 U.S. 140. A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. (*Francis v. Franklin* (1985) 471 U.S. 307, 313-314.)

Sandstrom recognized that a mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from

the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. (*Sandstrom v. Montana*, *supra*, 442 U.S. at pp. 517-518.)

> Mandatory presumptions must be measured against the standards of *Winship* as elucidated in *Sandstrom*. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. *Patterson v. New York* (1977) 432 U.S. 197, 215 ("[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). See also *Sandstrom*, *supra*, 442 U.S. at pp. 520-524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-701. A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of *Sandstrom*. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157-163. (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 314-315.)

In *Sandstrom*, the defendant was charged with murder. Intent was thus an element of the crime. The prosecutor requested and the trial judge agreed to instruct the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." (*Sandstrom v. Montana*, *supra*, 442 U.S. at p. 513.) The U.S. Supreme Court concluded that a reasonable jury could have interpreted the presumption as "conclusive" or "as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption." (*Id.*, at p. 517.) *Sandstrom* found, alternatively, "the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence – thus effectively shifting the burden of persuasion on the element of intent." (*Id.*, at p. 517.)

The Court observed that the fact that "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect" meant that the Court could not discount the possibility that the jurors actually did proceed under one or the other interpretation. (*Id.*, at pp. 518-519.) *Sandstrom* concluded that because the offending instruction had the effect of relieving the state of the burden of proof on the critical question of the defendant's state of mind, the instruction represented constitutional error under *Winship*.

In appellant's case, at the prosecutor's urging, the court instructed the jury: "This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved." (37CT 10788; 14RT 3200-3201.) Keeping in mind the statutory definition that a "presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action" (Evid. Code, § 600) and that "a mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts" (*Francis v. Franklin*, *supra*, 471 U.S. at p. 314), it may be seen that the instructional language challenged here constituted a mandatory presumption. The instruction expressly told the jury the law required it to find the personal firearm use enhancements to be true as to any person *charged* as a principal in the commission of the crime when Penal Code section 12022.53 and 186.22, subdivision (b)(1) are pled and proved. The instruction then required that the jury find that appellant was in fact a principal in the commission of the crime from the fact appellant had been *charged* as a principal in the crime. As was true of the instruction in *Sandstrom*, a reasonable jury could have interpreted the presumption as a direction to find appellant was a principal if it was convinced appellant had been *charged* as a principal. Alternatively, a reasonable jury could have interpreted the instruction as a direction to find appellant was a principal if he was

charged as a principal, unless appellant proved the contrary. (See *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 517.)

In this case, as appellant has discussed above, in order to return a true finding to the subdivision (d) enhancement, the jury was required to find that appellant was a principal, i.e., either that he as the actual killer personally and intentionally discharged a firearm proximately causing death or that he was an aider and abettor with the requisite mental state in an offense in which a principal personally and intentionally discharged a firearm proximately causing death. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.)

Under compulsion of the court's incorrect instruction, however, the jury was required to find appellant subject to the firearm use enhancement because he had been *charged* as a principal in the commission of the crime. In so mandating, the instruction relieved the prosecution of its burden of proving beyond a reasonable doubt that appellant was in fact a principal in the crime, that a particular principal personally and intentionally discharged the firearm, and, if appellant was found to be the aider and abettor whether he aided and abetted with the requisite mental state to be held liable as an accomplice.

E.3. THE INSTRUCTION WAS SUBJECT TO INTERPRETATION AS PRESENTING ALTERNATE LEGAL THEORIES, ONE OF WHICH WAS LEGALLY INCORRECT

Appellant has set forth the instruction given to his jury above (Subhead E.1), but reproduces the relevant paragraphs here to facilitate the discussion. Paragraph [2] of that instruction is a prefatory paragraph describing the jury's task. It states:

> [2.] If you find the defendants Daniel Nunez or William Satele guilty of one or more of the crimes charged, you must determine whether the defendants Daniel Nunez or William Satele intentionally and personally discharged a firearm, and proximately caused death to a

person not an accomplice to the crimes, in the commission of those felonies.

Paragraph [5] of the instruction contains the modification sought and secured by the prosecution. That language, as appellant has explained above, incorrectly states the law by allowing the jury to hold appellant liable for the enhancement if it determines he has been charged as a principal in the commission of an offense and the gang benefit enhancement is pled and proved.

> [5.] This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved.

Because this aspect of the instruction relieves the prosecution of proving that the actual killer personally and intentionally discharged the firearm and proximately caused death and of proving that the aider and abettor possessed the requisite mental state, it incorrectly stated the elements of this enhancement as this Court defined them in *People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.

Arguably, the instruction was subject to interpretation on the basis of these two paragraphs as presenting alternate legal theories under which appellant might be found liable for the enhancement. However, as appellant has noted, one of the legal theories was a legally incorrect theory.

The instructional error allowed the jury to return a true finding to the enhancement under a legally incorrect theory. Such a circumstances violates the principles articulated by this Court in *People v. Green* (1980) 27 Cal.3d 1 and *People v. Guiton* (1993) 4 Cal.4th 1116. In *Green*, this Court stated the general rule: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green*, *supra*, 27 Cal.3d at p. 69.) Appellant has discussed *Green* and *Guiton* in his Argument regarding error in the special

circumstance accomplice intent instruction (CALJIC No. 8.80.1; Argument V.B.) and in lieu of duplicating that discussion here incorporates it by reference.

As was the circumstance in *Green*, though in the context of a kidnapping, there was evidence that could have led the jury to specially find that appellant personally and intentionally shot Robinson and Fuller. (See *People v. Green*, *supra*, 27 Cal.3d at pp. 67-69.) But there was also evidence from which the jury could find that appellant was a "person charged as a principal in commission of the offense" and that a gang benefit enhancement had been pled and proved. The instructions allowed the jury to make the latter finding and the prosecutor, as appellant has described, expressly argued that the jury find the enhancement to be true by following that faulty analytical path.

> Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury, find the allegation that the defendants personally, intentionally used a firearm . . ." dah, dah, dah, "to be true or not true," please circle the true. The reason being is because the law says that they are both liable if it's a gang allegation proven. (14RT 3222-3223.)

Whether the jury, or for that matter whether some of the jurors, interpreted the instruction as authorizing alternative legal theories under which appellant might be held liable for the enhancement is not revealed in the record.

In *Guiton*, this Court reaffirmed the principles upon which it had relied in *Green*. "If the adequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton*, *supra*, 4 Cal.4th 1116, 1129 fn. omitted.)

Because nothing in the record establishes that the personal weapon use enhancements were actually based on a valid ground, because the prosecution presented its case to the jury on the legally incorrect theory, and because nothing in other properly given instructions corrected the mistake about the law, a reversal of the enhancements is required. (*People v. Green*, *supra*, 27 Cal.3d at pp. 63-71; *People v. Guiton*, *supra*, 4 Cal.4th at pp.1125-1126, 1128.)

Correct jury instructions serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Moreover, an erroneous instruction constitutes a state law violation that deprives a defendant of a liberty interest in contravention of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a jury properly instructed on the principles of law that are relevant to and govern the case, including instruction on all elements of the offense and enhancement. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; see also *People v. Winslow* (1995) 40 Cal.App.4th 680, 688.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

The instructional error allowed the jury to return true findings for the personal weapon use enhancement against appellant based on a legally incorrect theory of law.

Reversal of the personal weapon use enhancements are required because the error complained of here constituted structural error. Structural errors are those so fundamental to a fair trial that they are reversible per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279; 6 Witkin, Cal. Crim. Law 3d (2000) Chapter XVII, Reversible Error.) In *Pulido v. Chrones* (9th Cir. 2007) 487 F.3d 669, the Ninth Circuit Court of Appeals held that a felony murder conviction based solely on the defendant's post-murder involvement in the robbery, which was an invalid legal theory, was subject to reversal. The court stated that such error "was structural and that 'where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory' reversal is required." (*Id.*, at p. 676, quoting *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080, 1086.)

Alternatively, the error violated appellant's rights to due process of law and reversal is required because the error was not harmless beyond a reasonable doubt. The record here shows that the prosecution expressly urged the jury to ignore that aspect of the instruction directing it to consider whether appellant personally and intentionally discharged the firearm and proximately caused death. The prosecutor's mistaken statement of the law was not corrected by the court or by defense objection or by other properly given instructions. Under such circumstances, the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

E.4. THE INSTRUCTIONAL DEFECTS WERE NOT CORRECTED BY OTHER PROPERLY GIVEN INSTRUCTIONS

Further, the instructional error discussed here, particularly with regard to the mental state element required to prove appellant's liability as an aider and abettor, was not corrected by other instructions defining "principals" in a crime[19] and "aiding and abetting."[20] (37CT 10754, 38CT 11081.)

A reasonable jury would *not* have applied CALJIC Nos. 3.00 and 3.01 to the personal and intentional firearm use enhancement. The court's instruction specific to the enhancement required it to find appellant was a principal because he had been charged and to thereby hold him vicariously liable for the enhancement. Under the instruction given, the jury never had to reach the question of whether appellant had the requisite mental state to be held liable as an accomplice and to look to other instructions in an attempt to resolve that question.

In addition, the fact that the jury found the special circumstance to be true does not support a conclusion that the jury gave proper consideration to

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[19]. The trial court defined "principals" with CALJIC No. 3.00 at both guilt and penalty phases: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime." (37CT 10754, 38CT 11081.)

[20]. The trial court defined "aiding and abetting" with CALJIC No. 3.01 at both guilt and penalty phases: "A person aids and abets the commission of a crime when he or she, [¶] (1) with knowledge of the unlawful purpose of the perpetrator and [¶] (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (37CT 10755, 38CT 11082.)

appellant's mental state before convicting him. The special circumstance instruction (CALJIC No. 8.80.1) given appellant's jury did not require it to consider appellant's mental state in finding the special circumstance to be true. A correctly stated instruction, as appellant explains in Argument V, requires that in order to find the special circumstance to be true the jury consider whether the defendant who did not kill acted with the intent to kill. The version of the instruction given to appellant's jury, however, also permitted it to find the special circumstance to be true if it found appellant was a major participant who acted with reckless indifference to human life. This instruction allowed the jury to find the special circumstance to be true without consideration of appellant's mental state. As a result, the special circumstance finding fails to support a conclusion that the jury properly considered the question of mental state.

Significantly, the instructional language giving rise to the mandatory presumption, the fatal instructional defect arising from the trial court's failure to correctly instruct the jury on the elements of the enhancement, and the misdirection contained within the prosecutor's arguments regarding his proof of the elements of the enhancement all relieved the prosecution of proving, as it was required to prove, that a particular principal in the commission of the offense personally and intentionally discharged a firearm proximately causing death and that the non-shooting defendant was in fact an accomplice. Other instructions given at either the guilt or penalty phases of the trial did not compensate for the misdirection contained in the instruction in issue here. The State was thus relieved from proving beyond a reasonable doubt every fact necessary to constitute the personal firearms use enhancement. As a result, appellant was deprived of his Fifth and Fourteenth Amendment constitutional rights to due process of law as explained in *Winship* and the authorities set forth above.

E.5. THE IMPACT OF THE INSTRUCTIONAL ERRORS WAS EXACERBATED BY THE TRIAL COURT'S INSTRUCTION THAT THE JURY WAS REQUIRED TO USE VERDICT FORMS THAT FAILED TO REFLECT THE LEGALLY AVAILABLE OPTIONS AND BY THE FACT THAT THE LANGUAGE SET FORTH IN THE VERDICTS CONFORMED TO THE LEGALLY INCORRECT THEORY SET FORTH IN THE COURT'S INSTRUCTION

Appellant now turns to the deficiencies in the language of the verdict forms. In this case, the court instructed the jury that it must return special findings on the section 12022.53, subdivision (d), enhancement using a form provided by the court. (37CT 10788.) Those special findings, specific to appellant, stated:

> We the jury, find that the allegation that defendant, Daniel Nunez, personally and intentionally discharged a firearm, a Norinco MAK-90, which proximately caused death to Edward Robinson within the meaning of Penal Code Sections 12022.53(d) and 12022.53(e)(1), as charged in Count 1 of the Information to be _____ (True or Not True).
>
> We, the jury, find that the allegation that defendant, Daniel Nunez, personally and intentionally discharged a firearm, a Norinco MAK-90, which proximately caused death to Renesha Ann Fuller within the meaning of Penal Code Sections 12022.53(d) and 12022.53(e)(1), as charged in Count 2 of the Information to be _____ (True or Not True). (38CT 10929.)

The jury returned each special finding marked "True." (38CT 10929.)

These special findings were inadequate in providing the jury with the legally available range of verdict options. The language employed in the forms made no provision for finding any defendant liable for the enhancement as an accomplice under the proof identified by this Court in *Garcia*, e.g., with the use of language mirroring the proof requirements set forth there. In holding an accomplice liable, *Garcia* said the jury must find that "(1) a principal committed an offense enumerated in section 12022.53, subdivision (a), section 246, or section 12034, subdivision (c) or

(d); (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; (3) the aider and abettor was a principal in the offense; and (4) the offense was 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." (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.)

The deficiencies in the language of the verdict forms the court instructed the jury it was required to use conformed to the instructional errors described above. In combination, the errors in the instruction and the language of the verdict forms support appellant's claim that the special findings here are inherently suspect.

E.6. In Summary, the Personal Weapon Use Special Findings Are the Inherently Suspect Product of Errors upon Other Errors

In summary, the special findings in this case do not fulfill the requirements of section 12022.53, subdivisions (d) and (e)(1), because they were the product of an instruction that was fatally defective in its failure to properly set forth the "personal and intentional discharge" element of the enhancement and the proof required to impose accomplice liability. The instruction created a presumption that relieved the prosecution of proving that appellant was in fact a principal in the commission of the crime either as the actual killer or the aider and abettor if the jury found he had been *charged* as a principal in the commission of a crime committed for the benefit of a criminal street gang. This presumption was reinforced by the prosecutor's argument that he was not required to prove that there was a particular principal who personally and intentionally fired the weapon that caused death because the law held both defendants vicariously liable. Further, the instruction was subject to interpretation as allowing two alternative legal theories under which appellant might

be found liable for the enhancement. One of these legal theories was incorrect as a matter of law. It was also the legal theory upon which the prosecutor relied in arguing that the enhancement was applicable to appellant. On this record, it is not possible to know whether the jury, or some jurors, relied on the legally inadequate theory in reaching their verdict.

In addition, as discussed above, there was no credible evidence to support findings that both appellant and Satele personally and intentionally discharged the Norinco MAK-90 proximately causing death. Viewing the evidence – e.g., percipient witness testimony that the shots were fired in rapid succession, expert firearms testimony that the Norinco MAK-90 was capable of very rapid fire, physical evidence that the expended casings were clustered and that the gunshot wounds sustained by Robinson were clustered – in the light most favorable to the judgment, substantial evidence established there was but one shooter in this case. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Moreover, as appellant has asserted above, the prosecutor's own words – " . . . I did not prove to you which of the two defendants personally used a gun" – reflect his views that the evidence in his case proved the existence of but one shooter and that the weight of the evidence tending to show appellant was the actual killer did not allow him to make that argument. And, finally, as appellant explains below, the jury's special findings pertaining to the personal firearm use enhancement are not sufficiently supported by the required evidence the shooting was committed in pursuit of gang objectives (Pen. Code, § 186.22, subd. (b)(1)) because the instruction for that particular enhancement was fatally flawed.

Under these circumstances, the instructional error was not harmless beyond a reasonable doubt and reversal of the personal firearm use enhancements is required. (*Chapman v. California* (1967) 386 U.S. 18.)

F. THE TRIAL COURT'S INSTRUCTIONAL OBLIGATIONS

The Fifth and Fourteenth Amendment Due Process Clauses and the Sixth Amendment notice and jury trial guarantees require that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in a pleading, submitted to a jury, and proven beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship* (1970) 397 U.S. 358, 364.) Because a sentence enhancement requires findings of fact that increase the maximum penalty for a crime, the United States Supreme Court has held that this rule applies specifically to sentence enhancement allegations. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476, 490.)

The Due Process Clause requires that a court must instruct the jury that the state bears the burden of proving each element of the crime beyond a reasonable doubt and that the court must state each of those elements to the jury. (*In re Winship* (1970) 397 U.S. 358, 363; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Carella v. California* (1989) 491 U.S. 263, 265.) Omission of an element from an instruction is federal due process error and compels reversal unless the beneficiary of the error can show the error to have been harmless beyond a reasonable doubt. (*Ibid.*)

Similarly, to find the facts necessary for a sentence enhancement to be true beyond a reasonable doubt, the jury must be properly instructed on the elements of the enhancement. Thus, this court has held that the trial court must instruct on general principles of law relevant to and governing the case, even without a request from the parties. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) This rule applies not only to the elements of a substantive offense, but also to the elements of an enhancement. (*People v. Winslow* (1995) 40 Cal.App.4th 680, 688.)

Furthermore, due process requires that the prosecution prove every element of the offense charged against a defendant. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510.) In proving those charges, due process further prohibits

instructions which omit an element of the crime. (*Evenchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933-939.)

With the exception of prior convictions, " 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476, quoting *Jones v. United States* (1999) 536 U.S. 227, 243 fn. 6.)

It is well established that an enhancement must be proven as any other material fact in the trial of the cause. (*People v. Coleman* (1904) 145 Cal 609, 612, superseded by statute as stated in *People v. Saunders* (1993) 5 Cal.4th 580, 588.) If enhancements, which by their very nature increase the maximum penalty for a crime, must be proven in the same manner as the underlying offense, it necessarily follows that instructions which incorrectly define the elements of an enhancement are violative of due process.

In addition, the "Due Process Clause of the Fourteenth Amendment '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*, *supra*, 397 U.S. at p. 364. This 'bedrock, "axiomatic and elementary" [constitutional] principle' (*id.*, at p. 363), prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. (*Sandstrom v. Montana*, [(1979) 442 U.S. 510], 520-524; *Patterson v. New York* [(1977)] 432 U.S. 197, 210, 215, *Mullaney v. Wilbur* [(1975)] 421 U.S. 684, 698-701; see also *Morissette v. United States* [(1952)] 342 U.S. 246, 274-275.) The prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.' ([*In re Winship*] 397 U.S. at p. 372. See *Speiser v.*

Randall [(1958)] 357 U.S. 513, 525-526.)" (*Francis v. Franklin* (1985) 471 U.S. 307, 313.)

Correct jury instructions also serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Moreover, an erroneous instruction constitutes a state law violation that deprives a defendant of a liberty interest in contravention of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a jury properly instructed on the principles of law that are relevant to and govern the case, including instruction on all elements of the offense and enhancement. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; see also *People v. Winslow* (1995) 40 Cal.App.4th 680, 688.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

G. THE PERSONAL FIREARM USE ENHANCEMENT IS NOT SUFFICIENTLY SUPPORTED BY EVIDENCE THE CRIMES WERE COMMITTED FOR THE BENEFIT OF A STREET GANG AND MUST BE REVERSED

In Argument IV in this opening brief, appellant claims that the trial court incorrectly instructed the jury with regard to the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) when it delivered an instruction concerning the substantive offense of active gang participation (Pen. Code, § 186.22, subd. (a)) rather than an instruction regarding the sentence enhancement (Pen. Code, § 186.22, subd. (b)(1)) alleged in the pleadings.

Appellant has explained above that the personal firearm use instruction given his jury and the prosecutor's corresponding argument regarding the jury's determination of the firearm use enhancement both irrebuttably directed the jury to rely upon the prosecution's proof of the gang benefit enhancement in making its findings concerning the personal firearm use. Because the jury's finding regarding the gang benefit enhancement is the product of a defective instruction that omitted the elements of the enhancement, the finding must fall. Accordingly, that gang benefit enhancement finding may not support the personal firearm use enhancement, which consequently must also be reversed because it is not supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.)

H. THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT. THE LEGAL MISDIRECTION CONTAINED WITHIN THE INSTRUCTION LED INEXORABLY TO FINDINGS ATTRIBUTING TO BOTH APPELLANT AND SATELE, RESPECTIVELY, A CULPABLE ACT ONLY ONE OF THEM COULD HAVE COMMITTED. THESE FACTUALLY IRRECONCILABLE FINDINGS WERE IMPERMISSIBLY USED TO CONVICT AND TO OBTAIN THE DEATH PENALTY IN VIOLATION OF DUE PROCESS BECAUSE IN THOSE CIRCUMSTANCES THE STATE HAS NECESSARILY CONVICTED OR SENTENCED A PERSON ON A FALSE FACTUAL BASIS

The prejudice that arose as the result of the errors described within this Argument breached the confines of the personal firearm use enhancement and, aided by the advocacy of the prosecutor, spread to other matters being adjudged by the jury at the guilt and penalty phases of the trial. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." (*Lisenba v. California* (1941) 314 U.S. 219, 236-237.)

Appellant explained above that in *Garcia* this Court made clear that subdivisions (d) and (e)(1) of Penal Code section 12022.53 do not relieve the prosecution of the burden of proving the aider and abettor possessed the requisite mental state or that a particular principal personally and intentionally shot. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.) And yet, in appellant's trial, under compulsion of instructions, argument, and verdict forms that incorrectly stated the law and the legally available special findings, the jury found that both appellant and Satele shot and killed Robinson and Fuller. Appellant explained above that these special findings were inconsistent with and irreconcilable with the great weight of the evidence, which established, in a manner consistent with the prosecution's theory of the case, that there was but one actual killer.

This Court has recognized that the prosecution may not convict two individuals of a crime only one could have committed or obtain harsher sentences against two individuals by unjustifiably attributing to each a culpable act only one could have committed. (*In re Sakarias* (2005) 35 Cal.4th 140, 156-157.) In *Sakarias*, the defendant Sakarias claimed and this Court concluded that the prosecutor had in bad faith unjustifiably and prejudicially used inconsistent and irreconcilable factual theories to obtain a death sentence against him. Appellant does not repeat the claim of prosecutorial misconduct here.

Rather, appellant relies upon *Sakarias* not for the findings and decision pertaining to prosecutorial misconduct but for its recognition that a defendant's due process rights are violated when a conviction or death sentence is sought and obtained against him and another defendant on the basis of culpable acts for which only one could be responsible. Such principles are relevant to the claim appellant makes here. Though couched in language related to the underlying prosecutorial misconduct claim before it, an issue not pursued in this argument, *Sakarias* explained the due process concerns as follows:

> [W]e hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for – and, where prejudicial, actually achieves – a false conviction or increased punishment on a false factual basis for one of the accuseds. "The criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth." (*United States v. Kattar* (1st Cir. 1988) 840 F.2d [118], 127.)
>
> By intentionally and in bad faith seeking a conviction or death sentence for two defendants on the basis of culpable acts for which only one could be responsible, the People violate "the due process requirement that the government prosecute fairly in a search for truth." (*Smith* [*v. Groose* (8th Cir. 2000)] 205 F.3d [1045], 1053.) In such circumstances, the People's conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the

> state to punish a person factually innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them. In that situation, we *know* that *someone* is factually innocent of the culpable acts attributed to both. (See [Poulin], *Prosecutorial Inconsistency, [Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001)] 89 Cal. L.Rev. [1423], 1425 ["When the prosecution advances a position in the trial of one defendant and then adopts an inconsistent position in the trial of another on the same facts, the prosecution is relying on a known falsity"].) (*In re Sakarias*, *supra*, 35 Cal.4th at pp. 159-160.)

Other courts have recognized that inconsistently attributing the same criminal or culpability-increasing act to two defendants in separate trials for the same crimes denies the defendants fundamentally fair trials. (See *Jacobs v. Scott* (1995) 513 U.S. 1067 (dis. opn of Stevens, J., from denial of stay [fundamentally unfair to execute a person "on the basis of a factual determination that the State has disavowed" in coperpetrator's later trial]; *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1052 ["use of inherently contradictory theories violates the principles of due process"]; *Stumpf v. Mitchell* (6th Cir.2004) 367 F.3d 594, cert. granted sub nom. *Mitchell v. Stumpf* (2005) 543 U.S. 1042 ["the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation"].)

The misdirection as to law contained within the incorrect instruction led inevitably to inconsistent and irreconcilable factual findings that appellant and Satele both shot and killed Robinson and Fuller. Here, appellant discusses why the instructional errors violated his right to due process and were not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.)

In Argument II, which follows, appellant makes the separate but related claim that the use of factually inconsistent and irreconcilable findings to convict him and to obtain the sentence of death rendered his trial fundamentally unfair and violated his right to due process of law.

H.1. THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE JURY'S FINDINGS THAT BOTH APPELLANT AND SATELE SHOT AND KILLED PERMITTED THE JURY TO CONVICT APPELLANT OF THE MURDERS WITHOUT PROPER CONSIDERATION OF THE REQUIRED CONDUCT AND MENTAL STATE. AS A RESULT THE CONVICTIONS IN COUNTS 1 AND 2 MUST BE REVERSED

The acts and mental states required for liability for murder differ for the actual killer and the aider and abettor. This Court has described the mental state required of an aider and abettor as "different from the mental state necessary for conviction as the actual perpetrator." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122, quoted in *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

An actual killer must have malice aforethought and act in a manner which was "willful, deliberate, and premeditated." (Pen. Code, §§ 187, 189.) No further facts are necessary for a finding of guilt of first degree murder for the actual killer.

In contrast, an accomplice must act "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1994) 35 Cal.3d 547, 560.) Additionally, if the offense is a specific intent crime, the accomplice must "share the specific intent of the perpetrator," which occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid.*)

Thus, in order to convict a defendant as an aider and abettor, the prosecution must prove beyond a reasonable doubt that the defendant *knew the purpose of the perpetrator* before the crime was committed.

> To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of

> committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.] Thus, we held, an aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." [Citation.] (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.)

As a result, prior knowledge of the perpetrator's purpose to commit either the charged crime or a target crime is an element of any murder by an aider and abettor. Conversely, lack of knowledge of the perpetrator's purpose is a defense. (*People v. Mendoza*, *supra*, 18 Cal. 4th at p. 1132.) Similarly, the principle is well-established that "[M]ere presence at the scene of a crime is insufficient to establish aider and abettor liability." (*People v. Salgado* (2001) 88 Cal.App.4th 5, 15.)

Furthermore, in capital cases, the person who is not the actual killer is not subject to the death penalty unless that person, with the intent to kill, aided the actual killer or, in the context of a felony murder, was a major participant who acted with a reckless indifference to human life. These are findings that must be found by the jury to be true beyond a reasonable doubt. (*Tison v. Arizona* (1987) 481 U.S. 137, 152.)

In *Enmund v. Florida* (1982) 458 U.S. 782, the Supreme Court reversed the death sentence of a defendant convicted under Florida's felony-murder rule. Although liability under the felony murder rule was not pursued in appellant's trial, *Enmund*'s recognition of the following principle is relevant and applicable here. *Enmund* recognized that in determining the validity of capital punishment for an

accomplice's conduct, the focus has to be on his culpability, not on that of the individual who shot and killed the victim. (*Id.*, at p. 798.)

The question, therefore, of the mental state of the shooter and of the aider and abettor is a factual issue that must be considered and decided by the jury. In this case, the jury, having found that both appellant and Satele actually shot and killed Robinson and Fuller, which appellant has established above as findings that are factually inconsistent and irreconcilable and therefore unsustainable, did not have to consider their individual conduct and mental state, as they were required to do, in finding them guilty of the charged crimes.

Because that is so, appellant's convictions for murder in Counts 1 and 2 are not sustainable and must be reversed.

Appellant has explained above that the jury's determination that both he and Satele actually shot and killed Robinson and Fuller in the context of substantial evidence there was but one shooter permitted the jury to find guilt without a proper determination of the mental state required for such liability. Appellant now contends the convictions for murder in Counts 1 and 2 must also be reversed because the special findings that both he and Satele personally discharged the weapon deprived him of his due process right to have the jury unanimously determine the essential facts upon which guilt was founded.

This case presents an analogous situation to that presented when a single criminal act can be based on a number of different discrete acts. Here, appellant's culpability could be based on the fact that he shot and killed. Or, it could be based on the fact that he aided someone who shot and killed. As to either situation, the jury would have to agree on the requisite mens rea for that act. However, the jury must have believed that one of those two events occurred and, in view of the substantial evidence there was but a single shooter, the jury cannot base its verdict on the fact that both people were the shooters and neither aided and abetted.

Unanimity is not required when there is one act, but two separate legal theories that support the conviction. (*People* v. *Santamaria* (1994) 8 Cal.4th. 73, 77.) However, in this case, there were two different acts and/or mental states that could support the conviction, and the jury cannot attribute the same act and/or mental state to different people where substantial evidence established that only one person shot and killed. Courts have recognized that "[I]t is appropriate the jurors all agree the defendant is responsible for the same discrete criminal event." (*People* v. *Davis* (1992) 8 Cal.App.4th 28, 45; *People* v. *Hernandez* (1995) 34 Cal.App.4th 73, 77.)

The right to a unanimous jury in criminal cases, and the right to have the jury agree as to which act the defendant committed, is guaranteed by the California Constitution and is inherent in the requirement of a fundamentally fair trial, guaranteed by the United States Constitution. (Cal. Const., art. I, § 16; *People* v. *Jones* (1990) 51 Cal.3d 294, 321; U.S. Const., Fifth, Sixth, Fourteenth Amends.).

Moreover, there is an inherent unfairness in convicting two people on factual theories which are factually inconsistent and irreconcilable. The fact that the concept of due process of law is a fluid concept has been discussed in a multitude of different settings. The ultimate test of due process boils down to the question, "Is it fair?" Thus, "fundamental fairness" is the essence of the due process protection provided by our state Constitution. (See *People* v. *Ramos* (1984) 37 Cal.3d 136, 153; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872 ["Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice'"]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 ["the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"].)

In this case, there were two distinct and irreconcilable factual bases upon which appellant could have been convicted, *viz.*, as the actual killer or as the aider and abettor. Substantial evidence established there was a single shooter. The state of the evidence was such that the prosecutor himself proclaimed that he had

failed to prove the identity of the shooter. In such a factual circumstance, a jury may not find both defendants liable as the actual shooter.

In addition, depriving appellant of the protection afforded under the principles discussed herein is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" in the correct application of the law relating to this issue because under the law he is clearly entitled to a correct determination as to the facts upon which his criminal liability is premised. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold his conviction, in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

H.2. THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE JURY'S SPECIAL FINDINGS THAT BOTH APPELLANT AND SATELE SHOT AND KILLED WERE IMPROPERLY USED TO OBTAIN THE HARSHER PUNISHMENT OF THE DEATH PENALTY, WHICH MUST THEREFORE BE REVERSED

Appellant's penalty phase jury was required by instruction to apply guilt phase evidence, verdicts, and findings in deciding whether appellant should be given the penalty of death. The jury was told, "In determining which penalty is to be imposed on each defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." (CALJIC No. 8.85; 38CT 11086.) During the penalty phase, the court seated two alternate jurors as penalty phase jurors. On each occasion, the court instructed the entire jury as to the following: "For the

purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial." (CALJIC No. 17.51.1; 38CT 11119.) Thus, the jury's guilt phase determination that appellant personally and intentionally shot and killed Robinson and Fuller was directly and inextricably linked to the jury's determination to fix appellant's penalty at death rather than at life without the possibility of parole.

In addition to excusing the jury from making crucial findings as to the guilt phase determination of the mental state of the aider and abettor, the factually inconsistent and factually irreconcilable findings that both appellants fired the fatal shots improperly inflated appellant's culpability when it came to the decision as to whether to impose the death penalty. This is contrary to the established principle that the right to a fair trial includes the right to be judged on one's "personal guilt" and "individual culpability." (*United States v. Haupt* (1943, 7th Cir.) 136 F.2d 661, cited in *People v. Massie* (1967) 66 Cal.2d 899, *supra*, 66 Cal.2d 899, 917, fn. 20.) It also violates the Eighth and Fourteenth Amendment requirements of an individualized capital sentencing determination. (See *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

Appellant has explained above that the instruction given his jury regarding the personal weapon use enhancement contained an incorrect statement of law, that the prosecutor's argument contained the same incorrect statement of the law, and that the verdict forms supplied by the court and which the court instructed the jury it was required to use was limited to language that furthered that incorrect statement of the law, and that the combination of all of these factors allowed the jury to find that both he and appellant Satele both personally and intentionally shot and killed Robinson and Fuller without proper consideration as to the respective actus reus and mens rea required to hold an individual liable as either the actual killer or the

aider and abettor. The use in penalty phase determinations of the findings that appellant and Satele personally shot and killed Robinson and Fuller, contrary to the great weight of the evidence establishing that only one person shot and killed, violates due process because it attributes to both appellant and Satele a culpable act only one could have committed. (*In re Sakarias*, *supra*, 35 Cal.4th at pp. 156-157.)

The record shows that the jury's determination that appellant was the actual shooter was also used adversely against him in decisions pertaining to the imposition of the death penalty.

In a written Supplemental Motion for a New Trial, the defense pointed out there was insufficient evidence for the jury to determine who the actual shooter was. (39CT 11152.) The defense argued that in order "to find two defendants guilty of murder, the shooter must be established and alternatively an aider and abettor status be found as to the other defendant." (39CT 11152.) The defense motion pointed out that the actual killer must have express malice under *People v. Woods* (1992) 8 Cal.App.4th 1570 and *People v. Solis* (1993) 20 Cal.App.4th 264, 270-271 and that the aider and abettor has to act with knowledge of the actual killer's criminal purpose and with the intent to aid in the killing. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 616-617.)

At the hearing on appellant's motion, in which Satele joined, defense counsel argued that there was a question as to who the shooter was. Counsel observed that the evidence showed there was only one possible shooter. (18RT 4551-4552.) The defense further argued that the jury wanted to convict because of the nature of the case, but that the jury, like the prosecutor, was unable to determine who the shooter was and who aided and abetted. Thus, the only way to convict was to have both defendants convicted as being the shooter. (18RT 4552.) Counsel's evaluation of the jury's inability to determine who shot and who aided and abetted

is, of course, a reasonable one given the prosecutor's inability to make the same determination.

The defense further explained that the shooter is normally viewed as having the greater degree of culpability and that juries are more likely to impose the penalty of death upon that person. (18RT 4552.)

In denying the defense motion, the court stated:

> On the first part defendant Nunez seems to suggest that he did not shoot the victims in this case. With respect to the identity of the shooter, defendant Nunez' [sic] motion is denied. The record is unambiguous that the jury has sufficient information to conclude beyond a reasonable doubt that the defendant Nunez is a shooter in this case. His admission against penal interest, to wit Ernie Vasquez at the county jail stating in quote, "I did that, I AK'd them, coupled with the simulation of the holding of the AK 47 is sufficient for the jury to conclude he is one of the shooters." (18RT 4578.)

Next, the court addressed the issue of Satele as the shooter, stating:

> Moreover, the record is also unambiguous that the jury has sufficient information to conclude beyond a reasonable doubt that defendant Satele is a shooter in this case. The appellate court is invited to the testimony of Joshua Contreras introduced by way prior inconsistent statement or quote, unquote "Greened" statements pursuant to People versus Green, through the playing of the tapes or the tape recordings read into the record and the testimony of Detective Knolls and Dinlocker. Defendant Satele also told Ernie Vasquez, I, or we, did that, I or we, AK'd them" close quote when referring to the two victims shot in this case. (18RT 4578.)

Thus, the trial court relied upon the determination that appellant was the actual shooter in denying the new trial motion.

In addition, the trial court relied upon the same information in denying appellant's motions for modification of the degree of the crime or the sentence. In connection with Factor "J" evidence, the court said:

> Defendant Nunez admits to Ernie Vasquez: "I did that, I AK'd them," close quote when referring to his killing of Robinson and Fuller. The statement was made proudly while simulating the holding a rifle in his arms. (18RT 4596.)

The court made the analogous finding as to codefendant Satele. (18RT 4596-4597.)

Thus, the trial court relied upon the determination that appellant was the actual shooter in denying appellant's motions to reduce the degree of the offense and to reduce the sentence from the death penalty to life in prison without possibility of parole. As we have seen substantial evidence established, contrary to the jury's special findings, that a single shooter shot and killed Robinson and Fuller.

In *Enmund v. Florida*, *supra*, 458 U.S. 782, the United States Supreme Court discussed the imposition of the death penalty on someone other than the actual killer in a felony murder case. The Court explained that, absent substantial aggravating factors, only a small handful of states allowed the imposition of the death penalty under a theory of vicarious liability in felony murder cases for a defendant who was not the actual killer. (*Id.*, at pp. 789-793.) The Court noted that "[s]ociety's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made." The court observed that the vast majority of the people executed since 1954 were people who had personally committed the fatal assault. (*Id.*, at p. 794.)

As a result, the Court held that the Eighth Amendment does not permit "the imposition of the death penalty on [one] who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill,

attempt to kill, or intend that a killing take place or that lethal force will be employed." (*Id.*, at p. 797.)

The *Enmund* Court reiterated the rule that "[i]n determining whether the death penalty may be imposed, the focus must be on 'relevant facets of the character and record of the individual offender.'" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, quoted in *Enmund*, *supra*, at p. 798.)

The Court noted that the focus in the decision to impose the death penalty must be on the culpability of the specific defendant and not on the culpability of the actual shooter. The Court explained why this was so: "for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" (*Id.*, at p. 798, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

Thus, courts have recognized that it is likely that a jury would be influenced by a defendant's role as the actual killer in a murder case. The corollary is equally likely where the death penalty is concerned, i.e., it is likely the jury might be inclined to choose not to impose the death penalty upon the defendant who aids and abets but does not actually kill. Because the actual killer is regarded as the more culpable of the parties to a crime, the jury may be inclined to hold the actual killer comparatively more responsible than the non-killing aider and abettor when the decision regarding the imposition of the death penalty must be made. Where, as here, trial court errors pertaining to instructions, verdict language, and explication of the law resulted in special findings that both defendants actually shot and killed, when such findings are irreconcilable with the factual evidence, the result of such errors increases the likelihood the jury will impose death as the punishment for both defendants where it would not had the separate criminal liabilities of the defendants been properly proven beyond a reasonable doubt.

For the reasons set forth here, the instructional errors described above denied appellant a fair trial and due process of law and were not harmless beyond a

reasonable doubt requiring a reversal of the convictions and judgment of death. (U.S. Const., Fifth, Sixth, Fourteenth Amends.)

II.

THE PERSONAL WEAPON USE FINDINGS (PEN. CODE, § 12022.53, SUBD. (D)) ATTRIBUTED TO BOTH APPELLANT AND SATELE, RESPECTIVELY, A CULPABLE ACT ONLY ONE OF THEM COULD HAVE COMMITTED. THE USE OF IRRECONCILABLE FACTUAL THEORIES TO CONVICT OR TO OBTAIN HARSHER SENTENCES FOR BOTH ON THE BASIS OF AN ACT ONLY ONE COULD HAVE COMMITTED VIOLATES DUE PROCESS BECAUSE IN THOSE CIRCUMSTANCES THE STATE HAS NECESSARILY CONVICTED OR SENTENCED A PERSON ON A FALSE FACTUAL BASIS

Appellant states here the separate, though related, claim that the jury's conclusion that he and Satele were both the actual killers when only one of them could have been achieved a false conviction and increased punishment for one of them on the basis of a false factual basis. Appellant presents this claim separately because it states a separate due process violation predicated on the use of irreconcilable factual theories of guilt or culpability to obtain convictions or a harsher sentence. This court has held that such use renders a trial fundamentally unfair in violation of the due process guarantee of the Fourteenth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*In re Sakarias* (2005) 35 Cal.4th 140, 150.)

Sakarias presented a claim of error premised on prosecutorial misconduct, which appellant does not present here, in a circumstance where the prosecution had intentionally and in bad faith sought a conviction and death sentence for two defendants on the basis of culpable acts for which only one could be responsible. *Sakarias* reasoned: "In such circumstances, the People's conduct gives rise to a due process claim (under both the United States and California Constitutions) similar to a claim of factual innocence. Just as it would be impermissible for the state to punish a person factually innocent of the charged crime, so too does it violate due process to base criminal punishment on unjustified attribution of the same criminal or

culpability-increasing acts to two different persons when only one could have committed them. In that situation, we *know* that *someone* is factually innocent of the culpable facts attributed to both." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 160.)

In Argument I, appellant has set forth the evidence presented at trial concerning the number of actual killers and has explained why the great weight of the evidence establishes that one person, rather than two persons, shot and killed both Robinson and Fuller. Appellant respectfully refers the reader to that discussion and incorporates it here by reference. The jury's determination that appellant and Satele were both the actual killers is then irreconcilably in conflict with the great weight of evidence.

Sakarias stated, the "use of inconsistent and irreconcilable factual theories to convict two people of a crime only one could have committed, or to obtain harsher sentences for both on the basis of an act only one could have committed, violates due process because in those circumstances the state has necessarily convicted or sentenced a person on a false factual basis." (*In re Sakarias*, *supra*, 35 Cal.4th at p. 164.) The Court then reasoned: "It follows that where the probable truth of the situation can be determined – where we are able to say which of the prosecution theories was likely true and which false – only the defendant prejudiced by the *false* attribution is entitled to relief." (*Ibid.*) The Court declined to decide what result would obtain when the likely truth of the inconsistent theories cannot be determined, but noted that in two foreign jurisdictions, the courts have justified the prosecutor's use of alternate theories in separate cases on the uncertainty of the evidence. (*Id.*, at p. 164, fn. 8, citing *Parker v. Singletary* (11th Cir. 1992) 974 F.2d 1562, 1578; *Littlejohn v. State* (Okla.Crim.App.1998) 989 P.2d 901. 909.) The Court also noted in the same footnote, however, that a law review article on which the Court had relied a good deal in reaching its decision in *Sakarias*, proposed that "If . . . the court cannot determine which of the two versions is true, the prosecution should lose the benefit of both positions." (*Id.*, at p. 164, fn. 8, citing Poulin, *Prosecutorial Inconsistency,*

Estoppel, and Due Process: Making the Prosecution Get Its Story Straight (2001) 89 Cal.L.Rev. 1423, 1477.)

The state of the evidence at appellant's trial was such that, as appellant has observed in Argument I, the prosecutor actually admitted to the jury that he had been unable to prove who actually shot and killed Robinson and Fuller. (14RT 3222-3223.) The corollary to the prosecutor's admission, of course, is that he was also unable to prove under the facts of this case who, if anyone, aided and abetted the actual shooter. The prosecutor's evaluation of the evidence regarding who actually shot and killed and who aided and abetted is corroborated by the evidence adduced at trial. No percipient witness testified to events within the car at the time of the shooting. No forensic or expert opinion evidence shed light on the identity of the shooter or of the aider and abettor. Moreover, the prosecutor's admission and his adoption of the single shooter theory reveal that the prosecution had rejected the testimony of jailhouse informant Ernie Vasquez that appellant and Satele both independently claimed the role of the shooter in separate conversations with him and the two shooter theory implicit in such evidence. As appellant has explained in Argument I, Vasquez' two shooter factual recounting irreconcilably conflicts with the great weight of evidence there was but one shooter.

In this factual circumstance, in which the evidence is "highly ambiguous as to each accused perpetrator's role," with the result that it is not possible to determine which accused defendant was the actual killer and which accused defendant was the aider and abettor, the convictions and sentence of both defendants must be set aside because their convictions and sentence lack reliability in that they were obtained without regard to fairness and the search for truth, because they were obtained by means that undermine the fairness of the judicial process, and because they are the product of constitutionally significant prejudice. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 156, 157, 165, fn. 8.)

In reaching its decision in *Sakarias*, this Court relied upon cases from other jurisdictions expressing disapproval of the state's use of inconsistent and irreconcilable theories for the same crimes. Among the legal principles distilled from its review, *Sakarias* set forth the following. In *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, the court concluded that the use of inherently contradictory theories violates the principles of due process because the state is obligated not to pursue as many convictions as possible "without regard to fairness and the search for truth." (*Id.*, at p. 1051; *Sakarias*, *supra*, 35 Cal.4th at p. 157.) In *Stumpf v. Mitchell* (6th Cir. 2004) 367 F.3d 594, cert. granted sub nom. *Mitchell v. Stumpf* (2005) 543 U.S. 1042, the court concluded that the vice in using two inconsistent and irreconcilable factual theories to obtain a conviction is that one of them must be false and thus the convictions are rendered "unreliable." (*Stumpf v. Mitchell*, *supra*, 367 F.3d at p. 613; *In re Sakarias*, *supra*, 35 Cal.4th at p. 158.)

In *United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, the court recognized that the use of inconsistent and irreconcilable theories undermines the fairness of the judicial process. (*Id.*, at p. 127; *In re Sakarias*, *supra*, 35 Cal.4th at p. 159.) In *Sakarias*, this Court held that a defendant suffered constitutionally significant prejudice when the prosecutor manipulated the evidence to support his argument to the jury that the defendant had struck all of the hatchet-blade blows, including a particularly gruesome and severe antemortem blow. The Court found it impossible to conclude beyond a reasonable doubt that the prosecutorial argument played no role in the penalty decision and reversed the defendant's sentence of death based on the constitutionally significant prejudice that had flowed to him. (*Sakarias*, *supra*, 35 Cal.4th at pp. 164-165.)

In Argument I, appellant set forth under Subhead H, the ways in which the inconsistent and irreconcilable theories were used against him at the guilt and penalty phases of his trial. Appellant refers the reader to that discussion and incorporates it here by reference.

Appellant supplements the discussion made in the preceding Argument, as follows: Where appellant's guilt conviction is concerned, the state of the evidence – as reflected in the prosecution's inability to prove the identity of the actual killer and the concomitant inability to prove the identity of the aider and abettor – makes it impossible to conclude beyond a reasonable doubt that the factually inconsistent and irreconcilable determination that appellant and Satele were both actual killers played no role in appellant's conviction, despite the fact the trial court did instruct the jury with the law regarding principals and aiders and abettors (37CT 10754-10755)[21]. This is so in large part because the trial court incorrectly instructed the jury regarding mens rea requirements for principals and accomplices in connection with the personal weapon use enhancement (as explained in Argument I) and the special circumstance (as explained in Argument V) and because the thrust of the legally incorrect portions of the instructions allowed the jury to find guilt without assessing individual culpability. In addition, the trial court did not instruct the jury on the natural and probable consequences doctrine (CALJIC No. 3.02). As a result, the jury was not relieved of its duty to determine that appellant had the requisite mens rea to be culpable for the crimes.

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[21]. The trial court did not instruct the jury on, nor did the prosecution rely on, the natural and probable consequences doctrine (CALJIC No. 3.02; CALCRIM No. 4.02). The natural and probable consequences doctrine imposes vicarious liability upon the aider and abettor for crimes committed by a confederate that are a natural and probable consequence of the target crime the defendant aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-263; *People v. Croy* (1985) 41 Cal.3d 1.) In the case before this Court in *Prettyman*, as here, the parties did not rely on the natural and probable consequences doctrine. Of such a circumstance, this Court said: "Because the parties made no reference to the 'natural and probable consequences' doctrine in their arguments to the jury, it is highly unlikely that the jury relied on that rule when it convicted defendant Bray." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 273.)

Where the penalty decision is concerned, the circumstances again make it impossible to conclude beyond a reasonable doubt that the factually inconsistent and irreconcilable determination that appellant and Satele were both actual killers played no role in the penalty decision.

The prosecution's penalty phase case included the evidence and findings from the guilt phase of the case, which included appellant's assault over a drug dispute upon Esther Collins, and evidence that appellant was found in separate incidents with a razor blade within the pages of his Bible and with a metal staple under his upper lip. The jury also learned that on one occasion while being transported from the courthouse to the jail, appellant released himself and others from their handcuffs and performed jumping jacks on the bus in contravention of a sheriff's deputy's orders that he recuff himself. The jury also learned, however, that appellant and the other inmates did recuff themselves before the bus reached the county jail. Mitigating evidence revealed that appellant had had a very difficult childhood. His father was absent; his mother was emotionally distant and lacking in parenting skills. He had an uncle who periodically cared for him, but this same uncle also had to care for a large multigenerational family of dysfunctional individuals, as well as for his own wife and children. Appellant became involved with gangs and with drug sales and spent many years of his youth in the juvenile justice system.

But for the incident involving Esther Collins, conduct ascribed to appellant may have carried the potential of violence, but not the actual use of violence. We have some insight into the weight the jury accorded the assault upon Esther Collins in the jury's rejection of the hate crime enhancement (Pen. Code, § 422.75, subd. (c)) and special circumstance (Pen. Code, § 190.2, subd. (a)(16)).

Some aspect or aspects of the case concerned jurors in the sentencing decision because the jury declared itself deadlocked on more than one occasion. (See *In re Sakarias*, *supra*, 35 Cal.4th at p. 167 [that jury had concern about some aspects of case in reaching sentencing decision reflected in jury's deliberation for more than

10 hours over three days and declaration of deadlock prior to returning verdict of death].) It was not until two penalty phase jurors were replaced in seriatim that the jury reached its decision. Appellant has separately argued that each of the two original penalty phase jurors was improperly discharged (Arguments XIV, XV) and that the reconstituted jury was not properly instructed to disregard prior deliberations and to begin its deliberations anew (Argument XI). The penalty phase jury that fixed appellant's penalty at death did so within 50 minutes after its latest member was seated.

This court has characterized, in the context of penalty phase deliberations, the actual killer's "moral responsibility for the crimes" as being "at the zenith, with no coconspirator having greater culpability." (*In re Hardy* (July 26, 2007) 2007 WL 2128322.) Here, the jury operated under the understanding that appellant was the actual killer who personally and intentionally shot and killed two persons who were unknown to him and that he did so for reasons related to his gang (albeit under incorrect instructions as to this enhancement as appellant has explained in Arguments I and IV) and according to a preconceived plan. In *Hardy*, this Court recognized in its prejudice analysis that analogous aggravating factors would justify a verdict of death for the defendant before the court. (*Id.*) But then, *Hardy* alternatively posited that if the defendant did not kill anyone, if he had conspired with the group that included the actual killers but did not show up at the appointed time, his moral culpability would be different. And, the jury's weighing of the relative aggravating and mitigating factors would have been entirely different. (*Id.*) Much the same may be said for appellant.

For all of these reasons, it is not possible to conclude beyond a reasonable doubt that the jury's decision would have been the same had it not also used the factually incorrect and irreconcilable determination that appellant was one of two actual killers in the case.

For the reasons set forth here, appellant's guilt convictions and penalty were obtained in violation of his state and federal right to due process of law and must be reversed.

III.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO HAVE THE JURY DETERMINE EVERY MATERIAL ISSUE PRESENTED BY THE EVIDENCE WHEN IT FAILED TO INSTRUCT SUA SPONTE ON THE LESSER-INCLUDED OFFENSE OF IMPLIED MALICE MURDER OF THE SECOND DEGREE

A. INTRODUCTION

Appellant was charged with murder in counts 1 and 2. Because the prosecution's conflicting evidence supported several alternative legal theories of murder, the court instructed on first degree deliberate and premeditated murder (37CT 10766-10767; 14RT 3186-3187); first degree murder by use of armor-piercing ammunition (37CT 10768; 14RT 3188); and first degree drive-by murder (37CT 10769; 14RT 3188). The court also instructed on the lesser-included offense of unpremeditated murder of the second degree (i.e., express malice murder of the second degree) and on the related special finding pertaining to the intentional discharge of a firearm from a vehicle with the specific intention to inflict great bodily injury. (Pen. Code, § 190, subd. (d); 37CT 10770, 10771; 14RT 3188-3189.)

However, the court failed to instruct the jury on the lesser-included offense of second degree murder resulting from the commission of an unlawful act dangerous to life, i.e., implied malice murder of the second degree. (See CALJIC No. 8.31.[22]) Because substantial evidence supported such an instruction, and because the

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[22]. CALJIC No. 8.31 states: "Murder of the second degree is the unlawful killing of a human being when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result

court's error prevented the jury from considering a theory that would have resulted in a lesser degree of homicide, the court's error violated appellant's Fourteenth Amendment right to due process of law and his Eighth Amendment right to a reliable determination of guilt and penalty. Accordingly, the judgment must be reversed. A more detailed discussion follows.

B. FACTUAL BACKGROUND

The prosecution's evidence showed that Edward Robinson and Renesha Fuller were shot and killed sometime around 11:30 p.m. (5RT 1084-1086.) According to police detective Julie Rodriguez, appellant was with Juan Carlos Caballero[23] and codefendant Satele in the vicinity of Joshua Contreras' home in the early evening hours on the night of the shooting. (9RT 2077-2079.) Contreras told police that Caballero, codefendant Satele, and appellant arrived together at the park in the Dana Strand Project a little after midnight on the night of the shooting. Contreras overheard Satele say they had been out looking for African-Americans. (7RT 1584-1594.) Witness Ernie Vasquez testified he saw a car driven by Caballero traveling through the area before the shooting and that Satele was seated in the car's front passenger seat and appellant in the back seat. (6RT 1159-1160, 7RT 1394-1398.)

Viewed in the light most favorable to the judgment, the evidence showed that Caballero, codefendant Satele, and appellant had been in the car from which the shots were fired at the time of the killings of Renesha Fuller and Edward Robinson. However, the evidence was in conflict as to which of the car's occupants actually fired the shots.

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of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being."

[23]. Caballero was deceased at the time of trial.

According to witness Ernie Vasquez, codefendant Satele told him that "I" or "We" shot Robinson and Fuller. (6RT 1210-1211.) Witness Joshua Contreras also told police that Satele admitted to him that he had been the one who had shot the victims. (7RT 1618-1622, 8RT 1681.) Vasquez also told police that when he saw the burgundy Buick Regal earlier in the evening Caballero was driving, Satele was seated in the front passenger seat, and Nunez was sitting in the back seat. (6RT 1157-1158, 7RT 1394-1395.) If so, this would support the theory that Satele fired the shots, since it is more probable that the shooter would have been seated in the front passenger seat and the person functioning as lookout seated in the rear. Prosecution gang expert police detective Julie Rodriguez testified that gang members who commit a crime in rival gang territory often do so in combinations that include "one driver, one shooter, a lookout to make sure there aren't any police or witnesses that need to be taken care of. . . ." (9RT 2104.) The prosecutor followed up on Rodriguez' testimony during his summation by calling the jury's attention to her testimony and emphasizing: "They have a driver, they have a shooter, and they have people in the back to look for law enforcement, to look for witnesses." (14RT 3211.)

However, Vasquez also said appellant told him he had fired the shots. Vasquez said appellant mimed holding a gun when he said this. (6RT 1225-1226.)

Apart from these hearsay statements, there was no other evidence as to what took place in the car at the time of the killings.

The prosecutor contended that Caballero had been the driver of the car, but expressly stated that he had not proved the identity of the actual shooter.[24] Instead, the prosecutor contended that all three men were "aiders and abettors and principals in the commission of this offense." (14RT 3211, 3232-3233.)

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[24]. The prosecutor told the jury: "I will be the first one to tell you that I did not prove to you who the actual shooter was. Whether it was defendant Nunez or defendant Satele." (14RT 3211.)

Although there was substantial evidence of second degree implied malice murder, the court failed to instruct the jury on this lesser included offense. In failing to give this instruction, the court clearly erred.

C. THE DUTY TO INSTRUCT ON LESSER-INCLUDED OFFENSES

In capital cases, the Fourteenth Amendment Due Process Clause requires that a lesser-included offense instruction be given when the evidence warrants such an instruction. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) In addition, the Eighth Amendment prohibition on cruel and unusual punishments requires instruction on lesser included offenses in order to ensure that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided. (*Hopper v. Evans* (1982) 456 U.S. 605, 611.)

This court has also held that "a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and [], whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present, the failure to instruct on a lesser included offense, even in the absence of a request, constitutes a denial of that right. (*People v. Benavides* (2004) 35 Cal.4th 69, 101.)

"California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) The sua sponte duty to instruct is designed to protect not only a defendant's "'constitutional right to have the jury determine every material issue presented by the evidence'" but also "'the broader

interest of safeguarding the jury's function of ascertaining the truth."' (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) The duty extends to every lesser-included offense supported by substantial evidence; it is not satisfied "when the court instructs [solely] on the theory of that offense most consistent with the evidence and the line of defense pursued at trial." (*People v. Breverman* (1998) 19 Cal.4th 142, 153.)

A particular offense is considered a "lesser included offense," and therefore subject to the duty, if it satisfies one of two tests. The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser. The "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*People v. Cook* (2001) 91 Cal.App.4th 910, 918.) The scope of the sua sponte duty to instruct is determined from the charges and facts alleged in the accusatory pleading: "[T]he rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented in the accusatory pleading itself and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.' [Citations.] (*People v. Birks*, *supra*, 19 Cal.4th at p. 119.)" (*People v. Anderson* (2006) 141 Cal.App.4th 430, 442-443.)

D. SECOND DEGREE MURDER

It is well established that the crime of second degree murder is a lesser-included offense of first degree murder. (*People v. Seaton* (2001) 26 Cal.4th 598, 672.) First degree murder is an intentional, premeditated, deliberate killing with

malice aforethought, or a murder perpetrated during the commission of a felony enumerated in Penal Code section 189. All other forms of murder are second degree murder. (Pen. Code, § 189.)

Second degree murder has also been described as "an unpremeditated killing with malice aforethought." (*People v. Seaton, supra*, 26 Cal.4th at p. 672.) Malice may be express or implied. Malice is express when there is manifested an intention to unlawfully kill a human being. Malice is implied when: (1) a killing results from an intentional act; (2) the natural consequences of the act are dangerous to human life; and (3) the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (*People v. Combs* (2004) 34 Cal.4th 821, 856, fn. 8.)

Accordingly, when there is substantial evidence to support a finding that a killing was unpremeditated and without express malice, the trial court must instruct on the lesser included offense of second degree murder. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) "'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.'" (*People v. Benavides*, *supra*, at p. 102.)

In appellant's case, there was ample and persuasive evidence from which the jury could have concluded the killings were second degree murder, i.e., killings committed without premeditation and without express malice. In this regard, it is instructive to consider the type of evidence reviewing courts have typically considered as circumstantial evidence of a premeditated intentional killing. In this type of review, California courts have consistently applied the formula in *People v. Anderson* (1968) 70 Cal.2d 15, 26, which looked for (1) evidence of prior planning activity; (2) evidence of a motive to kill; and (3) evidence of a particular and exact means and manner of killing.

Here, substantial evidence showed that Robinson and Fuller were the random victims of a rapidly executed drive-by shooting rather than the selected

targets of a carefully planned shooting carried out in a particular and exact manner. Bertha Robinson Jacque and Frank Jacque were percipient witnesses to the shooting in that they saw and/or heard aspects of the event. Their testimonial evidence provides substantial evidence that Robinson and Fuller were random victims and that the actual shooting occurred in rapid, if not hasty, fashion. Both Bertha and Frank testified that Robinson and Fuller were outside for a very short span of time before the shootings took place. Such evidence makes any inference that they were the objects of prior planning activity a tenuous one. Bertha said Robinson and Fuller were watching television downstairs when she went upstairs to take a shower. When she finished her shower, she looked downstairs and saw that the lights were out. She went to her bedroom window and looked out and saw that Fuller's car was still at the curb. (5RT 983-985.) Frank testified that Robinson and Fuller left the house just before 11:00. He then went upstairs and spoke with Bertha, who was out of the shower and asked whether Edward had left. Frank told her, "He went outside." Bertha looked out of the window. (5RT 1053-1054.) Accordingly, the testimonies of both Bertha and Frank provide substantial evidence that Robinson and Fuller were random targets rather than the objects of prior planning activity.

The testimonies of Bertha and Frank also provide substantial evidence that the shooting was carried out in a rapid and hasty manner rather than in a particular and exact manner. Bertha testified that after she saw that the lights were out downstairs, she looked out of her bedroom window and saw that Fuller's car was still parked there. Bertha then turned and walked toward her bed, heard a burst of gunshots and immediately ran back to the window. When she looked out, she could only see the tail lights of the departing car and hear the sound of its accelerating engine. (5RT 983-984, 988.) Frank testified he heard "a bunch" of shots. Bertha went to the window and said Edward had been shot. (5RT 1053-1054.) A reasonable interpretation of these facts is of a shooting undertaken in haste and with conscious disregard for life, i.e., a shooting committed with implied malice.

Evidence of motive to kill is the last of the *Anderson* criteria set forth above. In this case, the prosecutor told the jury the killing was undertaken for racial reasons, but we are able to know from the jury's rejection of the hate crime allegations (Pen. Code, §§ 422.75, subd. (c), 190.2, subd. (a)(16)) that such evidence of motive was neither substantial nor persuasive. (38CT 10927-10928; 14RT 3214-3219.)

At trial, the prosecution's gang expert testified that WSW gang members who enter rival gang territory armed as the defendants are alleged to have been armed do so for the purpose of trying to kill someone. (9RT 2102-2103.) Such evidence suggests premeditation and an intent to kill. However, this same witness testified that WSW gang members do not like African-Americans (9RT 2106) and that if Caballero, Satele, and appellant shot and killed two African-Americans with no gang ties the murders would enhance their stature among other gang members who would view the elimination of African-Americans within the community to be beneficial to the gang (9RT 2106-2107.) This expert opinion was elicited to further the prosecution's theory that Caballero, Satele, and appellant were motivated to kill Robinson and Fuller because of their race. Such motive evidence directly relates to the consideration of premeditation, deliberation, and intent to kill under the prosecution's theory that Caballero and the defendants planned, prepared, and entered rival gang territory with the requisite intent to kill. As earlier noted, however, the jury found such evidence of motive to be neither substantial nor persuasive and to the extent motive evidence relates to premeditation, deliberation, and the requisite mental state the weight and quality of the expert's evidence would also be neither substantial nor persuasive.

Furthermore, as appellant will explain below, even with the testimonial evidence of the gang expert described above, the court and the parties were aware that substantial evidence supported an instruction on second degree implied malice murder. Although the record reveals some confusion among the parties concerning

the nature of express and implied malice murder of the second degree, it also shows the parties were aware that substantial evidence of implied malice murder was present. As a result of the confusion about implied and express malice second degree murder, the court summarily concluded the need for an instruction on second degree murder would be satisfied with the giving of an instruction for express malice second degree murder. This confusion is illustrated by the colloquy among court and counsel that followed after a discussion concerning instructions related to armor-piercing bullets:

> The Court: All right.
>
> 8.31 is murder in the second degree, which is a lesser included.
>
> The Court: Killing resulting from unlawful act dangerous to life.
>
> [The Prosecutor] Mr. Millington: I think that's more for a wreckless [sic] driving-type thing or something. I think the instructions we have incorporate second degree murder.
>
> The Court: Do you agree, counsel.
>
> [Counsel for Satele] Mr. Osborne: Well, I have some of my own in my package.
>
> [Counsel for appellant] Mr. MacCabe: I thought we had second degree included.
>
> The Court: Yes.
>
> Mr. Millington: Yes.
>
> The Court: All right.
>
> The second degree issue has been addressed in the other instruction. (13RT 3071:11-28.)

A little later, in the context of a discussion concerning whether the evidence supported voluntary manslaughter instructions, the following colloquy further illustrating the confusion about implied and express malice murder took place:

The Court: Here's the deal.

Let's say, for instance, that the jury does not believe your theory that the reason for the murder is, or for the killing I should say, is because of their passion. The culprit [sic] alleged passion against African Americans. They don't believe that portion. Then they're [sic] unlawful killing with a drive-by shooting, okay, then arguably could be just a random act, kind of like driving by with wreckless [sic] disregard and even something lesser in order to kill two human beings. Assuming that is the case.

And if there is sufficient information – if we don't believe the hate crime theory, okay, then there is a possibility that does not mean – if the jury does not believe the hate crime theory, and does not believe that there was commission of malice aforethought, and they were driving by spraying at random, with a less than depraved heart, kind of like a wreckless [sic] disregard for safety of humans, then I would say that perhaps that would be without malice aforethought. (13RT 3073:15-28 – 3074:1-5.)

In the discussion set forth above, the trial court described the very scenario that should have led the court to instruct on second degree implied malice murder. The court observed that if the jury rejected the prosecution's theory that the murder was motivated for racial reasons,[25] the resulting offense would arguably be a random shooting akin to a "driving by with []reckless disregard and even something lesser," which the court described as an act committed "without malice aforethought." (13RT 3073-3074.) The crime described by the court was, of course, second degree murder committed with implied malice, *viz.*, the doing of an intentional act the natural consequences of which are dangerous to human life performed with knowledge of the danger to, and with conscious disregard for, human life.

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[25]. Appellant's jury found the hate crime special circumstance and the related hate crime enhancement to be *not* true. (38CT 10927, 10928.)

Subsequently, the prosecutor revisited the question of whether voluntary manslaughter instructions were warranted in this case and there affirmed the existence of implied malice in the evidence in his case. The prosecutor said:

> "If the court was saying these guys got out of the car or if they shot a Norinco Mac-90 within 15 feet of these two individuals with armor piercing bullets, with four rounds that [sic], i[t] was obviously an intentional act dangerous to human life, with conscious disregard for human life." (13RT 3094:18-23.)

For the purposes of this argument only, appellant acknowledges these facts provide substantial evidence supporting a finding he and codefendant Satele were occupants of the car from which the fatal shots were fired.

Substantial evidence also supports the finding there was but one actual shooter. Bertha Robinson Jacque testified, as set forth above, that she looked out of her window and saw Renesha's car and had turned to walk toward her bed when she heard gunshots. She immediately ran to the window but by the time she got there she could only see the tail lights of the departing car. (5RT 983-984, 988-990.) The firearm was described as a "high capacity rapid fire semiautomatic" capable of firing up to four rounds per second. (10RT 2208.) The expended casings were grouped together, suggesting the weapon was not moved any significant distance between shots. (10RT 2212-2214) Robinson's four gunshot wounds were in close proximity to each other – (1) upper left arm passing through lung and heart, (2) left forearm, (3) left hip (which may have been caused by bullet that inflicted wound number 2, above) and (4) left side – from which it might be inferred the shot sequence was so rapid Robinson was in the same position throughout. (9RT 2014, 2016, 2018-2019, 2021, 2022, 2024.) Such evidence substantially supports the conclusion there was but one shooter as the only reasonable interpretation of the facts.

The evidence, however, fails to show who actually fired the fatal shots. And, there being no evidence as to the identity of the actual shooter, there was no evidence as to the shooter's mental state. Analogously, there was no evidence as to the actions or the mental state of the other occupants of the car. The prosecutor told the jury appellant and codefendant Satele acted as both the actual shooter and the aider and abettor. Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) Where, as here, the prosecution did not rely upon and the jury was not instructed on the natural and probable consequences doctrine, the aider and abettor may have acted with reckless disregard and with the intent to inflict great bodily injury, i.e., with the mens rea of implied malice, while the shooter shot with the intent to kill. Or the converse may have been the case.

The evidence at trial failed to point indisputably to a shooting committed with express malice since the evidence was equally as substantial the shooting was committed with implied malice. In the felony murder context, this Court has recognized that the issue of the degree of a murder can be taken from the jury only if the evidence points indisputably to a felony murder. (*People v. Turner* (1984) 37 Cal.3d 302, 327; *People v. Mendoza* (2000) 23 Cal.4th at 896, 908-909; *People v. Anderson* (2006) 141 Cal.App.4th 430, 448.) It follows that the issue of whether the aider and abettor and shooter acted with the requisite mental state may not be taken from the jury unless the evidence indisputably establishes each had the required mental state. In appellant's trial, the trial court's failure to instruct the jury on the lesser included offense of second degree murder committed with implied malice impermissibly removed the matter from the jury's consideration. The omission constituted prejudicial error.

E. PREJUDICE

It was error for the trial court not to have instructed on second degree implied malice murder.

In *People v. Barton* (1995) 12 Cal.4th 186, 196, this Court noted:

> Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence. (*Ibid.*)

The United States Supreme Court has suggested that the situation described by this Court in *Barton* could "raise difficult constitutional questions." (*Keeble v. United States* (1973) 412 U.S. 205, 213.)

In *People v. Breverman* (1998) 19 Cal.4th 142, 176, this Court concluded that the failure to instruct on a lesser-included offense raised by the evidence in a noncapital case is subject to the test of *People v. Watson* (1956) 46 Cal.2d 818, 836. A defendant is entitled to reversal under *Watson* when it is reasonably probable that a result more favorable to the defendant would have been reached had the error not occurred. (*Id.*, at pp. 835-837.) Notably, however, in her dissent in *Breverman*, Justice Kennard recognized that "[i]nstructions omitting or misdescribing an element of an offense are subject to harmless error analysis under

the test of *Chapman v. California* [(1967)] 386 U.S. [18], 24." (*People v. Breverman, supra*, 19 Cal.4th 142, 194, dis. opn., Kennard, J.)

In a capital case, as appellant's is, the failure to instruct on a lesser-included offense raised by the evidence is of federal constitutional dimension. In *Beck v. Alabama* (1980) 447 U.S. 625, 637, the United States Supreme Court held that in capital cases the Fourteenth Amendment Due Process Clause requires that a lesser-included offense instruction be given when the evidence warrants such an instruction. (*Schad v. Arizona* (1991) 501 U.S. 624, 645-648.) As such, the error is subject to review under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 21-26, rather than under the *Watson* test described above. Under the *Chapman* standard, the reviewing court will affirm the judgment only if it finds beyond a reasonable doubt that the error did not contribute to the verdict. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312 (Part II of opinion by Rehnquist, C.J.for the majority).)

The state of the evidence in this case is such that it cannot be concluded beyond a reasonable doubt that the failure to instruct on second degree murder committed with implied malice did not contribute to the verdict.

First, the prosecution presented no direct evidence of events within the car from which shots were fired immediately before the shooting took place. In order to place appellant in the car with Juan Carlos Caballero, the prosecution relied on the much-impeached and profitably rewarded Ernie Vasquez and his suspect testimony that appellant admitted his participation in the shooting. The prosecution again relied on statements made by Vasquez to detectives but repudiated by him at trial to place codefendant Satele in the front passenger seat and appellant in the rear. The prosecution presented no evidence as to whether Nunez occupied the rear seat behind the driver or the seat behind Satele or was seated in the middle of the seat at the time of the shooting. The prosecution presented no evidence as to the identity of the actual shooter. The prosecution presented no evidence as to the actions or the mental state of any of the car's occupants prior to and at the time of the shooting.

A properly given instruction on murder committed with implied malice, in conjunction with the aiding and abetting instructions[26] given the jury, would have focused the jury's analysis on the question of appellant's mental state, i.e., whether he, with the evidence showing he likely functioned as the lookout within the car, had the requisite intent to kill with premeditation and deliberation.

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (Pen. Code, § 31; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123.) Accordingly, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. The aider and abettor's guilt for the intended crime is not entirely vicarious, but "is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

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[26]. The jury was instructed with CALJIC Nos. 3.00 and 3.01. CALJIC No. 3.00 defines principals as: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] (1) Those who directly and actively commit the act constituting the crime, or [¶] (2) Those who aid and abet the commission of the crime." (37CT 10754; 14RT 3177.) CALJIC No. 3.01 defines aiding and abetting as: "A person aids and abets the commission of a crime when he or she (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (37CT 10755; 14RT 3178.)

Because the trial court did not instruct the jury on the natural and probable consequences doctrine, appellant limits the following discussion on the aider and abettor's mental state to the circumstance where the intended crime was murder.

The mental state required of an aider and abettor is "different from the mental state necessary for conviction as the actual perpetrator." (*People v. Mendoza*, *supra*, 18 Cal.4th at p. 1122.) An aider and abettor's mental state must be at least that required of the direct perpetrator. "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) This means the aider and abettor must know and share the murderous intent of the actual perpetrator. "Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.) This dichotomy may be illustrated by the following statement: "If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.)

Thus, although in this case the prosecution did not distinguish between the acts committed by each principal, it was required to prove each defendant had the requisite mens rea of the actual killer or the aider and abettor. Here, the prosecution lacked evidence as to the identity of the shooter and the roles of the defendants. Consequently, it lacked direct evidence regarding the mens rea of the shooter and of the aider and abettor. It could be equally inferred from the prosecution's evidence, for example, that the shooter shot with express malice, i.e., with the intent to kill, as it may be inferred the shooter shot with implied malice, e.g., with the intent to inflict great bodily injury. In fact, amongst the panoply of instructions relating to statutory and express malice murder, the court also instructed on a special finding pertaining to second degree murder committed by an intentional shooting from a motor vehicle

with the intent to inflict great bodily injury. An intentional shooting from a motor vehicle at persons outside the vehicle with the intent to inflict great bodily injury is manifestly the doing of an intentional act the natural consequences of which are dangerous to human life performed with knowledge of the danger to, and with conscious disregard for, human life. A killing achieved through such means is, of course, implied malice murder of the second degree. In this circumstance, the trial court's failure to instruct on the lesser included offense of second degree murder with implied malice was not harmless beyond a reasonable doubt.

Moreover, as appellant has discussed above, the jury rejected the prosecution's theory that the car's occupants were motivated to hunt down and shoot African Americans. The jury's rejection of the prosecution's theory regarding motive is necessarily a rejection of the prosecution's theory that the perpetrators acted with the requisite intent to kill and with premeditation and deliberation. (See, e.g., *People v. Cummings* (1993) 4 Cal.4th 1233, 1289; evidence defendant possessed handgun and had threatened to kill any policeman who got in his way went to his motive for shooting officer "and thus to the elements of intent, premeditation and deliberation.") The prosecution's evidence concerning events prior to the shooting consisted primarily of circumstantial evidence, which shed very little light on the intent of the participants.

Nor was the question of the participants' intent resolved by other jury findings. The prosecution contended that appellant committed two counts of willful, deliberate, and premeditated murder because the victims were African-Americans and by reason of their race were targets for gang-related purposes because the reputation of the perpetrators within the gang would be enhanced by the shooting. Although the jury returned verdicts convicting appellant of willful, deliberate, and premeditated first degree murder in both counts 1 and 2 (38CT 10926, 10930), the jury soundly rejected the prosecution's theory regarding appellant's motive by returning not true findings to both the hate crime enhancement allegation and the hate crime special

circumstance allegation the victims had been killed because they were African-American (38CT 10927-10928, 10933). And, although the jury returned true findings to the Penal Code section 186.22, subdivision (b), gang enhancement, it did so under instructions that failed to inform the jurors of the enhancement's elements.[27] Thus, neither of the two enhancement findings constitutes substantial evidence of motive, which the prosecution had used to prove intent and a deliberate and premeditated killing. And, as appellant has explained in Argument I, defects in the personal weapon use instruction were such that those special findings fail to provide proof of appellant's mens rea.

Moreover, although it may first appear that the verdicts finding willful, deliberate, and premeditated murder necessarily mean the jury found appellant acted with express malice, i.e., with an intent to kill, closer review shows the verdicts were necessarily produced by limitations in the verdict forms provided to the jury. Appellant earlier noted that in addition to willful, deliberate, and premeditated murder of the first degree, the trial court instructed the jury on first degree murder perpetrated by use of armor-piercing ammunition and on first degree murder committed by discharging a firearm from a motor vehicle with the specific intent to inflict death. And yet the first degree murder verdict forms in the record show the jury was only provided with guilty/not guilty verdict forms for willful, deliberate, and premeditated murder. (38CT 10927, 10939, 10945-10957.) Limited to this choice of verdict forms, the language pertaining to premeditated murder contained within the verdict form may not reasonably be said to be dispositive of the issue of whether appellant acted with express malice, i.e., with the intent to kill. Under such circumstances, therefore, it may not be reasonably said that the verdict of premeditated murder renders the

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[27]. Appellant has discussed in Argument IV the trial court's error in instructing the jury with the subdivision (a) substantive offense rather than with the subdivision (b) sentence enhancement of Penal Code section 186.22.

omission of instructions on the implied malice form of second degree murder harmless error. (*Cf. People v. Coddington* (2000) 23 Cal.4th 529, 591-594; overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Nor does the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) found true in this case dispose of appellant's claim. This special circumstance and the instructions under which it was found to be true fail to support a claim that a jury finding of intent to kill is implicit in the special circumstance finding.

The jury was instructed that in order to find the multiple murder special circumstance to be true, it had only to find: "[¶] A defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of murder of the first or second degree." (37CT 10780; 14RT 3195.) The finding thus does not require the jury find appellant possessed an intent to kill.

The trial court also instructed the jury on the special circumstance intent requirement for the actual shooter and for the accomplice. In so doing, the court included instructional language pertaining to the special circumstance intent requirement for an accomplice to a felony murder. Thus, the court instructed the jury that if it found "the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true." The jury was further instructed that if it found "the defendant was not the actual killer, or if it was unable to decide whether the defendant was the actual killer or aider and abettor or co-conspirator," it could not "find the special circumstance to be true unless it was satisfied beyond a reasonable doubt the defendant with the intent to kill" aided, abetted, etc., any actor in the commission of the murder, "or with reckless indifference to human life and as a major participant" aided, abetted, etc., in the

commission of the crime of "Penal Code 190.2 (a)(3)[,] Penal Code 190.2 (a)(16),"[28] i.e., the multiple murder or hate crime special circumstance.[29] (CALJIC No. 8.80.1;

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[28]. Where the CALJIC instruction provided for the insertion of the statutorily defined underlying felony, the court here inserted the Penal Code citations for the multiple murder and hate crime special circumstance allegations.

[29]. The court instructed with the following modified version of CALJIC No. 8.80.1:

If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true: Penal Code 190.2 (a)(3), Penal Code 190.2 (a)(16).

The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of Penal Code 190.2 (a)(3), Penal Code 190.2 (a)(16) which resulted in the death of a human being, namely Edward Robinson and Renesha Ann Fuller.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being.

You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your finding as to the one or more upon which you do agree.

You must decide separately each special circumstance alleged in this case as to each of the defendants. If you cannot agree as to all of the special

37CT 10778; 14RT 3193-3195.) This instruction thus told the jury it could find the special circumstance to be true if it found appellant acted with the mental state of "reckless indifference to human life." The instruction also told the jury if it found appellant actually killed a human being they did not need to find he intended to kill in order to find the special circumstance to be true. Here, as repeatedly noted, the prosecutor readily acknowledged he had failed to prove the identity of the actual shooter. Under these instructions, and assuming the jury actually reached a conclusion as to the identity of the shooter and the identity of the aider and abettor where the prosecutor could not, the jury could have found defendant A to be the actual shooter and returned a true finding as to him without finding he intended to kill. The jury could also have found defendant B to have aided and abetted with reckless indifference and as a major participant and returned a true finding as to him without finding he intended to kill.

In short, the multiple murder special circumstance instruction did not require that the jury find express malice or an intent to kill in order to return a true finding. Statutorily, the multiple murder special circumstance itself does not require an intent to kill. (CALJIC (6th ed. 1996) CALJIC No. 8.80.1, use note.) It therefore will not independently support a claim that express malice is implicit within the finding. And, as explained above, nothing in the version given of CALJIC No. 8.80.1 regarding appellant's liability for the special circumstance supports a conclusion that the jury necessarily found intent to kill in finding the special circumstance true.

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circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied. (37 CT 10778-10779; 14 RT 3193-3195.)

In addition, depriving appellant of the protection afforded under the principles here discussed is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a jury properly instructed on the principles of law that are relevant to and govern the case, including instruction on all elements of the offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Furthermore, correct jury instructions serve to ensure an accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

The physical and testimonial evidence regarding appellant's intent are neither overwhelming nor are they substantial. Under such circumstances, and for the reasons explained above, appellant respectfully submits this Court must reverse the judgment of conviction because the failure to instruct the jury on the lesser-included offense of implied malice murder of the second degree was not harmless beyond a

reasonable doubt. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Chapman v. California*, *supra*, 386 U.S. 24.)

IV.

THE COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT OMITTED ESSENTIAL ELEMENTS FROM THE GANG ENHANCEMENT INSTRUCTION. ALTERNATIVELY, APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE HE DID NOT RECEIVE NOTICE OF THE CHARGES AGAINST HIM. THE ENHANCEMENT MUST THEREFORE BE REVERSED

A. INTRODUCTION

The amended information alleged a sentence enhancement that appellant committed the murders charged in Counts 1 and 2 for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1). (2CT 397-402.) The jury returned "true" findings as to each sentence enhancement. (38CT 10928, 10933.)

The true findings, however, were obtained under erroneous instructions. Subdivision (a) of Penal Code section 186.22 defines the substantive offense of participation in a criminal street gang, while subdivision (b) imposes a sentence enhancement when a felony is committed for the benefit of, at the direction of, or in association with a criminal street gang. These two subdivisions describe different elements and require different mental states. The trial court erroneously instructed the jury on the elements of the substantive offense (Pen. Code, § 186.22, subd. (a)) rather than on the elements of the sentence enhancement (Pen. Code, § 186.22, subd. (b)). (CALJIC No. 6.50; 37CT 10761; 14RT 3180-3181). Because this error violated appellant's federal constitutional rights, as appellant explains below, the street gang sentence enhancement must be stricken.

B. ANALYSIS

The Fifth and Fourteenth Amendment Due Process Clauses and the Sixth Amendment notice and jury trial guarantees require that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in a pleading, submitted to a jury, and proven beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship* (1970) 397 U.S. 358, 364.) Because a sentence enhancement requires findings of fact that increase the maximum penalty for a crime, the United States Supreme Court has held that this rule applies specifically to sentence enhancement allegations. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476, 490.)

The Due Process Clause requires that a court must instruct the jury that the state bears the burden of proving each element of the crime beyond a reasonable doubt and that the court must state each of those elements to the jury. (*In re Winship* (1970) 397 U.S. 358, 363; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Carella v. California* (1989) 491 U.S. 263, 265) Omission of an element from an instruction is federal due process error and compels reversal unless the beneficiary of the error can show the error to have been harmless beyond a reasonable doubt. (*Ibid.*)

Similarly, to find the facts necessary for a sentence enhancement to be true beyond a reasonable doubt, the jury must be properly instructed on the elements of the enhancement. Thus, this court has held that the trial court must instruct on general principles of law relevant to and governing the case, even without a request from the parties. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) This rule applies not only to the elements of a substantive offense, but also to the elements of an enhancement. (*People v. Winslow* (1995) 40 Cal.App.4th 680, 688.)

Furthermore, due process requires that the prosecution prove every element of the offense charged against a defendant. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510.) In proving those charges, due process further prohibits

instructions which omit an element of the crime. (*Evenchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933-939.)

With the exception of prior convictions, " 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476, quoting *Jones v. United States* (1999) 536 U.S. 227, 243 fn. 6.)

It is well established that an enhancement must be proven as any other material fact in the trial of the cause. (*People v. Coleman* (1904) 145 Cal 609, 612, superseded by statute as stated in *People v. Saunders* (1993) 5 Cal.4th 580, 588.) If enhancements, which by their very nature increase the maximum penalty for a crime, must be proven in the same manner as the underlying offense, it necessarily follows that instructions which incorrectly define the elements of an enhancement are violative of due process.

Correct jury instructions also serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Moreover, the erroneous instruction constituted a state law violation that deprived appellant of a liberty interest in contravention of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a jury properly instructed on the

principles of law that are relevant to and govern the case, including instruction on all elements of the offense and enhancement. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; see also *People v. Winslow* (1995) 40 Cal.App.4th 680, 688.) To uphold appellant's conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

As applied to the facts of this case, the foregoing cases required that the jury be instructed on all of the elements of the criminal street gang enhancement charged in the information. That enhancement is defined in Penal Code section 186.22, subdivision (b), and requires the imposition of various enhancements on "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. . . ." (Pen. Code, § 186.22, subd. (b)(1).) The elements of this enhancement are: (1) the crime charged was committed for the benefit of, at the direction of, or in association with a criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b); see also CALJIC (7th ed. 2003) CALJIC No. 17.24.2; CALCRIM (Fall 2006) CALCRIM No. 3250.)

However, instead of instructing the jury on the foregoing elements, the trial court gave a modified version of CALJIC No. 6.50, which pertains to the substantive offense of participation in a criminal street gang, which read as follows:

> [Defendant is accused in Counts 1 and 2 of having violated section 186.22, subdivision (b), of the Penal Code, a crime.]
>
> Every person who actively participates in any criminal street gang with knowledge that the members are engaging in or have engaged in a pattern of criminal gang activity, and who willfully promotes,

furthers, or assists in any felonious criminal conduct by members of that gang, is guilty of a violation of Penal Code section 186.22, subdivision (b), a crime.

"Pattern of criminal gang activity" means the [commission of,] [or] [attempted commission of,] [or] [solicitation of] [sustained juvenile petition for,] [or] [conviction of] two or more of the following crimes, namely, murder and assault with a deadly weapon, provided at least one of those crimes occurred after September 26, 1988 and the last of those crimes occurred within three years after a prior offense, and the crimes are committed on separate occasions, or by two or more persons.

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, murder and assault with a deadly weapon, (2) having a common name or common identifying sign or symbol, and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Active participation means that the person must have a relationship with the criminal street gang that is more than in name only, passive, inactive or purely technical.

Felonious criminal conduct includes murder and assault with a deadly weapon.

In order to prove this crime, each of the following elements must be proved:

1 A person actively participated in a criminal street gang;

2 The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

3 That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and

4 That person either directly and actively committed or aided and abetted [another] [other] member[s] of that gang in committing the crime[s] of murder and assault with a deadly weapon (CALJIC No. 6.50; 37CT 10761-10762; 14RT 3181-3183.[30])

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[30] Counsel for appellant objected to the giving of the instruction, albeit on the ground the prosecution had failed to present evidence of a pattern of criminal gang activity. (See 13RT 3041-3043.) This issue was thus preserved for

Under this instruction, the jury was free to return a "true" finding to the charged enhancement without finding the essential elements of the enhancement, *viz.*, either that the crime charged was committed for the benefit of, at the direction of, or in association with a criminal street gang and that the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. Instead, the jury was able to find the enhancement allegation to be true merely if it found appellant actively participated in a street gang and aided and abetted the commission of a murder. (See *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207, holding that in proving the enhancement the prosecution need not prove that the defendant is a "current, active" member of the gang.)

The court's error was exacerbated by the fact that the trial court failed to include the sentence enhancement in its instruction that in order to return a "true" finding the jury had to find the concurrence of act and specific intent. The court instructed with CALJIC No. 3.31, as follows: "In the crimes charged in counts one and two, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime to which it relates is not committed. [¶] The specific intent required is included in the definitions of the crimes set forth elsewhere in these instructions." (37CT 10758; 14RT 3179.) Thus, not only was the jury not properly instructed on the elements of the enhancement, which required a specific intent determination, it was also not properly instructed on the need to find the concurrence of the *actus reus* and *mens rea* necessary for the enhancement.

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appellate review by the fact of counsel's objection and also because challenges to jury instructions affecting substantial rights are not waived even when no objection is made at trial. (Pen. Code, § 1259) Moreover, although the failure to state the correct grounds for an objection generally will not preserve the issue for review, trial courts have a sua sponte duty to correctly instruct on the elements of the offense, which negates the need for an objection. (*People v. Castillo* (1997)16 Cal.4th 1009, 1015.)

The omission of an essential element of an instruction compels reversal unless respondent can show the error to have been harmless beyond a reasonable doubt. (*Mitchell v. Esparza* (2003) 540 U.S. 12, 16, and cases there cited; *Chapman v. California* (1967) 386 U.S. 18, 24.) Under *Chapman* the conviction must be reversed unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt, and the burden shifts to the prosecution to show that the error was harmless.

To determine whether an error contributed to a verdict, *Chapman* "instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) In this case, appellant neither conceded nor admitted the omitted elements of the sentence enhancement, so the instructional error may not be found harmless on that basis. (*Carella v. California*, *supra*, 491 U.S. at p. 271 (conc. opn. of Scalia, J.).) Nor was the jury called upon to find the omitted elements as predicate facts in the resolution of appellant's guilt of the substantive offenses. (*Ibid.*) To the contrary, the prosecution's theory was that appellant was a WSW gang member motivated by the culture of his particular gang to shoot and kill Robinson and Fuller because they were African-Americans. The jury soundly rejected this theory when it refused to find the hate crime special circumstance allegations to be true. Implicit in the jury's rejection of the hate crime special circumstance allegations and by extension the prosecution's theory is the jury's rejection of the contention that Robinson and Fuller were murdered for gang-related reasons, the gravamen of the sentence enhancement in issue here. That suggests in turn that a properly instructed jury would not have found the sentence enhancement to be true. Finally, no other properly given instruction required that the jury resolve the factual questions in issue in the omitted instruction. Thus, it may not be said that the jury's verdict on other

points resolved the factual issues necessary to a finding of the sentence enhancement. (*California v. Roy* (1997) 519 U.S. 2.

For these reasons, the instructional error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 84.) Accordingly, the portion of the judgment imposing the enhancements of Penal Code section 186.22, subdivision (b)(1), enhancements must be reversed.

Moreover, this particular instructional error directly affected the jury's finding on the charged personal firearm use (Pen. Code, § 12022.53, subds. (d), (e)(1)). The information included sentence enhancements alleging that the murders were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and that a principal discharged a firearm in committing the murder (Pen. Code, § 12022.53, subd. (d)). Penal Code section 12022.53, subdivision (d), adds a consecutive 25-year-to-life term if a person convicted of statutorily specified felonies intentionally and personally discharged a firearm and caused great bodily injury or death. Section 12022.53, subdivision (e)(1), imposes vicarious liability under this section on aiders and abettors who commit crimes when both this section and subdivision (b) of section 186.22 are pled and proved. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

In Argument I, appellant more fully explains that the trial court gave the jury an incorrect instruction regarding the personal firearm use enhancement. As relevant here, that incorrect instruction included language that directed the jury to the gang enhancement instruction, to wit: "This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are ple[]d and proved." (37CT 10788; 14RT 3200-3201.) The prosecutor made specific reference to the foregoing sentence within the personal firearm use enhancement instruction and told the jury that inasmuch as he had both pled and proven the truth of the gang enhancement allegation he was relieved under that aspect of the instruction

of the burden of proving personal firearm use by a particular defendant. (14RT 3223.) As appellant explains in Argument I, pertaining to the incorrect personal firearm use instruction, the prosecutor's statement and the instruction were both manifestly incorrect statements of the law. And, the misdirection inherent in both the prosecutor's argument and the court's instruction permitted the jury to return true findings on the personal firearm use enhancements in reliance upon the determination of the gang enhancement, which, as appellant has explained above, the jury made in reliance upon an incorrect instruction pertaining to the gang enhancement.

Furthermore, as appellant explained in Argument I, the instructional error complained of here, in association with the prosecutor's arguments regarding the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)), the charged personal weapon use (Pen. Code, § 12022.53, subds. (d), (e)(1)), and the language of the verdict forms permitted the jury to view both appellant and codefendant Satele as the actual shooters. As explained in Arguments I and II, the finding that both appellants personally used the firearm in the commission of this offense is an irreconcilable inconsistency in the verdicts that was contrary to any reasonable interpretation of the evidence. That improper finding of "personal use" was a direct result of the interplay between section 12022.53, subdivision (e), and section 186.22.

As a result, the incorrect finding under the street gang statute led to the impermissible finding that both defendants were the actual killer, i.e., led to findings that both defendants were culpable for acts only one could have committed. This improperly inflated appellant's individual culpability in a manner that allowed the jury to avoid resolving crucial questions as to the mental state of the aider and abettor. It was also likely to be a factor that would heavily influence a jury to impose the death penalty, and it was a factor relied on by the trial court in denying the request to modify the verdict and/or grant a new trial.

Clearly, the error in instructions on the gang enhancement had an impact beyond the imposition of the enhancement itself, thereby requiring a reversal of the judgment of conviction and the death sentence.

C. APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW BECAUSE HE DID NOT RECEIVE NOTICE OF THE CHARGES AGAINST HIM IN RELATION TO THE GANG ENHANCEMENT ALLEGED UNDER SECTION 186.22, SUBDIVISION (B)

In the preceding sections, appellant has explained that although he was charged with the sentence enhancement set forth in Penal Code section 186.22, subdivision (b), the trial court incorrectly instructed the jury with the substantive offense of participation in a criminal street gang in violation of section 186.22, subdivision (a). The jury found the sentence enhancement to be true under the instructions given and appellant's sentence was enhanced as a result.

These errors deprived appellant of the right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, because it deprived him of the right to notice of the charges under which his sentence was enhanced. The Sixth Amendment guarantees a defendant the right to be informed of the nature of the charges against him so as to permit adequate preparation of a defense. As our Supreme Court has stated, "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." (*Cole v. Arkansas* (1948) 333 U.S. 196, 201; see also *In re Oliver* (1948) 333 U.S. 257, 273 ["A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence. . . ."]; *Jackson v. Virginia* (1979) 443 U.S. 307, 314 [A person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend."].)

In determining whether a defendant has received fair notice of the charges against him, one must first look to the information. (*James v. Borg* (9th Cir. 1994) F.3d 20, 24, citing *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805. 813 – "A court cannot permit a defendant to be tried on charges that are not made in the indictment against him"). "When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime." (*People v. West* (1970) 3 Cal.3d 595, 612, quoted in *People v. Thomas* (1987) 43 Cal.3d 818, 826.)

Recently, *Gautt v. Lewis* (9th Cir. 2007) ___ F.3d ___, 2007 WL 1615123, held that the standard of error requiring automatic reversal was appropriate when a defendant's due process right to notice of the charges was violated because a discrepancy existed as to the enhancement alleged and the enhancement for which jury instructions were given resulting in a finding by the jury that the enhancement allegation was true.

In *Gautt*, the enhancement under Penal Code section 12022.53, subdivision (b), was alleged by number and by nearly verbatim description in the information, but the defendant's sentence was enhanced under subdivision (d) of that section.

The Ninth Circuit observed that the two subdivisions of section 12022.53 differ in several critical respects. Italicizing the relevant differences, the court explained that subdivision (b) provides for an enhanced sentence when someone "*personally used a firearm*," while subdivision (d) provides for an even greater sentence when a principal "*intentionally and personally discharged a firearm and proximately caused great bodily injury*" to another.

Gautt explained the statutory confusion began when the trial court recited the elements unique to subdivision (d): personal discharge, intentional discharge, and proximate causation of great bodily injury or death. The statutory confusion repeated itself when the jury completed the verdict form, which cited to

subdivision (b), but listed the personal discharge and proximate causation elements, but not the intentional discharge element, of subdivision (d). The defendant's sentence was thereafter enhanced under subdivision(d).

In finding reversible error, Gautt stated that the situation presented was not one where the numerical citation for the statute was incorrect but the verbal description corresponded to the crime for which the defendant was convicted. Nor was it a situation where the reference to one statute necessarily encompassed the other one as a lesser-included offense. The court found defendant Gautt's constitutional right to be informed of the charges against him was violated by the stark discrepancy between the crime charged and the crime of conviction.

Gautt next considered whether the failure to give the defendant notice of the charges should be evaluated under the harmless error standard of *Chapman v. California*, (1987) 386 U.S. 18, 24, or the per se reversal standard assigned for structural error in *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.

Noting that the Supreme Court's characterization of the defendant's right to be informed of charges against him or her as both "basic in our system of jurisprudence" (*In re Oliver* (1948) 333 U.S. 257, 273) and as a "principle of procedural due process" that is unsurpassed in its "clearly established" nature (see *Cole v. State of Arkansas* (1948) 333 U.S. 196, 201), the Ninth Circuit concluded that the failure to be notified of the charges must be regarded as structural error because it "affect[s] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself" (*Fulminante*, *supra*, 499 U.S. at 310, and *Brecht v. Abramson* (1993) 507 U.S. 619, 629-630 [describing structural defects as those that "infect the entire trial process" and "which defy analysis by 'harmless-error' standards"].)

The error appellant complains of here is identical to that in *Gautt*. As in *Gautt*, the error complained of here was more than a mistaken recitation of the code section, which was offset by a correct recitation of the elements of the enhancement.

Rather, evidence was presented to the jury and the jury was asked to find facts for which appellant had never received notice. In particular, the elements of active participation and knowledge of the pattern of criminal behavior by the members of the gang had never been alleged in the information, and appellant had no notice that these elements would be part of the case against him.

Nonetheless, these elements were submitted to the jury, and appellant was convicted of an enhancement based of the presence of these facts.

Therefore, appellant submits that the findings pursuant to Penal Code section 186.22, subdivision (b), must be reversed.

Furthermore, as discussed above, the personal use of the firearm (Pen. Code, § 12022.53, subd. (d))was found to be true as a result of the enhancement under sections 186.22. This finding was used by the trial court in its decision to impose the death penalty returned by the jury. Because the finding of personal use of the firearm was constitutionally infirm, appellant submits that it was error to use that fact to impose the death penalty.

V.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY ON THE MENTAL STATE REQUIRED FOR ACCOMPLICE LIABILITY WHEN A SPECIAL CIRCUMSTANCE IS CHARGED. THE ERROR PERMITTED THE JURY TO FIND THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE TO BE TRUE UNDER A THEORY THAT WAS NOT LEGALLY APPLICABLE TO THIS CASE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL

A. INTRODUCTION

The jury found the multiple murder special circumstance to be true against appellant in special findings made in conjunction with Counts 1 and 2. (38CT 10927.) The jury reached these special findings, however, under an instruction that incorrectly stated the law regarding accomplice intent by allowing the jury to find the enhancement to be true for aiders and abettors without first finding the required intent to kill. This error violated appellant's Fifth and Fourteenth Amendment rights to due process of law and his Sixth Amendment right to a jury trial. The error was not harmless beyond a reasonable doubt in this case in which the jury could have reasonably concluded, as in fact the prosecutor did, that substantial evidence established there was but one actual killer, that appellant was *not* that actual killer, but an aider and abettor. In such a circumstance, under properly given instructions, the jury would have had to determine whether appellant aided and abetted with the intent to kill before finding the enhancement true as to him. The instructional error concerned an element of the special circumstance and was not harmless beyond a reasonable doubt. Reversal of the special circumstance findings is required.

B. THE JURY WAS INCORRECTLY INSTRUCTED AS TO THE LAW REGARDING ACCOMPLICE INTENT

A defendant is subject to a sentence of death or life imprisonment without the possibility of parole if he is convicted of first degree murder and a special circumstance is charged and specially found to be true that in the current proceeding the defendant has been convicted of more than one offense of murder in the first or second degree. (Pen. Code, §§ 190.2, subd. (a)(3), 190.3, 190.4.)

If the defendant is the actual killer, as opposed to an aider and abettor, the jury need not find the defendant acted with intent to kill in order to return a true finding to the multiple murder special circumstance. (Pen. Code, § 190.2, subd. (b); *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 992 [amendments to Pen. Code, § 190.2, by Propositions 114, 115, effective June 6, 1990]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301-302 [Prop. 115 amendment to Pen. Code, § 190.2(b), codified holding in *People v. Anderson* (1987) 43 Cal.3d 1104, 1144-1145].)

In contrast, intent to kill is required for aiders and abettors, except as set forth below. Penal Code section 190.2, subdivision (c), provides: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true. . . ." Thus, while intent to kill is not an element of the multiple murder special circumstance where the actual killer is concerned, when a defendant is an aider and abettor rather than the actual killer, intent to kill must be proved. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150; overruling *People v. Turner* (1984) 37 Cal.3d 302 to the extent it holds to the contrary.)

An exception to this rule, however, has been created for cases that arise on or after June 6, 1990, and involve a felony-based special circumstance. In such

cases, a defendant who is not the actual killer and who does not act with intent to kill is nevertheless subject to the death penalty if: (1) he, with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of a felony enumerated in subdivision (a)(17) of Penal Code section 190.2; (2) the enumerated felony resulted in the death of some person or persons, for which the defendant is convicted of first degree felony murder; and (3) the defendant is charged with a felony murder special circumstance enumerated in subdivision (a)(17). (Pen. Code, § 190.2, subd. (d).) In short, subdivision (d) of Penal Code section 190.2 subjects the defendant who is determined to be a major participant acting with reckless indifference to life in a felony-based special circumstance to the death penalty. (*People v. Smith* (2005) 135 Cal.App.4th 914, *People v. Hodgson* (2003) 111 Cal.App.4th 566.) The subdivision has also been held to apply under the "provocative act doctrine" to a defendant who provokes gunfire from a nonaccomplice bystander or victim, who accidentally shoots and kills the murder victim, if the defendant was a major participant in the underlying felony and acted with reckless indifference. (*People v. Briscoe* (2001) 92 Cal.App.4th 568.)

The pleading in appellant's case did not allege the felony murder special circumstance, nor did the prosecution proceed against appellant and Satele under the felony murder theory. Accordingly, the jury in this case was required to find the aider and abettor acted with the intent to kill in order to return a true finding on the multiple murder special circumstance as to him.

The trial court instructed appellant's jury with a modified version of CALJIC No. 8.80.1, the "introductory" special circumstances pattern instruction, setting forth the intent requirement for the actual killer and for the aider and abettor who is *not* charged with the felony murder special circumstance. The pattern instruction (CALJIC No. 8.80.1), however, also sets forth the major participant/reckless indifference language under which the aider and abettor who is

charged with the felony murder special circumstance may be subject to the death penalty. In modifying the version of CALJIC No. 8.80.1 given to appellant's jury, the trial court failed to redact from the pattern instruction language pertaining to the aider and abettor charged with the felony murder special circumstance. As a result of this error, the jury was allowed to find the multiple murder special circumstance to be true as to appellant if it found him to be a major participant who acted with reckless indifference to life. Thus, the instructional error allowed the jury to return a true finding to the enhancement without finding a required element of the enhancement, *viz.*, that appellant had the requisite intent to kill to be held liable for the special circumstance as an aider and abettor.

The trial court instructed the jury as follows:

> If you find a defendant in this case guilty of murder of the first degree, you must determine if one or more of the following special circumstances are true or not true: Penal Code 190.2 (a)(3), Pneal Code 190.2 (a)(16).
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, *or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of Penal Code*

190.2 (a)(3)[,] Penal Code 190.2 (a)(16) [sic][31] *which resulted in the death of a human being*, namely Edward Robinson and Renesha Ann Fuller.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being.

You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your finding as to the one or more upon which you do not agree.

You must decide separately each special circumstance alleged in this case as to each of the defendants. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied. (37CT 10778-10779; 14RT 3193-3195; emphasis added.)

The instruction given the jury thus allowed the jury to find the special circumstance to be true as to appellant if it found him to be a major participant who acted with reckless indifference to life, i.e., as though he were an aider and abettor charged with the felony murder special circumstance. The instructional error allowed the jury to return a true finding to the enhancement under a legally incorrect theory. Such a circumstances violates the principles articulated by this Court in *People v. Green* (1980) 27 Cal.3d 1 and *People v. Guiton* (1993) 4 Cal.4th 1116.

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[31]. In lieu of naming the qualifying Penal Code section 190.2, subdivision (a)(17), felony called for by the pattern instruction, the instruction given appellant's jury incorrectly named instead the Penal Code sections for the charged multiple murder and hate crime special circumstances. (37CT 10778.)

In *Green*, this Court stated the general rule: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green*, *supra*, 27 Cal.3d at p. 69.) This Court explained in *Guiton* why it is that presenting a jury in a criminal case with a legally incorrect theory generally requires reversal.

> "[¶] Jurors are not generally equipped to determine whether a particular theory of conviction is submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think their own intelligence and expertise will save them from that error. . . ." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59.)

In *Green*, the defendant, who was convicted of kidnapping, moved the victim three times. In reversing the kidnapping count and related kidnapping special circumstance, this Court "found [legal] error as to two of the three possible segments of asportation . . . [and] could not determine from the record whether the jury based its verdict on either of the 'legally insufficient segments of [the victim's] asportation. . . .' (*People v. Green*, *supra*, 27 Cal.3d at p. 67.) The first of the legally insufficient segments of the asportation was instructional; the second resulted from this Court's determination that the evidence was insufficient as a matter of law to establish the crime. (*Id.*, at pp. 63-64, 65-67.)

In evaluating the prejudice flowing from the errors, *Green* began with the Court's observation that it was unable to know whether the jury based its verdict on the legally correct theory or on one or both of the legally incorrect theories. The Court rejected the Attorney General's contention that the evidence supported the conclusion that the three segments constituted one continuous kidnapping that began

with the initial movement and ended in the murder because that was not the theory on which the case was tried. In his closing argument, the prosecutor had divided the asportation into three segments and had argued to the jury that any one of the three segments is sufficient evidence of a kidnapping. (*People v. Green*, *supra*, 27 Cal.3d at pp. 67-68.) The Court noted that "[n]othing in the instructions . . . disabused the jury of this notion. The instructions . . . told the jury only that the crime is committed when the defendant moves a person . . . for a substantial distance, that is, a distance more than slight or trivial. No further guidance was provided. . . ." (*Id.*, at pp. 68-69.)

Of the record before it, the Court said the record "contains evidence that could have led the jury to predicate its kidnapping verdict on the legally sufficient portion of [the] asportation. But it also contains evidence that could have led the jury to rely instead on either of the legally insufficient portions of that movement. The instructions permitted the jury to take the latter course; and the district attorney expressly urged such a verdict in his argument, at least with respect to [the second of the legally incorrect segments." (*People v. Green*, *supra*, 27 Cal.3d at p. 71; cf. *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1036 ["That the jury here was not, in the end, invited to reach a guilty verdict by a faulty analytical path is clear from a consideration of the prosecutor's summation."") The Court further observed that the jury may have followed the prosecutor's advice with some but not necessarily all of the jurors resting their verdict on a legally insufficient segment of the movement. (*Ibid.*)

This Court stated,: "In these circumstances the governing rule on appeal is both settled and clear: when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.*, at p. 69; quoted in *People v. Guiton*, *supra*, 4 Cal.4th at p. 1122; see *Griffin v. United States*, *supra*, 502

U.S. at pp. 52-55, 58-59; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1551.)

Subsequently, in *Guiton*, this Court reaffirmed the principles upon which it had relied in *Green*. "If the adequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green*, the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton*, *supra*, 4 Cal.4th 1116, 1129, fn. omitted.)

In appellant's case, the inadequacy complained of is legal and not merely factual. The incorrect instruction allowed the jury to return a true finding to the special circumstance finding by way of a faulty and legally unsustainable analytical path, namely by finding that appellant was a major participant who acted with reckless indifference to life. In *Green*, this Court concluded that reversal was the correct remedy where the jury reached its verdict under two legally incorrect and one legally correct theories and there was no basis in the record to find the verdict was actually based on a valid ground. In appellant's case, the jury was instructed that it could find the special circumstance true as to him if it found he was the actual killer, or if it found he was the aider and abettor who acted with intent to kill, or if he was a major participant who acted with reckless indifference to human life. The third alternative does not apply to hold a defendant who is not charged with a felony-based special circumstance liable for the multiple murder special circumstance. (Pen. Code, §§ 190.2, subds. (c), (d); *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150; overruling *People v. Turner* (1984) 37 Cal.3d 302 to the extent it holds to the contrary.)

Accordingly, the instruction given to appellant's jury included an alternative theory of liability that was not legally viable.

The Fifth and Fourteenth Amendment Due Process Clauses and the Sixth Amendment notice and jury trial guarantees require that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in a pleading, submitted to a jury, and proven beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship* (1970) 397 U.S. 358, 364.) Because a sentence enhancement requires findings of fact that increase the maximum penalty for a crime, the United States Supreme Court has held that this rule applies specifically to sentence enhancement allegations. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476, 490.)

The Due Process Clause requires that a court must instruct the jury that the state bears the burden of proving each element of the crime beyond a reasonable doubt and that the court must state each of those elements to the jury. (*In re Winship* (1970) 397 U.S. 358, 363; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Carella v. California* (1989) 491 U.S. 263, 265.)

Correct jury instructions also serve to ensure accuracy in the truth-finding process. Incorrect jury instructions increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Fifth, Eighth, and Fourteenth Amendments, which require greater reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Moreover, an erroneous instruction constitutes a state law violation that deprives a defendant of a liberty interest in contravention of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v.*

Estelle (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a jury properly instructed on the principles of law that are relevant to and govern the case, including instruction on all elements of the offense and enhancement. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; see also *People v. Winslow* (1995) 40 Cal.App.4th 680, 688.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

The instructional error allowed the jury to return a true finding for the multiple murder special circumstance against appellant based on a legally incorrect theory of law.

Reversal of the multiple murder special circumstance is required because the error complained of here constituted structural error. Structural errors are those so fundamental to a fair trial that they are reversible per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279; 6 Witkin, Cal. Crim. Law 3d (2000) Chapter XVII, Reversible Error.) Alternatively, the error violated appellant's rights to due process of law and reversal is required because the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

C. THE INSTRUCTIONAL ERROR AFFECTED AN ELEMENT OF THE SPECIAL CIRCUMSTANCE AND CONSTITUTED STRUCTURAL ERROR; ALTERNATIVELY, THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT. REVERSAL OF THE SPECIAL CIRCUMSTANCE AND THE DEATH PENALTY ARE REQUIRED UNDER EITHER STANDARD

In *People v. Jones* (2003) 30 Cal.4th 1084, this Court recognized that the trial court has a sua sponte duty to instruct the jury on the mental state required for accomplice liability when there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, regardless of the prosecution's theory of the case. (*Id.*, at p. 1117.) If the evidence is such that the jury could convict the defendant as a principal or as an accomplice, and the defendant is charged with, as here, a special circumstance that does not require intent to kill by the principal, the jury must find intent to kill if they cannot agree that the defendant was the actual killer. (*Ibid.*, see also CALCRIM No. 702, "Bench Notes – Instructional Duty.")

This Court has held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Williams* (1997) 16 Cal.4th 635, 689; *People v. Osband* (1996) 13 Cal.4th 622, 681; *People v. Johnson* (1993) 6 Cal.4th 1, 45.) Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (*Chapman*, *supra*, 386 U.S. at p. 24.)

The evidence in this case was such that the jury could have convicted appellant as either the actual killer or the accomplice aider and abettor. However, the weight of the evidence as to the former was recognizably minimal. The evidence that appellant was the actual killer consisted of jailhouse informant Ernie Vasquez' testimony that both Satele and appellant had admitted to him they individually shot and was so problematic from a proof perspective the prosecutor chose not to rely on a two-shooter theory at either the guilt or penalty phases of his case. Rather, in his guilt

phase argument, the prosecutor admitted to the jury that he had not proven the identity of the shooter, but argued either appellant or Satele was the shooter without specifying what factual evidence established either defendant was the actual shooter. (14RT 3211.) Subsequently, in his penalty phase argument, the prosecutor argued Satele was the front seat passenger who shot and killed Robinson and Fuller and that appellant was seated in the backseat, fulfilling the role of lookout described by prosecution gang expert Julie Rodriguez. (17RT 4295.) Significantly, in his penalty phase argument, the prosecutor described appellant, Satele, and Juan Carlos Caballero, in language echoing the instructional complaint voiced here, as "major participants in this crime." (17RT 4294.)

Appellant has described in Argument I, section B, the evidence concerning whether one or two persons shot and killed Robinson and Fuller. There, as here, appellant begins with the observation that the prosecutor uniformly maintained throughout the trial that there was but a single shooter, as manifested in his repeated statement: "I will be the first to admit that I have not proven which of the two defendants was the actual shooter." (13RT 3048-3049.) The prosecution's assessment of his case is, of course, not evidence where proof of appellant's guilt is concerned. But, it inferentially reflects an evaluation of the evidence made by a prosecutor seasoned enough in murder trials to be selected to prosecute a capital murder case and thus is a reflection of the weight of the evidence.

In fact, substantial evidence adduced at trial supported the prosecutor's view there was but a single shooter. Bertha Robinson Jacque testified to shots fired in such rapid sequence that the shooting took place and the getaway car had accelerated away down the street in the time it took her to walk away from and return to her bedroom window. (5RT 983-990.) Firearms evidence established that the rifle called "Monster" was capable of firing up to four rounds per second. Expended casings were deposited in a cluster, leading reasonably to the inference that "Monster" was not moved any significant distance between shots. (10RT 2208, 2212-2214.) The

wounds to Robinson and Fuller were also in a cluster, reasonably leading to the inference the injuries were inflicted so quickly the bodies of Robinson and Fuller did not move in any significant degree and to the inference "Monster" was not moved in any significant degree as from one shooter to a second. (9RT 2014-2045.) In addition, the medical examiner found nothing that led him to conclude the firearm that caused the wounds had been moved between shots. (9RT 2027.)

In view of these factual circumstances, the trial court had a sua sponte duty to instruct on the mental state required for accomplice liability. And, by giving a modified version of CALJIC No. 8.80.1,[32] the court recognized that the state of the evidence obligated it to instruct on the mental state required for accomplice liability where proof of the special circumstance was concerned. The problem is that the court instructed incorrectly.

Under the circumstances of appellant's case, it cannot be concluded beyond a reasonable doubt that the inclusion in the instruction of the major participant/reckless indifference language did not contribute to the verdict by allowing a true finding based on a theory of liability that was incorrect as a matter of law.

Viewed, as required, in a light that supports the convictions, the prosecution presented evidence that gang members Juan Carlos Caballero, Satele, and appellant were in a car in rival gang territory with a weapon capable of firing rapidly. Prosecution gang expert Julie Rodriguez testified that when three gang members enter rival gang territory they assume the separate roles of driver, shooter, and lookout. (9RT 2104.) The jury might have concluded from such evidence alone that appellant was a major participant who acted with reckless indifference to life.

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[32]. The trial court also instructed with CALJIC Nos. 3.00 (defining principals) and 3.01 (defining aiding and abetting.) (37CT 10754, 10755.)

In *Pulido v. Chrones* (9th Cir. 2007) 487 F.3d 669, the Ninth Circuit Court of Appeals held that a felony murder conviction based solely on the defendant's post-murder involvement in the robbery, which was an invalid legal theory, was subject to reversal. The court stated that such error "was structural and that 'where a reviewing court cannot determine with absolute certainty whether a defendant was convicted under an erroneous theory' reversal is required." (*Id.*, at p. 676, quoting *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080, 1086.)

This Court has held the instructional error complained of here harmless when it has been able to conclude that in determining the truth of the special circumstance allegation the jury had necessarily found an intent to kill under other properly given jury instructions or when evidence of the defendant's intent to kill the victims was "overwhelming." (*People v. Hardy* (1992) 2 Cal.4th 86, 192 [instructions considered in combination required jury to find defendant was either actual killer or that he intentionally aided actual killer in an intentional killing]); *People v. Johnson* (1993) 6 Cal.4th 1, 45 [overwhelming evidence of actual killer's intent to kill in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 crime in that he strangled one victim and set her on fire and beat second victim to death by inflicting 10 to 12 kicks to head and face].)

In appellant's case, the evidence that appellant possessed the intent to kill Robinson and Fuller is more accurately described as underwhelming rather than overwhelming. The prosecutor personally and repeatedly acknowledged he had failed to prove appellant was the actual killer, whose intent to kill need not be proven for purposes of returning a true finding to the multiple murder special circumstance. The evidence was equally underwhelming that appellant in the role of aider and abettor possessed the intent to kill Robinson and Fuller. The prosecution contended that Juan Carlos Caballero, Satele, and appellant were gang members who were motivated to shoot and kill Robinson and Fuller for racial reasons in furtherance of gang objectives. The jury did not agree and returned not true findings to enhancements

pursuant to Penal Code section 422.75, subdivision (c), which alleged that appellant had committed the murders of Robinson and Fuller voluntarily and in concert with others for reasons of race (38CT 10928) and to special circumstance allegations that appellant *intentionally* killed Robinson and Fuller because of their race (38CT 10927-10928). And, although the jury did return true findings to the allegation that appellant committed the crimes for the benefit of the gang with the specific intent to promote criminal conduct by gang members, these special findings were the product of an incorrect jury instruction, as appellant has explained in Argument IV and for that reason do not inferentially lead to the conclusion that appellant possessed an intent to kill Robinson and Fuller. The prosecution presented evidence from which appellant's presence in the car from which shots were fired might be inferred, but no evidence of any action taken by him within the car and no evidence of his mental state while in the car that would constitute "overwhelming" evidence that he acted in the role of aider and abettor with the required intent to kill.

When the jury's task of determining appellant's intent is viewed in the context of the limited available evidence of his mental state at the time the crimes were committed, the alternative, albeit faulty, analytical path offered in the court's instruction of finding appellant, a gang member riding in a car in rival territory with two other gang members and a firearm capable of rapid fire, liable for the special circumstance as a major participant who acted in reckless disregard of human life is understandably attractive. Nothing in the instructions informed the jury that such an analytical path was incorrect as a matter of law. (*People v. Green*, *supra*, 27 Cal.3d at p. 68.)

Nor was the question of appellant's intent to kill necessarily resolved under other properly given instructions. The jury returned verdicts in Counts 1 and 2

convicting appellant of the crime of "willful, deliberate, premeditated murder."[33] However, these verdicts do not reliably establish that the jury necessarily found that appellant had an intent to kill. The prosecutor argued the defendants were liable for first degree murder under three alternative theories – willful, deliberate, premeditated murder (14RT 3207); (2) drive-by murder (14RT 3212); and (3) murder committed with the knowing use of armor-piercing ammunition (14RT 3212). The trial court instructed the jury on all three theories of first degree murder (37CT 10764-10767; 10768, 10769). Regarding a drive-by murder, the jury was instructed: "Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree." (37CT 10769.) While such instruction sets forth the mens rea finding required to prove the guilt of the actual killer, it does not speak to the mens rea requirement for the aider and abettor. As to a willful, deliberate, premeditated killing, the jury was instructed that such a killing perpetrated with "express malice aforethought" is murder of the first degree and that express malice is present "when there is manifested an intention unlawfully to kill a human being." (37CT 10765, 10766.) Again, this instruction did not speak to the mens rea requirement for the aider and abettor. As to the use of armor-piercing ammunition, the trial court instructed: "Murder which is perpetrated by means of a knowing use of ammunition designed primarily to penetrate mental or armor is murder of the first degree." (37CT 10768.) The instruction does not require a mental state of an intent to kill.

The court further instructed the jury that a principal is one who directly and actively commits the act constituting the crime or one who aids and abets the commission of the crime and that an aider and abettor is one who acts with knowledge

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[33]. Appellant contends in Argument VI that the jury's failure to find the degree of the murders subjects the verdicts to the operation of Penal Code section 1157.

of the criminal purpose of the perpetrator and "with the intent or purpose of committing or encouraging or facilitating the commission of the crime." (CALJIC Nos. 3.00, 3.01). In view of the uncertainty surrounding the verdict form, these instructions, and the state of the evidence, it is not possible to conclude that the jury either found appellant himself was the actual killer or that he intentionally aided the actual killer in an intentional killing.

Moreover, other findings made by the jury do not support an inference bearing on appellant's intent to kill. Appellant has discussed above that the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)), which was found to be true by the jury (38CT 10928) may not serve as the basis for such an inference because the true finding was obtained under an instruction that incorrectly informed that appellant was liable for the enhancement because of his status as a gang member, not for his conduct and mental state. The gang enhancement must be stricken and any inference derivative from that special finding that appellant harbored an intent to kill must be discredited. Nor may the jury's finding that appellant personally and intentionally discharged a firearm proximately causing death (Pen. Code, § 12022.53, subd. (d)) be used to conclude that the jury necessarily found intent to kill because, as appellant has demonstrated in Argument I, the instruction under which that enhancement was found to be true incorrectly stated the law.

Here, the instruction impermissibly allowed the jury to find the special circumstance to be true as to appellant if it determined he was a major participant who acted with reckless disregard for human life. There was evidence in this case that arguably might support such a conclusion. In *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754, for example, the court found sufficient evidence the defendant was a major participant who acted with reckless indifference to life to support a felony murder special circumstance finding in evidence the defendant admitted planning with two others to rob the victim; the defendant hit the victim; and after the actual killer stabbed the victim, the defendant fled with his accomplices and the robbery loot,

leaving the victim to die. In *Tison v. Arizona* (1987) 481 U.S. 137, the defendant was a major participant who acted with reckless indifference because he participated in the kidnapping and robbery, watched the killing, and did not aid the victims. (*Id.*, at p. 152.)

Under these circumstances, there is no certainty that in deciding appellant's guilt the jury necessarily found that he harbored an intent to kill. The evidence appellant was the actual killer was underwhelming. The evidence that appellant was the aider and abettor with the aider and abettor's required intent to kill was also underwhelming. There was evidence from which the jury might have considered that appellant was a major participant who acted with reckless disregard for life. Therefore, the instruction allowing the jury to return a true finding to the multiple murder special circumstance based on a determination appellant was a major participant who acted with reckless disregard in lieu of necessarily finding he acted with the intent to kill was prejudicial error.

For the reasons set forth here, reversal of the multiple murder special circumstance finding and the judgment of death are required.

VI.

THE JURY FAILED TO FIND THE DEGREE OF THE MURDERS CHARGED IN COURTS ONE AND TWO. BY OPERATION OF PENAL CODE SECTION 1157, THESE MURDERS ARE THEREFORE OF THE SECOND DEGREE, FOR WHICH NEITHER THE DEATH PENALTY NOR LIFE WITHOUT PAROLE MAY BE IMPOSED

Penal Code section 1157 states that whenever a defendant is convicted of a crime that is "distinguished into degrees," the trier of fact, whether the jury or the court, must find the degree of the crime of which he is guilty. When the jury or the court fails to make that necessary determination, the degree of the crime is deemed to be of the lesser degree by operation of law.[34] (Pen. Code, § 1157.)

Appellant's jury returned verdicts in Counts 1 and 2 finding him "guilty of the crime of willful, deliberate, premeditated murder, in violation of section 187(a) of the Penal Code," but failing to specify the degree of murder in each instance. When the verdicts were returned, the trial court did not resubmit the question of the degree of the murder to the jury, as it might have while it still retained control over the jury. (*People v. Gray* (2005) 37 Cal.4th 168, 199; *People v. Bonillas* (1989) 48 Cal.3d 757.) Accordingly, by operation of Penal Code section 1157, both of the murders are of the second degree, an offense for which neither the death penalty nor a sentence of life without possibility of parole may be imposed.

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[34]. Penal Code section 1157 states: "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

In recent decisions, this Court has recognized exceptions to the application of section 1157 in instances where the jury's verdict has failed to set forth the degree of the crime. (See, e.g., *People v. Gray*, *supra*, 37 Cal.4th at p. 199; *People v. San Nicolas* (2004) 34 Cal.4th 614, 634-635; *People v. Mendoza* (2000) 23 Cal.4th 896.) However, as appellant will show below, none of the exceptions to the application of Penal Code section 1157 identified in those decisions is applicable here. Section 1157 therefore applies to the verdicts in Counts 1 and 2 and the crimes of which appellant stands convicted therein is murder of the second degree, for which neither a sentence of death or life without the possibility of parole may be imposed.

A. FACTUAL BACKGROUND

Appellant was charged by felony complaint dated March 12, 1999, and subsequently by amended felony complaint filed on June 22, 1999, alleging, as relevant here, two counts of murder (Pen. Code, § 187, subd. (a)). Neither pleading alleged the degree of the charged murders. (2CT 379-384, 397-402.) Appellant was then charged by information dated July 7, 1999, with two counts of murder, which the information alleged to be willful, deliberate, premeditated murder. (2CT 385-388.)

At trial, the prosecution presented conflicting evidence supporting several alternative murder theories. As a result of this evidence, the court instructed on first degree deliberate and premeditated murder (37CT 10766-10767; 14RT 3186-3187); first degree murder by use of armor-piercing ammunition (37CT 10768; 14RT 3188); and first degree drive-by murder (37CT 10769; 14RT 3188). The court also instructed on the lesser-included offense of unpremeditated murder of the second degree (i.e., express malice murder of the second degree). (Pen. Code, § 190, subd. (d); 37CT 10770, 10771; 14RT 3188-3189.) In addition, although the court did not instruct on implied malice murder of the second degree, appellant has contended in Argument III of this brief that such an instruction should have been given. Thus, evidence of more than one degree of murder and evidence of more than one theory of

first degree murder, along with correlating instructions except as noted, were presented to appellant's jury.

In arguing appellant's guilt, the prosecutor told the jury appellant was guilty of first degree murder in "three different ways." (14RT 3207.) The prosecutor described these as (1) willful, deliberate, premeditated murder (14RT 3207); (2) drive-by murder "where these individuals shoot a gun from inside a car out at someone with the intent to kill" (14RT 3212); and (3) murder committed with the knowing use of armor-piercing ammunition (14RT 3212). The prosecutor reiterated that all three theories of first degree murder applied, but also acknowledged the jury might find he had only proven appellant's guilt of second degree murder. (14RT 3212, 3214:18.)

The jury returned guilt verdicts, utilizing forms prepared for its use by the trial court, finding appellant guilty of "the crime of willful, deliberate, premeditated murder, in violation of section 187 (a) of the Penal Code. . . ." in Counts 1 and 2.

The verdict in Count 1 read:

> We, the Jury in the above-entitled action, find the defendant, DANIEL NUNEZ, Guilty of the crime of WILLFUL, DELIBERATE, PREMEDITATED MURDER, in violation of Section 187 (a) of the Penal Code of the State of California, a felony, to wit: who, on or about October 29, 1998, in the County of Los Angeles, did unlawfully and with malice aforethought murder EDWARD ROBINSON, a human being as charged in Count 1 of the Information. (38CT 10925.)

The verdict in Count 2 substituted the name "Renesha Fuller" for "Edward Robinson" and "Count 2" for "Count 1," but otherwise mirrored the language of the verdict in Count 1. (38CT 10925.)

Although it may first appear that the guilt verdicts finding willful, deliberate, and premeditated murder arguably mean the jury found appellant guilty of first degree premeditated murder, closer review shows these verdicts were necessarily

produced by limitations in the verdict forms provided to the jury. Although the trial court instructed the jury on all three theories of first degree murder and unpremeditated second degree murder argued by the prosecutor, the murder verdict forms in the record show the jury was only provided with guilty/not guilty verdict forms for a particular theory of first degree murder, *viz.*, willful, deliberate, and premeditated murder, and for premeditated second degree murder. (38CT 10925-10927, 10939, 10945-10957.) Limited to this choice of verdict forms, the language pertaining to premeditated murder contained within the executed verdict form does not reasonably and conclusively demonstrate that the jury actually found appellant guilty of express malice premeditated murder, since a juror convinced of guilt under another theory may well have cast a vote in support of the verdict in the absence of other verdict choices and in the understandable belief that the trial court had provided it with appropriate verdict forms.

Significantly, neither guilt phase verdict form contained language specifying the degree of murder found in each offense.

On receipt of the verdicts in Counts 1 and 2, the trial court made no attempt to resolve the question of the degree of the murders by resubmitting the verdicts to the jury with properly worded forms.

Thereafter, at the conclusion of the penalty phase, however, the jury was given and returned a verdict form stating the degree of the murder to be that in the first degree: "We, the Jury in the above-entitled action, having found the defendant . . . guilty of first degree murder, . . . and having found the special circumstance to be true, fix the penalty at death." (38CT 10941-10944.)

B. THE GENERAL PRINCIPLES OF LAW RELEVANT TO SECTION 1157 AND THE EXCEPTIONS CREATED BY *MENDOZA* AND *SAN NICOLAS*

Penal Code Section 1157 is a plainly worded statute. It provides, in relevant part: "Whenever a defendant is convicted of a crime or attempt to commit a

crime which is distinguished into degrees, the jury . . . must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury . . . to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

Thus, the statute's first mandate arises in the event the jury finds the defendant guilty of a crime that is distinguished into degrees. In that circumstance, the statute requires that the jury find the degree of which the defendant is guilty. (Pen. Code, § 1157.)

The statutory language investing the jury with the duty to determine the degree of the offense has remained unchanged since the original enactment of section 1157 as part of the Penal Code of 1872. (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 907.)

This aspect of the statute establishing the jury's function in determining the degree of the crime is in harmony with a basic principle of criminal law and procedure long recognized throughout the United States. "In a criminal case a jury's acquittal, or finding of a lesser degree of guilt than that charged, although contrary to uncontradicted evidence, is final and absolute, and irreversible by trial and appellate courts. . . . [O]ur history and tradition have made it clear at least to most that such a rule, on balance, is preferable to one which permits a judge, or some other power, to compel a jury's guilty verdict, or to set aside a jury's verdict of acquittal." (*People v. Gottman* (1976) 64 Cal.App.3d 775, 780.) This principle "recognizes also a jury's power to find an accused guilty of an offense of a lesser degree than that manifested by the evidence and the trial court's instructions. . . ." (*Id.*, at p. 781.)

In California, this principle of criminal law is given statutory recognition and implementation in Penal Code sections 1150 to 1156, which set forth the scheme or design dealing with verdicts in general and with general and special verdicts in particular. As is readily apparent, these statutory provisions numerically precede section 1157 and, when viewed together, Penal Code sections 1150 to 1157 reveal a

verdict design structured to implement and protect the ability of the jury to return a verdict that is contrary to the law or the facts. Penal Code section 1150 provides that general verdicts are required in criminal cases.[35] Section 1151 defines a general verdict upon a plea of not guilty as effectively limited to either "guilty" or "not guilty."[36] Section 1152 defines a special verdict as one in which the jury finds and presents "conclusions of fact as established by the evidence" in a manner so that the court's sole act is to draw conclusions of law upon them.[37] Section 1155 defines the manner in which the judge must give judgment upon the special verdict.[38] As earlier noted, section 1157 requires that the jury find the degree of a crime divisible into degrees and in the absence of such a jury determination deems the crime to be of the lesser degree by operation of law. The remaining Penal Code sections between sections 1150 and

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[35]. Penal Code section 1150 provides: "The jury must render a general verdict, except that in a felony case, when they are in doubt as to the legal effect of the facts proved, they may, except upon a trial for libel, find a special verdict."

[36]. Penal Code section 1151 states: "A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the accusatory pleading. Upon a plea of a former conviction or acquittal of the offense, charged, or upon a plea of once in jeopardy, the general verdict is either "for the people" or "for the defendant." When the defendant is acquitted on the ground of a variance between the accusatory pleading and the proof, the verdict is "not guilty by reason of variance between charge and proof."

[37]. Penal Code section 1152 states: "A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them."

[38]. Penal Code section 1155 states in relevant part: "The court must give judgment upon the special verdict as follows: [¶] 1. If the plea is not guilty, and the facts prove the defendant guilty of the offense charged in the indictment or information, or of any other offense of which he could be convicted under that indictment or information, judgment must be given accordingly. But if otherwise, judgment of acquittal must be given."

1157 deal with the manner and form in which the special verdict must be returned (sections 1153 and 1154, respectively) and the trial court's handling of a defective special verdict (section 1156).

In *People v. Williams* (2001) 25 Cal.4th 441, this Court explained why general verdicts are required in criminal cases, why there is a rule against special verdicts in criminal cases, and the important part such a verdict design plays in carrying out the well-settled principle discussed above, *viz.*, that the jury, as the conscience of the community, has the ability to disregard, or nullify, the law. Appellant presents *Williams*' discussion of verdicts and criminal trials at some length here because it is an aid to understanding the part played by section 1157 in the general design of verdicts and in understanding how the general design of verdicts implements the "unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." (*Harris v. Rivera* (1981) 454 U.S. 339, 346; *People v. Palmer* (2001) 24 Cal.4th 856, 863.)

> It long has been recognized that, in some instances, a jury has the ability to disregard, or nullify, the law. A jury has the ability to acquit a criminal defendant against the weight of the evidence. (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138 ["the jury has the power to bring in a verdict in the teeth of both law and facts"], not followed on other grounds in *United States v. Gaudin* (1995) 515 U.S. 506, 520; *United States v. Schmitz* (9th Cir. 1975) 525 F.2d 793, 794 ["the jury has the inherent power to pardon one no matter how guilty"].) A jury in a criminal case may return inconsistent verdicts. (*Dunn v. United States* (1932) 284 U.S. 390, 393-394 [the acquittal may have been the jurors' " 'assumption of a power which they had no right to exercise, but to which they were disposed through lenity' "]; *United States v. Powell* (1984) 469 U.S. 57, 63 [recognizing " 'the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons' "]; *People v. Palmer* (2001) 24 Cal.4th 856, 863.) A court may not direct a jury to enter a guilty verdict "no matter how conclusive the evidence." (*United Brotherhood of Carpenters v. U.S.* (1947) 330 U.S. 395, 408; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277; *United States v. Garaway* (9th Cir. 1970) 425 F.2d 185; *United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144.)
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> General verdicts are required in criminal cases, in order to permit the jury wide latitude in reaching its verdict. (*United States v. Spock*

(1st Cir. 1969) 416 F.2d 165, 182.) "A general verdict insures the input of compassion into a jury's decisional process. The rule against special verdicts and special questions in criminal cases is thus nothing more nor less than a recognition of the principle that 'the jury, as conscience of the community, must be permitted to look at more than logic.' [Citation.] In the words of one thoughtful commentator, the prohibition of special verdicts affirms the notation that '[i]n criminal cases . . . it has always been the function of the jury to apply the law, as given by the court in its charge, to the facts,' while preserving 'the power of the jury to return a verdict in the teeth of the law and the facts.' [Citation.]" (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 419; *United States v. Wilson* (6th Cir. 1980) 629 F.2d 439, 443 ["submitting special questions to the jury invades the province of the jury and 'infringes on its power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by report of its deliberations; and on its power to follow or not to follow the instructions of the court. . . .' [Citation.]"

The jury's power to nullify the law is the consequence of a number of specific procedural protections granted criminal defendants. Chief Justice Bird, quoting Judge Learned Hand's description of jury nullification as the jury's " 'assumption of a power which they had no right to exercise, but to which they were disposed through lenity,' " observed: "This power is attributable to two unique features of criminal trials. First, a criminal jury has the right to return a general verdict which does not specify how it applied the law to the facts, or for that matter, what law was applied or what facts were found. [Citations.] [¶] Second, the constitutional double jeopardy bar prevents an appellate court from disregarding the jury's verdict in favor of the defendant and ordering a new trial on the same charge. [Citations.]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 599 (conc. & dis. opn. of Bird, C. J.).) The United States Supreme Court has referred to the ability of a jury in a criminal case to nullify the law in the defendant's favor as "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." (*Harris v. Rivera* (1981) 454 U.S. 339, 346 [102 S.Ct. 460, 464, 70 L.Ed.2d 530]; see also *People v. Palmer*, *supra*, 24 Cal.4th 856, 863.) (*People v. Williams*, *supra*, 25 Cal.4th at pp. 450-451.)

Thus, *Williams* gives us insight into the general design of verdicts set forth in Penal Code sections 1150 to 1157 and provides the raison d'etre for our verdict

structure. *Williams* explains that general verdicts are required in criminal trials so that the jury need not reveal what law it applied or what facts it found. This restriction protects the jury's right to function as the conscience of the community and return a verdict without having to support its reasons for that verdict. Viewed from that perspective, we can see that Penal Code section 1157 fulfills two important functions in preserving and safeguarding the jury's role as the community's conscience. First, section 1157 protects the jury's function as the community's conscience by reserving to it the right to find the degree of the crime when the crime is divisible into degrees. Second, by providing for a reduction to a lesser degree by operation of law when the jury fails to find the degree, section 1157 safeguards the jury's prerogative as the community's conscience by barring any attempts to increase the degree of the offense through claims that might undermine the sanctity of the deliberative process or the jury's unique powers in that area.

With regard to Penal Code section 1157, this Court has declared "the obvious purpose of the statute . . . is to ensure that where a verdict other than first degree is permissible, the jury's determination of degree is clear." (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 910.) This articulation of the statute's purpose harmonizes with the recognition set forth above that the determination of the degree of the crime lies exclusively within the province of the jury as the community's conscience. It further speaks to the recognition that where the jury's determination of degree is being construed to be of the greater degree that construction can only occur where the jury's determination is apparent, i.e., clear.

The Penal Code further provides that a court may not discharge the jury until it has found the degree of the crime charged, or has formally declared its inability to do so.[39] (Pen. Code, § 1164, subd. (b).) If the jury is erroneously discharged before

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[39]. Penal Code section 1164, subdivision (b), states: "No jury shall be discharged until the court has verified on the record that the jury has either reached

fixing the degree of the crime and finds the defendant is guilty of the crime in general, the least degree will be the finding. (Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 226-228.) The provision in section 1157 commanding that the crime be deemed to be of the lesser degree in the event the jury fails to designate the degree was added to section 1157 in 1949 "to change the judicially declared rule that a failure to determine degree entitled a defendant to a new trial. (*Id.*, at p. 911; *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 73.)

Over the years, California courts have consistently held pursuant to section 1157 that the jury's failure to specify the degree of murder on the verdict form renders the offense second degree murder. (See, e.g., *People v. Hughes* (1959) 171 Cal.App.2d 362; *In re Harris* (1967) 67 Cal.2d 876; *People v. Williams* (1984) 157 Cal.App.3d 145; *People v. McDonald* (1984) 37 Cal.3d 351; *People v. Superior Court (Marks)*, *supra*, 1 Cal.4th 56; *People v. Balinton* (1992) 9 Cal.App.4th 587; *People v. Dailey* (1996) 47 Cal.App.4th 747; *People v. Escobar* (1996) 48 Cal.App.4th 999; *In re Birdwell* (1996) 50 Cal.App.4th 926.)

Then, in *People v. Mendoza*, *supra*, this Court "clarified the proper interpretation of section 1157 in felony-murder cases, explaining that where the prosecution's theory in a murder case is felony murder, a defendant subject to such a verdict is 'not "convicted of a crime . . . which is distinguished into degrees' within the plain and commonsense meaning of section 1157.' (*Mendoza*, *supra*, at p. 908.)" (*People v. Gray* (2005) 37 Cal.4th 168, 199.)

The *Mendoza* Court considered the question of whether section 1157 applied under the following circumstances: (1) the prosecution's only murder theory at

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a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding."

trial is that the killing was committed during perpetration of robbery or burglary, which is first degree murder as a matter of law (Pen. Code, § 189); (2) the court properly instructs the jury to return either an acquittal or a conviction of first degree murder; and (3) the jury returns a conviction for murder, but its verdict fails to specify the murder's degree. *Mendoza* concluded that under these circumstances, section 1157 does not apply because the defendant has not been "convicted of a crime . . . which is distinguished into degrees" within the meaning of section 1157. Thus, the conviction is not "deemed to be of the lesser degree" under section 1157.) (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 900.)

This Court observed that its holding concerned circumstances "where, under proper instructions, the jury had no degree decision to make": "[W]e hold that section 1157 does not apply where the jury instructions actually and correctly given do not permit the jury to consider or return a murder conviction other than of the first degree. . . . (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 910, fn. 5.)

Mendoza then considered the question of the verdict before it in the context of the instructions and circumstances of the trial that produced the verdict.

This Court explained that a contrary construction of section 1157 would "ignore the obvious purpose of the statute, which is to ensure that where a verdict other than first degree is permissible, the jury's determination of degree is clear." (*Id.*, at p. 910.) The Court observed that when the crime is of the first degree as a matter of law and the trial court properly instructs the jury to acquit or convict of first degree murder there is no degree determination for the jury to make. Under those circumstances, a contrary construction of section 1157 would "do violence to the principle that the law does not require idle acts. [Citations.] As we have explained, such murders are of the first degree as a matter of law, and where the trial court properly instructs the jury to find a defendant either not guilty or guilty of first degree murder, there is simply no degree determination for the jury to make." (*Id.*, at p. 911.)

Finally, *Mendoza* noted that a contrary construction would produce absurd and unjust results. This Court commented that the result of applying section 1157 "where, under correct instructions, a jury may convict a defendant only of first degree felony murder would be both absurd and unreasonable, for it would require courts to deem a conviction to be of a degree that was never at issue and that the jury was neither asked nor permitted to consider. (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 911.)

This Court thereafter recognized another exception to the application of section 1157 in *People v. San Nicolas*, *supra*.

In *San Nicolas*, this Court held that if a jury returns a verdict of "guilty" of "murder" with a special finding in the verdict form itself that in committing the offense the defendant "did act willfully, deliberately, and with premeditation," that is tantamount to a finding of first degree murder in the verdict form itself and section 1157 is not implicated. (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 635.) In *San Nicolas*, the verdict form returned by the jury in count 1 stated:

> We, the Jury in the above entitled cause, find the defendant, RODNEY JESSE SAN NICOLAS GUILTY of the offense of MURDER, Violation of Section 187 of the California Penal Code, a felony, as charged in Count 1 of the Information.
>
> We further find that in committing the offense of MURDER, the defendant (did/did not) act willfully, deliberately, and with premeditation."

San Nicolas noted the phrase "(did/did not)" appeared below a blank underline. The verdict form for count two was identical to the verdict form for count 1, but for the substitution of the phrase "Count 2" for "Count 1." On the verdict forms for both counts one and two, the jury handwrote the word "DID" in the blank space, indicating that "defendant DID act willfully, deliberately and with premeditation." (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 634.)

This Court distinguished the verdict forms in *San Nicolas* from those it had earlier reviewed in *People v. McDonald* (1984) 37 Cal.3d 351, 381 (overruled in part by *People v. Mendoza*, *supra*, 23 Cal.4th at p. 914) and *People v. Campbell* (1870) 40 Cal. 129, 132.) In *McDonald*, this Court stated: " 'The key is not whether the "true intent" of the jury can be gleaned from circumstances outside the verdict form itself; instead, application of [section 1157] turns only on whether the jury specified the degree in the verdict form.'" (*People v. McDonald*, *supra*, 23 Cal.4th at p. 383.) In *McDonald*, the jury returned a verdict form that stated only that the defendant was "'guilty of MURDER, in Violation of Section 187 Penal Code, a felony as charged in Count 1 of the information.'" (*People v. McDonald*, *supra*, 37 Cal.3d at p. 379.) *McDonald* found section 1157 applied to the verdict and reduced the murder to the second degree with the observation that application of section 1157 turns only on whether the jury specified the degree in the verdict form. (*People v. McDonald*, *supra*, 37 Cal.3d at p. 382.)

In *People v. Campbell*, the jury returned a verdict form stating only "'guilty of the crime charged,'" without specifying the degree. (*People v. Campbell*, *supra*, 40 Cal. at p. 132.)

San Nicolas observed that in both *McDonald* and *Campbell*, the "verdict form itself failed to delineate the required elements of first degree murder in section 189, i.e., 'any . . . kind of willful, deliberate, and premeditated killing.'" (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 635.) In contrast, in the verdict form before the *San Nicolas* Court, the jury made the specific finding that in committing the murders the defendant "did act willfully, deliberately, and with premeditation." This Court found that language "tantamount to a finding of first degree murder in the verdict form itself," with the result that section 1157 was not implicated. (*Ibid.*)

In reaching its holding, *San Nicolas* relied upon the analysis set forth in *People v. Goodwin* (1988) 202 Cal.App.3d 940, 946, declaring "*Goodwin* controls here."

San Nicolas set forth in its opinion the analysis in *Goodwin* upon which it relied:

> In *People v. Goodwin* (1988) 202 Cal.App.3d 940, 946 (*Goodwin*), the verdict forms returned by the jury found the defendant " 'guilty of residential burglary, in violation of Penal Code section 459, a Felony, as charged in Count I [and Count II] of the information.' " The Court of Appeal held that "section 1157 does not apply to reduce the degree of the offenses, because the verdict forms did not find appellant guilty simply of burglary without any indication of the degree. The jury's verdict form did specifically find appellant guilty of 'residential burglary . . . as charged' in the information which alleged the burglary of an 'inhabited' dwelling. 'Every burglary of an inhabited dwelling house . . . or the inhabited portion of any other building, is burglary of the first degree.' (Pen.Code, § 460.) There is also 'no practical difference between burglary of an inhabited dwelling house and residential burglary.' [Citation.] Accordingly, since the verdict forms specified 'residential burglary' and referred to the information which described 'an inhabited dwelling house,' necessarily constituting burglary of the first degree, the jury satisfied [[*People v.*] *McDonald*'s [(1984) 37 Cal.3d 351, 381] requirement that it specify the degree 'in the verdict form.' [Citation.] [¶] There is no logical reason to compel the fact finder to articulate a numerical degree when, by definition, 'first degree burglary' and 'residential burglary' are one and the same thing." (*Goodwin*, supra, 202 Cal.App.3d at p. 947; see also *People v. Atkins* (1989) 210 Cal.App.3d 47, 51-52.) (*People v. San Nicolas*, *supra*, 34 Cal.4th at pp. 635-636.)

In *San Nicolas*, this Court concluded in language adopting and modifying that in *Goodwin*, " 'There is no logical reason to compel the fact finder to articulate a numerical degree when, by definition, "first degree [murder]" and "[willful, deliberate, and premeditated killing]" are one and the same thing.' (*Goodwin*, *supra*, 202 Cal.App.3d at p. 947.) The statutory mandate of section 1157 was met even without the express use of the phrase 'first degree murder' in the verdict forms." (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 636.)

In *San Nicolas*, this Court's analysis included the fact that finding the murder was a willful, deliberate, and premeditated killing was made on the verdict

form itself. (*Id.*, 34 Cal.4th at p. 635.) This aspect of the analysis is in keeping with the identified rationale for section 1157, which *Goodwin* and other cases have stated as: "The Legislature has required an express finding on the degree of the crime to protect the defendant from the risk that the degree of the crime could be increased after the judgment. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947; *People v. Anaya* (1986) 179 Cal.App.3d 828, 832; *People v. Lamb* (1986) 176 Cal.App.3d 932, 935.) In short, matters reflecting the degree of the crime of which the defendant stands convicted must be expressly reflected on the verdict form itself to safeguard the defendant against post-verdict increases in the degree of the crime.[40]

Thus, *San Nicolas* and *Goodwin* establish that Penal Code section 1157 does not apply to reduce the degree of an offense when the verdict form specifies the degree through a "descriptive and definitive label" that "constitutes an acceptable alternative to specifying degree by number." (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947; *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 636.)

In so holding, *Goodwin* observed of the case before it, "'[t]here is nothing uncertain or ambiguous in the jury's findings." The Court noted that the finding within the verdict was made in connection with the verdict finding the crime, as opposed to jury findings made in connection with either an enhancement or other special finding. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947; quoting *People v. Anaya*, *supra*, 179 Cal.App.3d at p. 832.) In addition, no uncertainty or ambiguity attended the conclusion the conviction was for first degree burglary because that conclusion was consistent with the parties' stipulation, which the trial court had expressed to the jury, that under the facts of the case the burglary, if found, could only

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[40]. Appellant has observed above that within the general design of verdicts section 1157 functions as a safeguard of the jury's role as the community's conscience in limiting post-verdict claims that would increase the degree of the crime by providing that the degree of the crime be of the lesser degree by operation of law.

be burglary of the first degree. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at pp. 946-948.)

Goodwin and *San Nicolas*, then, as with *Mendoza*, considered the question of the verdict before it in the context of the instructions and other circumstances of the trial for the purpose of ensuring that there could be no question the degree of the crime it was imputing to the verdict was the only possible finding of degree to be made.

C. NEITHER THE LANGUAGE OF THE PENALTY PHASE VERDICT, NOR *MENDOZA*, NOR *SAN NICOLAS* BAR THE APPLICATION OF SECTION 1157 TO REDUCE THE DEGREE OF APPELLANT'S MURDER CONVICTIONS

Although the verdicts in issue were presented above, appellant reproduces them here to facilitate the discussion. But for the replacement of Edward Robinson's name with Renesha Ann Fuller's name and Count 2 in place of Count 1, the verdicts in Counts 1 and 2 were as follows:

> We, the Jury in the above-entitled action, find the defendant, DANIEL NUNEZ, Guilty of the crime of WILLFUL, DELIBERATE, PREMEDITATED MURDER, in violation of Section 187 (a) of the Penal Code of the State of California, a felony, to wit: who, on or about October 29, 1998, in the County of Los Angeles, did unlawfully and with malice aforethought murder EDWARD ROBINSON, a human being as charged in Count 1 of the Information. (38CT 10925.)

Appellant first addresses the question of whether the description of the murder in the penalty phase verdicts as first degree murder may be used to clarify, complete, or otherwise give meaning to the guilt phase verdicts. In the factual summary above, appellant noted that the jury, using a verdict form it had been instructed to use if it decided to fix the verdict at death, returned a penalty phase verdict, which stated: "We, the Jury in the above-entitled action, having found the

defendant . . . guilty of first degree murder, . . . and having found the special circumstance to be true, fix the penalty at death." (38CT 10941-10944.)

Any claim that the language of the penalty phase verdict form completes, clarifies, or in any way demonstrates the jury's intention to convict appellant of first degree murder runs afoul of *San Nicolas* and *Goodwin*. Both require that the factual alternatives to the numerical degree appear on the actual verdict form itself. Hence, the language on the penalty phase verdict setting the degree of the murder at the first degree may not be used to supplement the omission in the guilt phase verdict.

In addition to, and dispositive of the issue, is the fact that the penalty phase verdict may not be used to "complete" the guilt phase verdict within the meaning of Penal Code section 1164, *supra*, though it may appear the trial court retained jurisdiction and control over the jury. In *People v. Bonillas* (1989) 48 Cal.3d 757, 774, this Court explained that the commencement of the penalty phase trial and the receipt of penalty phase evidence effectively discharged a jury over whom the trial court had otherwise retained jurisdiction and control. *Bonillas* defined the "effect" to which it referred as "the 'incalculable and irreversible' effect of exposing the jury to improper influences." (*Ibid.*) Stated simply, "the guilt phase ended when the penalty phase commenced, and it was thereafter too late to permit the jury to complete its guilt phase verdict." (*Ibid.*) Accordingly, the guilt phase jury in appellant's case was effectively discharged with the commencement of the penalty phase trial. Therefore, the language of the penalty phase verdict in this case may not be used to complete the guilt phase verdict by establishing the murder as of the first degree.

Nor does the exception to the application of section 1157 created by *Mendoza* apply here. *Mendoza* carved out an exception specific to felony murder cases in which the prosecution's sole theory of the defendant's guilt is premised on felony murder and the jury is instructed accordingly. *Mendoza* reasoned that section 1157 did not apply because a conviction for felony murder under such circumstances is not a conviction of a crime "distinguished into degrees" within the meaning of section 1157.

(*People v. Gray*, *supra*, 37 Cal.4th at p. 200; *People v. Mendoza*, *supra*, 23 Cal.4th at p. 908.)

At its broadest, the rule created by *Mendoza* holds "that section 1157 does not apply where the jury instructions actually and correctly given do not permit the jury to consider or return a murder conviction other than of the first degree." (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 910, fn. 5.)

The verdicts in issue here manifestly do not fall within the boundaries of *Mendoza*'s rule. Viewed in the perspective of *Mendoza*'s rule at its narrowest, the prosecution did not argue appellant was guilty of first degree murder based on the felony murder theory. Neither did the prosecutor argue for conviction and the court instruct exclusively on the theory of first degree murder committed willfully, deliberately, and with premeditation, as reflected in the verdict form, as might support a claim that the crime was not one divisible into degrees under the broader reading of *Mendoza*'s rule. Instead the prosecutor argued for conviction of first degree murder on three alternative theories and, alternatively, for conviction of second degree murder committed with express malice. (14RT 3212, 3214.) The trial court instructed the jury on the alternative legal theories of first and second degree murder, as appellant has set forth in the factual statement for this Argument.

Thus, the jury instructions actually given in appellant's case permitted the jury to consider and return a murder conviction other than of the first degree. Under these circumstances, *Mendoza*'s ruling, even when read at its broadest, does not apply to prevent the application of section 1157 to reduce the verdicts to the lesser degree of the crime, i.e., to murder of the second degree.

Neither does the exception created by *San Nicolas* and *Goodwin* bar the verdicts in this case from the application of section 1157, although on first impression the verdicts in appellant's case might resemble the verdict in *San Nicolas*, which appellant has reproduced above. *San Nicolas* and *Goodwin* held that a "descriptive and definitive label [on the guilt verdict form] constitutes an acceptable alternative to

specifying degree by number." (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947.) The jury in *San Nicolas* found the defendant guilty of murder in one paragraph and found he committed the murder willfully, deliberately, and with premeditation in a second paragraph of the same verdict form. This Court said: "In the verdict form itself, the jury made the specific finding that defendant, in committing the murders, 'did act willfully, deliberately, and with premeditation.' This is tantamount to a finding of first degree murder in the verdict form itself and section 1157 is therefore not implicated." (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 635.)

Thus, the jury in *San Nicolas* convicted the defendant of the crime of murder and then provided "a descriptive and definitive label," which this Court construed to be an acceptable alternative to specifying the degree of the crime by number. It readily appears that the purpose of the finding in the *San Nicolas* verdict was to describe the degree of the crime in alternative language. Murder verdicts provided for the use of juries by trial courts commonly set forth findings pertaining to guilt of the offense and to the degree of the offense in a two-step process. As with the language used in the verdict in *San Nicolas*, in utilizing these typical verdict forms, the jury first finds the defendant guilty of the crime of murder and further finds the murder to be of a particular degree.

In contrast, the record in appellant's case demonstrates that the verdicts in issue here were in fact defectively drawn verdicts. The prosecutor argued and the trial court instructed on three different theories of first degree murder and on unpremeditated murder of the second degree, but the verdict forms presented to appellant's jury were specific to only one theory of first degree murder. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution require a degree of greater reliability in capital cases (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879). In the circumstance of appellant's case, it is not possible to state of the verdicts finding

appellant guilty, as the *Goodwin* court stated of the verdict before it, "There is nothing uncertain or ambiguous in the jury's findings," because the purpose of the finding was to describe the degree of the crime. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947.)

In the present case, the prosecution's reliance on alternative theories of first and second degree murder, the corresponding instructions given the jury, and the limitations in verdict forms provided for the jury's use establish that the purpose of the "willful, deliberate, premeditated" descriptive was not intended to provide an alternative descriptive for the degree of the murder but was in fact a defect in the drawing of the verdict itself. In this circumstance, it may not reasonably be said that "[t]here is nothing uncertain or ambiguous in the jury's findings."

Finding the murders in Counts 1 and 2 to be of the first degree would mean that application of section 1157 would be barred by a defectively drawn verdict form. Such a result offends common sense and violates principles of statutory interpretation applied by this Court in construing section 1157 in *Mendoza*. It would ignore the obvious purpose of section 1157, which is to ensure that where a verdict other than first degree is permissible, the jury's determination of degree is clear. (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 910.) Finding the murders to be of the first degree would produce absurd and unjust results because it may not be reasonably said under these circumstances in which the jury was instructed on multiple theories and degrees of murder that appellant was not convicted of a crime which is distinguished into degrees. (*Id.*, at p. 911.)

In addition, neither *Goodwin* nor *San Nicolas* appear to have considered in their analyses the part played by section 1157 in the general design of verdicts,[41] or

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[41]. *Goodwin* did recognize that "The Legislature has required an express finding on the degree of the crime to protect the defendant from the risk that the degree of the crime could be increased after judgment. [Citations.]" (*People v.*

that the general design of verdicts protects and enforces the long-held foundational principle of our criminal justice system that the jury has the ability to disregard the law and need not provide an accounting for its action. (*People v. Williams*, *supra*, 25 Cal.4th 441, 449.) Appellant has contended above that section 1157 furthers that principle by reserving to the jury the duty to find the degree of the crime and that section 1157 protects that principle by requiring that the degree of the crime be deemed to be that of the lesser degree when, as here, the jury has failed to find the degree. Establishing the degree of the crime to be that of the lesser degree when the jury has failed to act protects the jury's right to nullify by forestalling efforts to invade the jury's deliberative processes in an effort to determine the degree of the crime.

Appellant believes the contentions made above in connection with this Court's analysis in *Williams*, the reasons general verdict forms are required in criminal trials, and the general design of verdicts set forth in Penal Code sections 1150 to 1157 are relevant to this discussion here. Where, as here, ambiguity and uncertainty attend the conclusion the murder of which appellant was convicted is of the first degree because any construction of the verdict necessarily rests on the language of a defective verdict form, a construction of section 1157 that bars its application to reduce the crime is contrary to the purpose of that section.

The jury's failure to specify the degree of the offense on the verdict form deprived appellant of his right to have an impartial jury determine every element of the offense beyond a reasonable doubt, and thereby violated appellant's right to a jury trial under the Sixth Amendment to the United States Constitution and to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. Because the special circumstances which form the basis for the death

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Goodwin, *supra*, 202 Cal.App.3d at p. 947.) Appellant has pointed out above that this function of section 1157 safeguards the jury's legally accepted role as the community's conscience in the determination of a defendant's guilt.

penalty can only be applied in cases in which there has been at least one first-degree murder conviction, the special circumstance must be stricken, and the death penalty imposed upon appellant must be reversed.

On this record, "as a matter of law," appellant was convicted of second degree murder. (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 73.) In fixing appellant's conviction for murder of the second degree, section 1157 conclusively resolved the question of his guilt for the greater degree crime in appellant's favor on a plea of "once in jeopardy." Appellant's jeopardy for first degree murder terminated when the jury was discharged from the guilt phase and a second degree verdict was rendered pursuant to section 1157. (*Id.*, at p. 76; *Green v. United States* (1957) 355 U.S. 184, 191; *Price v. Georgia* (1970) 398 U.S. 323, 329.) Appellant has explained above that his guilt phase jury was effectively discharged when the penalty phase trial began. (*People v. Bonillas*, *supra*, 48 Cal.3d at p. 774.)

The jury's failure to determine the degree of the offense deprived appellant of his federal constitutional right to jury trial and to due process of law. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." (U.S. Const., Amend. VI.) This right is applicable to the states through the operation of the Due Process Clause of the Fourteenth Amendment. (*Turner v. Murray* (1986) 476 U.S. 28, 36.) The California Constitution similarly provides that "[t]rial by jury is an inviolate right and shall be secured to all. . . ." (Cal. Const., art. I, §16.) In addition, "the 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.)

Depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fifth and Fourteenth

Amendments to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant has demonstrated above that the verdicts in his case do not fall within the exceptions to the application of section 1157 created by *San Nicolas*, *Goodwin*, and *Mendoza.* Appellant has a constitutionally protected liberty interest in the application of section 1157 to the verdicts in his case. Barring the application of section 1157 to the verdicts here under new judicial constructions of that section violates appellant's right to due process of law. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold his convictions in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

For the foregoing reasons, appellant respectfully submits that by operation of Penal Code section 1157 the crimes of which he was convicted in Counts 1 and 2 are second degree murder, for which neither a sentence of death or life in prison without the possibility of parole may be imposed.

VII.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT TESTIMONY THAT LAWRENCE KELLY OFFERED SOMEONE $100.00 TO TESTIFY THE WEST SIDE WILMAS GANG GETS ALONG WITH AFRICAN-AMERICANS. THIS ERROR DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A RELIABLE DETERMINATION OF THE FACTS REQUIRED IN A CAPITAL CASE BY THE EIGHTH AMENDMENT

The trial court erred in overruling the defense objection to the prosecution's testimony of Glenn Phillips to the effect that Lawrence Kelly offered Warren Battle $100.00 to testify that members of the West Side Wilmas gang get along with African-Americans. This error deprived appellant of due process of law and a reliable determination of the facts in a capital case as required by the Fifth, Eighth, and Fourteenth Amendments.

A. THE HEARINGS BELOW

As set forth in the Statement of Facts, the defense called Lawrence Kelly (Puppet), a West Side Wilmas member, who testified to the following facts: that neither the gang nor appellant was racist (10RT 2394-2398), that all the gang members had access to the rifle used in the murders (10RT 2402-2404), that Contreras was frequently under the influence of methamphetamine and would get paranoid and think that people were saying things (10RT 2402-2409), that he saw appellant and Satele on October 28th at the Strand Park playground and neither appellant nor Satele said anything about going out "looking for niggers" (10RT 2409-2410).

On cross-examination, the prosecution asked Kelly if he had offered someone money to testify that the West Side Wilmas get along with African-Americans. Kelly denied doing so and denied ever offering an African-American $100 to say, "We get along." (10RT 2413-2414.)

On rebuttal, the prosecution called Glenn Phillips to testify that he heard Kelly offer a black employee of Phillips' named Warren Battle $100 to testify that "we" get along with blacks. (13RT 3000-3001.) The defense objected to this proffered evidence.

At the hearing pursuant to Evidence Code section 402, the defense argued that the conversation witnessed by Phillips took place in 1999 and no reference was made in the conversation to this case. Counsel for Satele voiced his objection to the proffered evidence by characterizing it as "way out of direct contact." (13RT 2979.)

Counsel for appellant also objected to the proffered testimony under Evidence Code section 352. (13RT 2979.)

The prosecution attributed the "we get along" statement to Kelly, who had denied making it on cross-examination. (13RT 2980.)

At the hearing, Phillips testified that he knew Kelly, Kelly was at a party at Phillips's house in August of 1999, and Kelly offered Battle, a black employee of Phillips, $100.00 to say, "We get along with black people." (13RT 2983-2985.)

Phillips had heard from someone else that Kelly knew that "a couple of guys" were having "problems." (13RT 2986.) Phillips thought this related to some people who "had gotten killed." (13RT 2987.)

In response to a question from the trial court, the prosecution explained that it was offering this testimony for the limited purpose of impeaching Kelly who had denied making the statement. (13RT 2991.)

The defense argued that "the impeaching testimony" of Kelly was remote and opened the door to different opinions as to what the evidence meant. Furthermore, there was no evidence that Phillips knew the defendants or that the statement related to this case. Therefore, the defense believed that the probative value of the evidence was outweighed by its prejudicial effect. (13RT 2994.)

The trial court held that this evidence was a direct contradiction of Kelly's testimony, and was therefore admissible. (13RT 2996.) The trial court further held that the probative value of the statement outweighed its prejudicial effect. (13RT 2994-2997.)

Thereafter, Glenn Phillips testified that he knew Kelly in 1999, and Phillips heard Kelly offer Warren Battle $100 to testify that "we" get along with blacks. (13RT 3000-3001.)

B. THE RELEVANT LAW

It is well established that evidence of efforts by a defendant to persuade a witness to testify falsely are admissible against a defendant to show a consciousness of guilt. However, it is equally well established that efforts by a third person to fabricate evidence are admissible against the defendant *only* if done in the defendant's presence and/or the defendant authorized the conduct of such a third person. (*In re Pratt* (1980) 112 Cal.App.3d 795; *People v. Terry* (1962) 57 Cal.2d 538, 556; *People v. Burton* (1961) 55 Cal.2d 328, 347.)

It has been also established that if a third person attempts to suppress or fabricate evidence, there must be a showing that the defendant in some way authorized that action, before it may be used as indicating a consciousness of guilt. The mere fact of a relationship between the defendant and the person making the attempt to fabricate evidence is not a sufficient basis for that inference. (*People v. Terry*, *supra*, 57 Cal.2d 538, 565-566; *People v. Hannon* (1977) 19 Cal.3d 588, 599; *People v. Perez* (1959) 169 Cal.App.3d 473, 477; *People v. Weiss* (1958) 50 Cal.2d 535, 553.)

Because there was no showing or contention that either defendant authorized or encouraged Kelly to try to influence a witness, the use of this evidence to show consciousness of guilt on the part of either appellant was prohibited.

Therefore, it was improper for the prosecution to initially cross-examine Kelly on this point.

Because the prosecution had no evidence linking either appellant or Satele to the $100 offer and the "we get along" statement, the proffered testimony was admissible only if it could be used to impeach Kelly. Evidence Code section 780, subdivision (i), permits impeachment of a witness to show "[t]he existence or nonexistence of any fact testified to by him." However, in this circumstance, the prosecutor's examination of Kelly regarding whether he had tried to bribe a witness was not a question designed to lead to admissible evidence because the prosecution lacked the necessary evidence linking the bribe attempt to appellant or Satele.

A party may not introduce evidence for the purpose of making otherwise inadmissible evidence admissible. In *People* v. *Luparello* (1986) 187 Cal.App.3d 410, at 426, the Court of Appeal said: "The fact that a topic is raised on direct examination and may therefore appropriately be tested on cross-examination, however, does not amount to a license to introduce irrelevant and prejudicial evidence merely because it can be tied to a phrase uttered on direct examination."

This is especially true where the party seeking to introduce the otherwise irrelevant and prejudicial impeachment evidence is the party who presented the evidence or testimony now sought to be impeached.

In *People* v. *Lavergne* (1971) 4 Cal.3d 735, at 744, this Court stated: "A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions."

The *Lavergne* Court explained:

> While collateral matters are admissible for impeachment purposes, the *collateral character of the evidence reduces its probative value and increases the possibility that it may prejudice or confuse the jury.* The

> Law Revision Commission notes, in its comment on section 780, that the inflexible rule excluding collateral matters relevant to credibility has been eliminated, but goes on to state that not all evidence of a collateral nature offered to attack the credibility of a witness is thereby made admissible. It refers to the trial court's "substantial discretion" under section 352 to exclude prejudicial and time-consuming evidence. It concludes that the effect of section 780, when read with section 352, is "to change the [then] present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge."] (*Id.*, at p. 742, italics added.)

In *People v. Luparello*, *supra*, 187 Cal.App.3d 410, a witness had testified that someone had written graffiti associated with the "F-Troop Gang" on the witness's van. This was determined to be "marginally relevant" to credibility. (*Id.*, at p. 422.) A subsequent witness then identified one of the parties, and described him as wearing clothing associated with the F-Troop. (*Id.*, at p. 423.) The prosecutor then used this to "open the door" to get in a body of evidence about the F-Troop gang that otherwise would have been inadmissible. (*Id.*, at pp. 424-246.)

This tactic was disapproved of by the Court, which stated:

> In this manner, the prosecutor used a relatively innocuous description of a type of head gear . . . and began a foray based consistently on leading questions in which he attempted to inform the jury by innuendo not only that F-Troop was a street gang whose members were suspected of committing homicides and other violent attacks on persons, but also that the gang was likely connected to the case in such a way that its members had threatened a material witness. (*Id.*, at p. 426.)

In *Luparello*, had it not been for the earlier innocuous references to the gang and the clothing, this evidence would not have been admitted. Consequently, it was error to bootstrap this information into evidence by the use of the prior testimony. (*Id.*, at pp. 426-247.)

From the foregoing, it is clear that a party is not allowed to cross-examine a witness/party on a marginally relevant subject, solely for the purpose of bringing in otherwise inadmissible evidence to rebut the information elicited.

The danger inherent in questionably relevant evidence also raises due process concerns. In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the court explained that while one of the items of evidence complained of was "faintly relevant" to a material issue (*id.*, at p. 1384, fn. 7), several of the items of evidence introduced were not relevant to any fact other than the defendant's character and the inference that he acted in conformity with that character. (*Id.*, at pp. 1381-1884.) Because the other acts evidence gave rise to no permissible inferences, and because the exclusion of such evidence is "an historically grounded rule of Anglo-American jurisprudence," the admission of such evidence may result in a violation of due process. (*Id.*, at p. 1381, citing *Jammal v. Van de Kamp* (1991, 9th Cir.) 926 F.2d 918, 920 and *Dowling* v. *United States* (1990) 493 U.S. 342, 352.)

C. APPLICATION OF THE LAW

Initially, it must be noted that the fact that the hate-crime allegation was found to be not true does not mean that this issue is moot. In order to find the special circumstance to be true, the jury must believe that fact beyond a reasonable doubt. However, the jury may have a reasonable doubt as to some fact, yet believe that fact to be true by a preponderance of the evidence, and therefore use it for other purposes that also benefit the prosecution.

In this case, even if the jury rejects the hate crime allegation because it had a reasonable doubt as to that fact, because of other evidence introduced relating to racial animosity, the jury could believe by a preponderance of the evidence that such an animosity existed. This would benefit the prosecution, and be detrimental to the defense, in several ways. First, it creates a motive for a senseless crime, a particularly culpable motive as racial hatred is correctly viewed as a particularly egregious form of behavior. Second, because racial animosity creates such a negative image, it paints the defendants in a particularly unattractive light.

Furthermore, the primary purpose of this evidence was to impeach Kelly. Kelly was a defense witness who testified that all the gang members had access to the rifle used in this crime. (10RT 2402-2404.) He testified that Contreras was frequently under the influence of methamphetamine and would get paranoid and think that people were saying things. (10RT 2402-2409.) He also testified that he did not hear Satele or Nunez say anything about going out "looking for niggers" or saying that they think they got one, a fact to which Contreras testified. (7RT 1597, 10RT 2410.)

Showing Kelly lied about one matter to which he testified casts doubts on the rest of his testimony, and the jury was instructed by CALJIC No. 2.21.2 that if it found a witness was "willfully false" in one part of his testimony, that witness was to be "distrusted" in other parts of his testimony, and the jury could reject all of that testimony. (37RT 10733, 14RT 3167.)

Kelly's testimony was important to the defense partly because it potentially placed the fatal weapon in the hands of other gang members and partly because it could be used to undermine the credibility of Contreras.

This is important because Contreras was a crucial witness to the prosecution. It is true that the testimony of Vasquez was very damaging to the case. However, the jury may look at that testimony with a high degree of skepticism. The reason for this is two-fold. First, the odds of Vasquez running into the two defendants in this case in the manner in which he described meeting them are astronomical.

Using the "product rule" to calculate the odds of this occurrence, one would have to square the jail population of Los Angeles County Jail system to ascertain the odds of an inmate randomly running into two specific individuals. That improbable figure has to be further questioned as it also involves the two individuals in question as making confessions to the stranger. (Appellant is not at this point disputing whether Vasquez was telling the truth in his testimony. Rather, appellant is

only suggesting that the jury could look upon this unlikely series of events and have doubts about it.)

Thus, if Kelly is believed, he creates gaps in the prosecution's case by bolstering the defense claim that other members of WSW had access to, and could have used, the gun involved in this crime, disputing the alleged racial animosity of the gang, and casting doubts as to the accuracy of Contreras's testimony.

In contrast, if Kelly is improperly impeached, the prosecution's case is erroneously bolstered.

Clearly, the defense objection under Evidence Code section 352 was well founded. As shown, this evidence has a minimal probative value. On the other hand, there is a high likelihood that the jury will misuse the evidence to also infer a consciousness of guilt on the part of appellant, even though the foundational fact for that use, namely, the authorization of the attempted witness-tampering by the defendant, is lacking.

Furthermore, an example of confusion caused by this evidence is apparent in the closing arguments of the prosecution to the jury. As noted above, this evidence was *only* offered to impeach Kelly by showing a direct contradiction.

In fact, in closing argument, in questioning Kelly's veracity, the prosecution argued

> Glen Phillips was called to show you that Mr. Puppet, that Puppet offered an African-American a hundred dollars to say we get along. Is this a witness, that being Puppet, somebody that you are going to believe in this courtroom. Somebody that go would go [sic] to the extent of going up to an African-American and say if you go into court and say something for us. Mr. Phillips has no axe to grind in here. I know he has some misdemeanor convictions and felony convictions, but you don't find a swan in the sewer. These aren't witnesses that I chose.

> This is a witness, Puppet, Puppet is the person who hangs around Glenn Phillips, not Glen Phillps [sic] hangs around with these guys, offered a hundred dollars to a witness to lie in this case. What does that tell you about Puppet, and his testimony here. (14RT 3399.)

Later, the prosecutor argued, "Lawrence Kelly, Puppet, I've already spoken about the fact that he said he bribed an individual with hundred bucks to come in here and lie." (14RT 3402.)

There are two important facts that can be gleaned from this argument. First, although the prosecution informed the court that the only purpose of the evidence was to show a direct contradiction between the testimony of the witness and another fact to which the witness testified, this was not the purpose being argued. Rather, the prosecution was arguing *the fact* of the bribe. Assuming for the moment that this was a good-faith error on the part of the prosecution, this proves the defense argument against the admission of the evidence under Evidence Code section 352, which provides that relevant evidence may be inadmissible when balanced against the potential confusion that the admission of the evidence may cause.

As explained above, the relevance on this evidence was minimal, showing that Puppet lies. However, the likelihood of confusion that may be caused by the misuse of the evidence is high. Indeed, if the prosecutor was unable to remember the correct purpose of this evidence, it is even more likely that the jury would misuse the evidence, particularly as it seems that the jury was never instructed as to the proper, limited use for which the evidence was offered.

Secondly, it is possible that the prosecution was using this evidence to argue that appellant was involved in the attempt to bribe Battle. This would be an improper purpose because, as explained above, unless it can be shown that a defendant authorized an attempt to dissuade a witness, it is inadmissible that some other person made that attempt.

However, if one re-arranges the punctuation in the above-quoted portions of the prosecution's argument it is possible that either the prosecutor argued, or the jury understood the argument to be "these guys, offered a hundred dollars to a witness to lie in this case." Because the only possible plural "guys" are appellant and Satele, this argument would improperly have appellant and Satele appear to be behind the attempted bribe.

In this light it must be remembered that the punctuation in the record is a discretionary matter inherent in the court reporter's job. However, the punctuation in the record is not cast in stone. Indeed, this Court has stated.

> Of course, when the court orally instructs the jury, the court reporter cannot always capture and report the court's intended punctuation. Speakers seldom indicate punctuation as they speak, leaving the court reporter with the always difficult, and sometimes impossible, task of supplying punctuation that reflects the speaker's cadence and inflection. Although we rely upon the court reporter to accurately record the words spoken in court, we are not bound by the court reporter's interpretation of the speaker's intended meaning as shown by the punctuation inserted by the reporter. (*People v. Huggins* (2006) 38 Cal.4th 175, 191.)

The fact that this possible alternative punctuation would render the quoted-portion less readable or articulate is of minor significance in determining what was said. Indeed, looking at the sentence as transcribed and punctuated by the court reporter reveals numerous errors made either by the speaker or by the reporter. This is demonstrated by the following: The phrase "somebody that go would go [sic] to the extent of going up to an African-American and say if you go into court and say something for us" is very awkward in its construction. Of course, in speaking, people are not as formal or as articulate as they are in writing, which allows for corrections of errors and ambiguities.

In fact, in the hearing to correct the record in this case, the trial court recognized the likelihood of people misspeaking. (February 7, 2006, RT 54; see also the hearing of February 15, 2006, RT 16-17.)

Again, the possible confusion caused by this punctuation debate demonstrates the accuracy of the defense prediction that the probative value of this evidence was outweighed by the risk of confusion.

Consequently, it is clear that the introduction of this evidence was likely to, and in fact did, cause confusion regarding the proper use of this evidence.

Furthermore, depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in the correct application of the law regarding the jury being informed about attempts to fabricate evidence because the consciousness of guilt which the jury may improperly infer from this evidence would likely be a fact which would strongly serve to corroborate the rest of the State's case, in spite of the weaknesses of that case, as discussed previously. Therefore, the incorrect application of the law in this area acts to deprive appellant of the right to due process of law. (*See Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold appellant's convictions, in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Additionally, because of the likelihood of confusion which would be caused by the introduction of this evidence, as shown above, and as evidenced in that even the Deputy District Attorney was unable to correctly compartmentalize this evidence for its proper function, it is clear that this evidence is likely to have an adverse impact on the reliability of the verdict in violation of Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334); *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

D. CONCLUSION

In summary, the trial court erred in overruling the defense objection to the prosecution's testimony of Glenn Phillips to the effect that Lawrence Kelly offered Warren Battle, a guest at Phillips's house, $100.00 to testify that members of the West Side Wilmas gang get along with African-Americans. Because this evidence improperly resulted in attacking the credibility of a defense witness, and because of the likelihood of confusion of the issues, appellant was prejudiced by the introduction of this evidence, requiring a reversal of the judgment of conviction entered below.

VIII.

THE TRIAL COURT ERRED IN REFUSING APPELLANTS' REQUEST FOR AN INSTRUCTION INFORMING THE JURY THAT BEING IN THE COMPANY OF SOMEONE WHO HAD COMMITTED THE CRIME WAS AN INSUFFICIENT BASIS FOR PROVING APPELLANT'S GUILT. THIS ERROR HAD THE EFFECT OF DEPRIVING APPELLANT OF THE RIGHT TO DUE PROCESS OF LAW AND THE EIGHTH AMENDMENT RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE, THEREBY REQUIRING A REVERSAL OF THE JUDGMENT AND DEATH PENALTY VERDICT

The trial court erred in refusing appellant's request for an instruction informing the jury that being in the company of someone who had committed the crime was an insufficient basis for proving appellant's guilt as an aider and abettor. This error had the effect of depriving appellant of his Fifth and Fourteenth Amendment rights to due process of law and the Eighth Amendment right to a reliable determination of the facts in a capital case, thereby requiring a reversal of the judgment and death penalty verdict.

A. THE REQUESTED INSTRUCTION

At the time that the jury instructions were discussed the defense submitted a special instruction,[42] which read, "Merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict." (38CT 10868)

The prosecution objected to this instruction, stating that it was almost the exact language of CALJIC No. 3.01, the instruction on aiding and abetting, which

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[42]. The trial court and counsel agreed that, unless otherwise stated, all defense requests for instructions were jointly requested. (13RT 3058.)

the court had already agreed to give, and that CALJIC No. 3.01 given in conjunction with CALJIC No. 2.90 "suffices." (13RT 3058.)

The court appears to have refused the instruction because it was not a standard one. The court said it was "leery about burden of proof to modify 2.90 and the collateral one. It's not a wise idea. We should stick with 2.90." (13RT 3058.)

B. THE RELEVANT LAW

A criminal defendant is entitled upon request to an instruction pinpointing the theory of the defense. (*People v. Wharton* (1991) 53 Cal.3d 552, 570.) Such an instruction may direct attention to evidence or amplify legal principles from which the jury may conclude that guilt has not been established beyond a reasonable doubt. (*People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1137.)

This Court has explained the importance of pinpoint instructions, stating:

> Ordinarily, the relevance and materiality of circumstantial evidence is apparent to the trier of fact, but this is not always true, and the courts of this state have often approved instructions pointing out the relevance of certain kinds of evidence to a specific issue. [Citation.] (*People v. Sears*, *supra*, 2 Cal.3d at p. 190.)

This Court clarified this rule in *People v. Wright*, *supra*, holding that the defendant has no right to direct the jury's attention to specific evidence or testimony. Nevertheless, *Wright* specifically held that CALJIC 2.91 (regarding eyewitness testimony) and CALJIC No. 4.50 (regarding alibi) are proper pinpoint instructions. Each of those instructions calls attention, in a generic form, to the evidence upon which the defense theory is based and admonishes the jurors that if they have a reasonable doubt after considering such evidence, they must acquit. (See Evid. Code, § 502; *People* v. *Simon* (1996) 9 Cal.4th 493, 500-501 [as to defense theories, the trial court is required to instruct on who has the burden and the nature of that burden].)

Then, in *People v. Saille* (1991) 54 Cal.3d 1103, this Court explained that a defendant is entitled to a pinpoint instruction upon request. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*Id.*, at p. 1119, see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1019, Brown, J., concurring.)

Here, the instruction requested by appellant – "Merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict" – was important to appellant's defense of alibi in several ways. First, the jury heard evidence that appellant, Caballero, and Contreras were together and that Satele was on his bike nearby in the early evening hours on the night of the shooting. The jury also heard evidence that the same individuals were together in the park in the late night hours after the shooting and that on the following evening Satele was caught while fleeing from the traffic stop of a car, from which appellant and another fled and in which the murder weapon was found. The requested instruction was important to appellant's theory of defense because it correctly pointed out that where appellant was concerned merely being in the company of Satele and Caballero before and after the shooting occurred was not sufficient to prove appellant's guilt beyond a reasonable doubt. For the juror evaluating appellant's evidence that he was at home at the time of the shooting, the instruction properly informed the juror that evidence appellant was seen with Satele and Caballero before and after the shooting was not enough to establish the inference his alibi was a sham and from that his guilt. For the juror who had formed the belief appellant was in the car with Satele and Caballero at the time of the shooting based on evidence he was with them before and after the shooting, the requested instruction would have correctly informed the juror that proof of appellant's guilt required more than his presence in the car with them.

In addition, the jury heard evidence that appellant, Caballero, Contreras, and Satele were members of a criminal street gang. The jury heard further evidence in the form of the opinion testimony of the prosecution's gang expert that WSW gang members who arm themselves and drive into the area where the charged murders occurred do so to commit murder. The gang expert further opined that gang members who plan to commit a drive-by shooting do so in a group that includes a driver, a shooter, and a lookout. (9RT 2102-2104.) In the face of such evidence, it was important to appellant's defense that the jury be properly instructed that appellant's gang membership and purported presence in the car with other gang members was insufficient to prove his guilt.

Thus, the requested instruction went to the core of appellant's defense. California courts have recognized the importance of focusing the jury's attention on their task through such instructions, as the discussion of the following cases illustrates.

In *People* v. *Roberts* (1967) 256 Cal.App.2d 488, the defendant was convicted of oral copulation. The evidence in that case showed that the police, who had received complaints of a public bathroom being used for sexual purposes, had used a peep-hole in that bathroom to observe several incidents of various individuals engaging in oral sex over a period of several days. The lighting conditions at the time of the observations were less than ideal, and the initial identification of the defendant was "tentative." There was no evidence that corroborated the identification. (*Id.*, at p. 491.)

The defendant in *Roberts* requested an instruction to the effect that if the jury had a reasonable doubt of the defendant's guilt, based on the ability of the officers to identify the defendant from their place of concealment, the jury should acquit him. (*Id.*, at p. 492.) The trial court refused the instruction and the defendant was convicted. The Court of Appeal reversed the conviction, holding that it was prejudicial error to refuse an instruction directing the jury's attention to the potential weaknesses of the identification, which was the core of the defense. (*Id.*, at p. 494;

see also *People v. Guzman* (1975) 47 Cal.App.3d 380, 388 [it is error to refuse a defendant's request for an instruction relating identification to reasonable doubt].)

For the purposes of determining whether additional instructions on identification are needed, the court should consider whether the case may be considered to be a "close case." Part of this inquiry focuses on whether the identification has "any substantial corroboration." If there is no substantial corroboration, the refusal to give this type of pinpoint instruction is more likely to be regarded as prejudicial. (*People v. Gomez* (1972) 24 Cal.App.3d 486, 490.)

In *People* v. *Hall*, *supra*, 28 Cal.3d 143, 159, the court held that the trial court erred in not giving a tailored version of a proposed instruction on identification that was found to be too long and argumentative. This Court found the error was not prejudicial because the trial court had instructed the jury with CALJIC No. 2.91, which related the concept of reasonable doubt to identification testimony. (*Id.*, at pp. 159-160.) In appellant's case, however, no equivalent curative instruction was given to appellant's jury to compensate for the failure to give the requested instruction.

In *People v. Johnson* (1992) 3 Cal.4th 1183, 1230, the court explained that a defendant is entitled to an instruction that directs the attention of the jury to facts relevant to a determination of the existence of reasonable doubt regarding an identification. Such an instruction should list the relevant factors supported by the evidence. (*Id.*, at p. 1230, citing *People v. Wright*, *supra*, 45 Cal.3d 1126, 1141.) The court stated that the proposed instruction "should not take a position as to the impact of each of the psychological factors listed; it should also list only factors applicable to the evidence at trial, and should refrain from being unduly long or argumentative." (*Johnson*, *supra*, at p. 1230.)

In *Johnson* the court held that the instruction requested was properly refused because the proposed instruction was argumentative.[43] Furthermore, the fact that that post-event information could contaminate an identification (the defect complained of in that case) was covered by other instructions. (*Ibid.*)

In contrast, the proposed instruction herein did not suffer from the same argumentative defects as the instruction in *Johnson*. It merely informed the jury that if it found appellant had been in the presence of a felon, that fact was not sufficient by itself for guilt. Unlike the instruction in *Johnson*, it did not argue that this factor would produce an inaccurate result, merely that additional evidence was required.

C. APPLICATION OF THE LAW TO APPELLANT'S CASE

As noted above, the prosecution objected to this instruction, arguing it was similar to the combined instructions CALJIC Nos. 3.01 and 2.90, which the court had previously agreed to give. The court declined to give the requested pinpoint instruction, reasoning it was not wise to tinker with the pattern instructions. (13RT 3058.) Neither of these purported rationales justified the refusal to give the pinpoint instruction.

First, the prosecutor's contention that the requested instruction was "almost the exact language of 3.01 with regards to aiding and abetting" is not supportable. While the requested instruction and CALJIC No. 3.01 share limited phrases in common, the phrases were used to make different points in the separate instructions. CALJIC No. 3.01 is the pattern instruction defining aiding and abetting. As given in this case, and as utilized by the prosecutor in his objection, the instruction

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[43]. The instruction offered in *Johnson* stated: "Was the witness's memory affected by intervening time and events? Memory tends to fade over time, and studies show that a witness may subconsciously incorporate into her memory information from other sources." (*Johnson*, *supra*, at p. 1232.)

informed the jury, "Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting." (37CT 10755.) The requested instruction, on the other hand, made no reference to aiding and abetting. Rather, its purpose and language directed the jury's analysis to appellant's theory of defense and to the weight of the evidence required for a determination of guilt by pointing out that merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict.

In addition, the two instructions serve very separate purposes. CALJIC No. 3.01 defines the role of the aider and abettor as a participant in the crime. The requested pinpoint instruction, on the other hand, focused on the amount of evidence required to establish guilt by specifying that being with someone believed to have committed a felony is not enough. CALJIC No. 3.01 focuses on a defendant's presence at the scene of the crime. The requested instruction focuses on the defendant' association with a person who committed a felony. CALJIC No. 3.01 bars an inference of guilt from presence at the crime scene. The requested pinpoint instruction informs that guilt may not be inferred from a defendant's association with "a person believed to have committed a felony."

The requested pinpoint instruction was important to appellant's defense because there was little direct evidence of the events of the shooting. The prosecutor presented no evidence regarding the identity of the shooter and certainly no evidence as to specific acts by appellant or of his mental state at the time of the shooting. The prosecution compensated for this lacunae with evidence of appellant's gang membership, appellant's association with fellow gang members Satele, Caballero, and Contreras on the night of the shooting as described above, on the race-based misconduct attributed to appellant and members of his gang, including fellow WSW member Lawrence Kelly. The prosecutor did not tie Kelly to the shooting incident, but he presented evidence of purported witness tampering by Kelly despite the fact no evidence linked such activity to appellant, Satele, or the gang. In addition, the

prosecution presented a gang expert's opinion testimony that if three WSW members were in the area of the shooting with a loaded weapon, their intent was to try and kill someone. (9RT 2102-2103.)

Guilt by association is a particularly discredited concept and deprives a defendant of the due process right to a fair trial. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072; *People v. Young* (1978) 85 Cal.App.3d 594, 603, fn. 3.) Here, a review of the prosecution's case shows it relied heavily on appellant's association with his gang in general and with Satele and Caballero in particular in arguing appellant was guilty of the charged crimes. Because of the state of the prosecution's case, the requested pinpoint instruction, which was a correct statement of the law, was necessary to the fairness of appellant's trial.

By focusing the jury's attention on the conduct of a particular individual, the requested pinpoint instruction would also have assisted the jury in properly analyzing the weight and materiality of the gang-related evidence before it. Gang evidence is inflammatory. (*People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.) Moreover, as a practical matter, unless care is exercised, gang expert opinion testimony that in given circumstances gangs take certain action or its members act in certain ways often easily lends itself to be used as impermissible profile evidence. In

People v. Robbie (2001) 92 Cal.App.4th 1075, the Court of Appeal defined profile evidence as a collection of conduct and characteristics commonly displayed by those who commit a crime. In *People v. Erving* (1997) 63 Cal.App.4th 652, 663, the court explained, "Profile evidence is inadmissible because 'every defendant has the right to be tried based on evidence tying him to the specific crime charged, and *not on general facts accumulated by law enforcement* regarding a particular criminal profile.' Moreover, such evidence encourages the jury to engage in circular reasoning." (*People v. Erving*, *supra*, 63 Cal.App.4th at p. 663 [citations omitted; italics added].)

The pinpoint instruction requested by appellant would have assisted the jury's application of law to fact by keeping the jury focused on the proper use of the gang evidence it had heard and thus ensuring that appellant was tried on the evidence tying him to the specific crime charged rather than on evidence that gang members commit drive-bys in a certain manner and with a certain intent.

Here, the trial court appears to have declined to give the instruction because it was not a standard instruction. It is, however, improper to refuse a nonstandard instruction when it is supported by the evidence.

In an en banc decision, the Ninth Circuit indicated that trial judges who rely solely on CALJIC face reversal for the denial of a defendant's constitutional rights. In *McDowell v. Calderon* (9th Cir., 1990) 130 F.3d 833, the court stated:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions. (*Id.*, at p. 836.)

The Ninth Circuit made clear that standard instructions are not always sufficient to assure that the jury will fulfill its purpose.

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of "standard" jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong. (*Id.*, at p. 841.)

Recently, *McDowell*'s recognition that a particular group of pattern instructions, in this case CALJIC instructions, do not hold sacred cow status was given

real meaning within California's criminal justice system when the Judicial Council adopted an altogether different set of instructions, *viz.*, CALCRIM, as the official instructions for use in this state. (Rule 855, California Rules of Court.) Thus, while a trial court's reluctance to give an instruction outside the scope of accepted instructions may be understandable, that reluctance is not a legally supportable reason for rejecting a legally correct instruction supported by the evidence.

Here, the requested instruction was a legally correct statement of the law as it is well established that merely being in the company of a person who commits a crime is not a sufficient basis of proving guilt because evidence of mens rea is lacking. (See, e.g., *People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 560 [aider and abettor must act with knowledge of criminal purpose of perpetrator and with intent or purpose either of committing or of encouraging or facilitating commission of the offense].) The requested instruction was supported by the evidence. Appellant has described above that the prosecution's case, which manifestly lacked direct evidence of the events of the shooting, relied instead on evidence of appellant's association with Satele, Caballero, Contreras, and the WSW gang. Under these circumstances, the trial court erred in refusing the requested instruction.

There were also additional reasons why the instruction should have been given. The court should have given the instruction in order to preserve appellant's right to reciprocity under the Due Process Clause. The trial court instructed the jury with regard to a specific evidence from which it might infer appellant's guilt, *viz.*, motive (CALJIC No. 2.51). (37CT 10743.) If the prosecution is given the benefit of instructions directing the jury's attention to evidence supporting its case, the defense is entitled to instructions directing the jury's attention to evidence that supports the defense case. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the Supreme Court noted that state trial rules that provide for non-reciprocal benefits violate the due process clause. (See also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377.) Although

Wardius was concerned with reciprocal discovery rights, the same principle should apply to jury instructions. (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.)

Furthermore, depriving appellant of the protection afforded under the principles discussed above was a misapplication of a state law that constituted a deprivation of a liberty interest in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in having the jury correctly instructed in this area. The nature of gang cases makes it easy for the jury to hold a purported gang member liable for the actions of other gang members. Here, the requested instruction was a correct statement of the law and supported by the evidence. The trial court erred in refusing to give it.

Courts have recognized that the refusal to instruct on the defendant's theory of the case violates the defendant's right under the Sixth and Fourteenth Amendments to adequate instruction on the theory of the defense and the Sixth Amendment right to a jury trial. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867; *United States v. Unruh* (9th Cir. 1988) 855 F.2d 1363, 1372; in accord, *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.) As such, the erroneous ruling of the trial court in this area deprived appellant of the right to due process of law. (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold appellant's conviction, in violation of these established legal principles, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 [state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, unless the jury is properly instructed that being in the company of another believed to have committed a felony is not sufficient to prove guilt, the jury

is likely to reach its verdict based on an incorrect understanding of the law, thereby undermining the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

D. PREJUDICE

Appellant was prejudiced by the refusal of the trial court to give this instruction. The prosecution's evidence of the events of the shooting was spare. There was evidence that Caballero was driving and conflicting evidence as to whether the shooter was Satele or Nunez. The prosecutor repeatedly stated during the colloquy over jury instructions and in argument to the jury that he had not proven the identity of the actual killer. In fact, the state of the evidence was so spare as to the identity of the actual killer that the jury could have as readily found that any one of the purported occupants of the car, including Caballero the driver, was the actual shooter.

In addition to evidence that Caballero was the driver, the prosecution relied on its gang expert's opinion that gang drive-by shootings typically involved a driver, a lookout, and a shooter in arguing for conviction. Where the prosecution's case lacked evidentiary force, however, was in the absence of evidence regarding the conduct of appellant, Satele, or Caballero with regard to the shooting. And, this weakness in the prosecution's case went directly to the issue of guilt because not only was the prosecution unable to prove who actually shot, it was also unable to prove the nonshooters in the car had the requisite mens rea for guilt as accomplices. The pinpoint instruction requested by the defense was directed at this very point because it expressly told the jury that appellant's guilt could not rest on appellant's mere presence in the company of an individual or individuals believed by the jury to have committed a felony.

As such, the requested instruction would have focused the jury's attention on facts that directly impacted appellant's criminal liability and the weaknesses in the prosecution's case. The requested instruction would thus have had an impact on the jury's determination of appellant's guilt beyond a reasonable doubt. "An error in instruction which significantly misstates the requirement that proof of guilt be beyond a reasonable doubt 'compels reversal unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt.' " (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472, quoting *Chapman v. California* (1967) 386 U.S. 18, 24.)

E. CONCLUSION

For the reasons set forth above, appellant respectfully submits that the erroneous denial of his requested pinpoint instruction deprived him of the Fifth and Fourteenth Amendment rights to due process of law and the Eighth Amendment right to a reliable determination of the facts in a capital case. Accordingly, a reversal of the judgment and verdict of death is warranted.

IX.

THE PROSECUTOR'S MISCONDUCT IN ARGUMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS AND COMPELS REVERSAL

The prosecutor committed misconduct by vouching for the veracity of a prosecution witness, thereby depriving appellant of the Due Process right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

A. VOUCHING FOR WITNESS

The prosecutor improperly vouched for the veracity of prosecution witness Ernie Vasquez. In his arguments to the jury, the prosecutor referred to the fact that Vasquez had identified a picture of Juan Carlos Caballero as the person who was with appellant and Satele on the night of the crimes. The prosecutor said, "What a coincidence. Because *I guarantee that is the truth.* What he testified to was corroborated. (14RT 3232; italics added.)

Counsel for appellant objected to "the district attorney's guarantee that is the truth." The court overruled the objections, stating only, "Your objection is improper argument. State a legal objection." (14RT 3232.) The prosecutor's purported "guarantee" constituted clear misconduct and the trial court erred in overruling the objection. Furthermore, the trial court overruled the defense objection in language from which it might be readily inferred the defense objection had no legal basis, from which it might be inferred in turn that the prosecution's guarantee was good.

Later regarding the tape made of the conversation between appellant and Satele in the transportation van, after the defense argued that portions were

inaudible, the prosecutor stated, "You will hear it. I will back up my words. You will hear this. I will stake my reputation on that." (14RT 3404-3405.)

A defense objection to this comment was sustained. (14RT 3405.)

Returning to the subject a short time later, after being told he should not stake his reputation on his argument, the prosecutor noted, "I shouldn't say I state [sic] my reputation." (14RT 3411.)

Improper vouching for the strength of the prosecution's case "'involves an attempt to bolster a witness by reference to facts outside the record.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 206, quoting *People v. Williams* (1997) 16 Cal.4th 153, 257.) It is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. (*People v. Huggins*, *supra*, at p. 207.)

Vouching is prohibited out of the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors. (*United States v. Edwards* (9th Cir. 1998) 154 F.3d 915, 921.) The prohibition against vouching was designed to prevent prosecutors from taking advantage of the "tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the 'fundamental distinctions' between advocates and witnesses." (*Id.*, at p. 922.)

In *United States v. Rosario-Diaz* (1st Cir. 2000) 202 F.3d 54, the court noted that prosecutors may not place the prestige of the government behind a witness by making personal assurances about the witness's credibility or by indicating that facts not before the jury support the witness's testimony. (*Id.*, at p. 65; see also *United States v. Necoechea* (1993) 986 F.2d 1273.)

In analyzing whether arguments of the prosecutor constitute prejudicial vouching, courts consider the form of vouching, how much of an implication is

created that the prosecutor has additional knowledge, the degree of personal opinion expressed, how much the witness's credibility had been attacked, and the importance of the witness's testimony to the case overall. (*United States v. Daas* (9th Cir. 1999) 198 F.3d 1167, 1178.)

Vouching by the prosecutor creates two related dangers. It can convey the impression that there was evidence supporting the charges known to the Deputy District Attorney, but not presented to the jury. When improper prosecutorial vouching creates such an impression, it violates a defendant's right to be tried solely on the basis of the evidence presented to the jury. Furthermore, such improper vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." (*United States. v. Young* (1985) 470 U.S. 1, 18-19.)

Vouching is related to the rule that the prosecutor may not express his personal opinion about the guilt of the defendant. (See, e.g., *People v. Kirkes* (1952) 39 Cal.2d 719; *People* v. *Edgar* (1917) 34 Cal.App. 459, 468.)

In determining whether a prosecutor's comments are improper, a court should look to the comments to determine what a jury would naturally take those comments to mean. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1303; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1067.) A jury is likely to believe that a prosecutor's guarantee that a particular witness is telling the truth or is accurate implies that the prosecutor has some knowledge beyond that presented to the jury that leads the prosecutor to believe the witness is in fact correct and honest. It would be reasonable for the jury, instructed by way of the pretrial admonition (CALJIC No. 0.50; 37CT 10704) that its role was to conscientiously consider and weigh the evidence, to infer that the prosecutor, who knew the evidence the jury had heard, was providing them with his personal guarantee because he knew something more than they did. Under such circumstances it would be reasonable for the jury to reason there could be no other reason for the prosecutor's guarantee.

The same basis for a finding that the comments herein were not prejudicial cannot be made in this case. Because of the way that the remark was made, with the prosecutor staking his reputation on the facts asserted, the Deputy District Attorney was making this a personal guarantee more so than the comments in *Hawthorne*, which discussed the obligations of counsel in a more general nature. Second, unlike *Hawthorne*, the jury herein was never told to disregard these remarks.

The danger of improper vouching increases when the case is "closely balanced." (*People v. Perez* (1962) 58 Cal.2d 229, 248; *People v. Lyons* (1955) 50 Cal.2d 245, 262.)

The prosecution's guarantee in issue here was prejudicial. First, Ernie Vasquez was the most important witness in the state's case because he testified both appellant and Satele made damning admissions to him. No jury could overlook such evidence.

On, the other hand, credibility issues cast a long shadow over Vasquez's testimony. Evidence adduced at trial established that Vasquez was in the vicinity of the shooting because he was trying to sell a VCR someone had "given" to him and that he was using crack cocaine during that time. (5RT 1121-1123.) The jury learned that Vasquez was in jail when he began providing information to detectives and when Satele and appellant made seriatim admissions to him. Jurors also learned that the detectives with whom Vasquez was cooperating in turn helped him with his cases and helped him claim the $50,000 reward offered in this case. (6RT 1160, 1164-1166 1209, 1214, 1225.)

Stating simply the obvious inference to be drawn from this evidence, Vasquez helped himself by helping the police. Jury instructions cautioned the jury to be

wary of a witness who had a bias, interest, or motive in testifying[44] and to view the testimony of an in-custody informant with caution and to consider the extent to which it may have been influenced by the receipt or expectation of benefits from the party calling that witness.[45]

In contrast, the jury is bound to have a high regard for the Deputy District Attorney, who, they have been told, is a representative of the People. If the Deputy District Attorney is willing to guarantee the veracity of a witness, the jury is likely to give great weight to that promise.

In summary, the prosecutor improperly vouched for the veracity of Ernie Vasquez by guaranteeing that he was telling the truth in his testimony, depriving appellant of the right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States

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[44]. CALJIC No. 2.20, as given to appellant's jury, stated in relevant part: " . . . In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] . . . The existence of nonexistence of a bias, interest, or other motive. . . ." (CALJIC No. 2.20; 37CT 10729)

[45]. CALJIC No. 3.20, as given to appellant's jury, stated: "The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence n this case. [¶] 'In-custody informant' means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by a defendant while both the defendant and the informant are held within a correctional institution." (CALJIC No. 3.20; 37CT 10756.)

B. CONCLUSION

For the foregoing reasons, it is clear that the prosecutor committed misconduct by vouching for the veracity of a prosecution witness, thereby depriving appellant of the Due Process right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

X.

GUILT AND PENALTY PHASE VERDICTS WERE RENDERED AGAINST APPELLANT BY A JURY OF FEWER THAN TWELVE SWORN JURORS; THE RESULTING STRUCTURAL TRIAL DEFECT REQUIRES REVERSAL

The judgment of conviction must be reversed because the verdicts rendered against appellant were rendered by fewer than the constitutionally mandated twelve sworn jurors. Here, the jurors were sworn to the statutorily prescribed oath for trial jurors and the alternate jurors were separately sworn to a different "alternate juror's oath." Soon after the jury was sworn, the court discharged a trial juror and replaced her with an alternate juror. During penalty deliberations, the court discharged two jurors in seriatim and replaced each with an alternate. In each instance, the court neglected to have the alternate jurors swear to the prescribed oath for trial jurors. Thus, at both the guilt and penalty phases of appellant's trial, the jury that tried the cause was not comprised of the requisite twelve sworn trial jurors. This violation of appellant's constitutionally mandated entitlement created structural trial error requiring that the judgment of conviction be reversed.

The jury selection process, including the swearing of the jurors, is summarized below. A discussion of the applicable law and the application to this case follow.

A. THE JURY SELECTION PROCESS AND THE SUBSEQUENT SEATING OF ALTERNATES AS TRIAL JURORS

The prospective jurors in this case were divided into four groups of approximately 50 jurors. As to each group, the selection process began with the

administration of the following acknowledgment and agreement required by Code of Civil Procedure section 232, subdivision (a)[46]:

> You, and each of you,[47] do understand and agree that you will accurately and truthfully answer all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the cause now pending before this court, and that failure to do so may subject you to criminal prosecution. (2RT 330, 354, 366-367, 376-377.)

Each group of jurors answered collectively in the affirmative. (2RT 330, 354, 366-367, 376-377.)

After the twelve trial jurors were accepted by the parties, the court invited the courtroom clerk to swear the panel, as is required by Code of Civil Procedure section 232, subdivision (b).[48] The following oath was administered:

> You, and each of you, do understand and agree that you will well and truly try the cause now pending before this court and render a true verdict according to the evidence presented to you and the instructions of this court. (4RT 846.)

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[46]. Code of Civil Procedure section 232, subdivision (a), provides: "Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgment and agreement shall be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement, 'I do': [¶] 'Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before this court; and that failure to do so may subject you to criminal prosecution.'"

[47]. The phrase "and each of you" was omitted from the oath administered to the first of the four groups. (2 RT 330.)

[48]. Code of Civil Procedure section 232, subdivision (b), provides: "As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement, 'I do': [¶] 'Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court.'"

The 12 trial jurors collectively answered, "I do." (4RT 846.)

The court and parties next agreed to select six alternate jurors. (4RT 847-848.) When the six alternates were chosen, the court clerk administered the following oath:

> You understand and agree that you will act as an alternate juror in the case now pending before this court by listening to the evidence and instructions of this court, and will act as a trial juror when called up to do so. (4RT 856-857.)

The six alternate jurors collectively answered, "I will." (4RT 856-857.)

After the alternate jurors were sworn, the court excused the jurors for the weekend and ordered them to return on the following Monday. (4RT 859.)

Juror No. 5 (Juror No. 9889) remained behind in the courtroom and advised court and counsel that she was unable to serve as a trial juror because she socialized with law enforcement officers and was in frequent contact with her brother, a deputy district attorney. The court ordered Juror No. 5 to return on the following Monday. (4RT 860-861.) On that date, the court found the juror was biased in favor of the prosecution and excused her for cause. (4RT 871-872.)

When trial reconvened, the court seated alternate juror number one (Juror No. 4965) as Juror No. 5. The trial juror's acknowledgment and agreement taken by the 12 original trial jurors and set forth in Code of Civil Procedure section 232, subdivision (b), was not administered to Juror No. 4965 at that time or at any later point in the trial. (4RT 876.)

Later in the trial, during penalty phase deliberations, the trial court excused two trial jurors for cause.[49] The court excused Juror No. 10 after finding the deliberating juror had committed misconduct by discussing the case with nonjurors

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[49]. In Arguments XIV and XV in this brief, appellant asserts the trial court erred in discharging these deliberating jurors.

and replaced her with alternate juror number two (Juror No. 8971) (18RT 4463, 4470.) The court subsequently excused Juror No. 9 after finding trial-related stress was affecting the juror's health and pregnancy and seated alternate juror number four (Juror No. 2211)[50] in her place. Neither newly seated Juror No. 10 nor newly seated Juror No. 9 was administered the juror's acknowledgment and agreement taken by the 12 original trial jurors and set forth in Code of Civil Procedure section 232, subdivision (b), at the time either was seated as a trial juror or at any later point in the trial. (18RT 4470-4471, 4491-4492.)

B. THE RIGHT TO A JURY TRIAL ENCOMPASSES THE RIGHT TO A JURY OF TWELVE SWORN JURORS

"The right to trial by jury in criminal cases derives from common law and is secured by both the federal and state constitutions. [Citation.]" (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1029; U.S. Const., Art. III, § 2, cl. 3, and the Sixth and Fourteenth Amendments; Cal.Const., art. 1, § 16.) A jury trial in a criminal case in a state court is now a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148-149; 5 Witkin and Epstein Cal. Crim. Law (3d ed.), Criminal Trial, §438.)

The federal constitutional guarantee of a trial by jury does not require trial by exactly 12 persons. Thus, a state criminal jury of six persons is not unconstitutional, though a state may not try a criminal defendant before a jury of five persons. (*Williams v. Florida* (1970) 399 U.S. 78, 103; *Ballew v. Georgia* (1978) 435 U.S. 223, 245.)

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[50]. Alternate juror number three was excused by the court for hardship reasons pertaining to his prepaid, preplanned vacation. (18 RT 4465-4466.)

The California Constitution, however, mandates trial by twelve jurors in felony criminal cases:

> Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes other than causes within the appellate jurisdiction of the court of appeal the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.
>
> In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. (Cal. Const., Art. I, §16.)

"The [California] Constitution assures *the essentials of a common law jury trial in felony cases*, and these, not subject to legislative or judicial curtailment, are (a) the number of jurors, (b) impartiality of the jurors, and (c) unanimity of the verdict. (*People v. Howard* (1930) 211 Cal. 322, 324, 295 P. 333; *People v. Richardson* (1934) 138 Cal.App. 404, 409, 32 P.2d 433; *People v. Bruneman* (1935) 4 Cal.App.2d 75, 79; see *People v. Galloway* (1927) 202 Cal. 81, 92 [impartiality]; *People v. Diaz* (1951) 105 Cal.App.2d 690, 697 [impartiality]." (5 Witkin and Epstein Cal. Crim. Law (3d ed.), Criminal Trial, §437; emphasis added.)

Appellant, who was charged with murder, was entitled to be tried by a jury of 12 persons absent a waiver of that right. (*People v. Dyer* (1961) 188 Cal.App.2d 646.)

In criminal cases, the waiver of the right to be tried by a 12-person jury must be "expressed in open court by the defendant and the defendant's counsel." (Cal. Const., Art. I, §16.) This provision has been strictly construed not only to

require a waiver by the defendant personally, but also to require expression of the waiver in words. (See *People v. Holmes* (1960) 54 C.2d 442, 443 ["the waiver must be so expressed and will not be implied from a defendant's conduct"].) An express personal waiver by the defendant of the right to a jury trial is required for a court trial. Anything less requires reversal of a resulting conviction. (*People v. Ernst* (1994) 8 Cal.4th 441, 448.) There was no equivalent waiver by appellant here.

Appellant has a constitutional right to a fair trial by an impartial jury under both the federal and California Constitutions. (*People v. Banner* (1992) 3 Cal.App.4th 1315, 1323-1324.) Although there is no state or federal constitutional provision requiring that the jury be sworn or dictating the content of the juror's oath, courts have held that an entire failure to swear the jury renders a conviction a nullity. (See, e.g., *People v. Pelton* (1931) 116 Cal.App.Supp. 789; *State v. Godfrey* (Ariz.App. 1983) 666 P.2d 1080, 1082; *Foshee v. State* (Ala.Crim.App. 1995) 672 So.2d 1387.) These courts reason that the oath is an important element of the constitutional guarantee to a trial by an "impartial" jury. "'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

If the entire failure to swear the jury renders a conviction a nullity, it follows that a defendant's constitutionally protected right to a unanimous verdict would operate to render a conviction a nullity when it is reached by a jury with even one member who is not properly sworn.

In California, numerous provisions of the Code of Civil Procedure and Penal Code governing jury selection in criminal cases were repealed and replaced in 1989 with the "Trial Jury Selection and Management Act" (Trial Jury Act). (Code of Civ. Proc., §§ 190-237.)

Code of Civil Procedure section 192, a section within that act, states: "This chapter applies to the selection of jurors, and the formation of trial juries, for both civil and criminal cases, in all trial courts of the state." The Trial Jury Act thus governs the jury selection process in appellant's case. That this is so is acknowledged by one of the few provisions of the Penal Code dealing with jury selection not repealed by the Trial Jury Act. That provision, Penal Code section 1046, provides that criminal trial juries are formed in the same manner as are trial juries in civil actions.[51]

Trial jurors are defined by Code of Civil Procedure section 194, subdivision (o), as follows:

> "Trial jurors" are those jurors *sworn* to try and determine by verdict a question of fact. (Emphasis added.)

A trial jury is defined by Code of Civil Procedure section 194, subdivision (p), as follows:

> "Trial jury" means a body of persons selected from the citizens of the area served by the court and *sworn* to try and determine by verdict a question of fact. (Emphasis added.)

This requirement that a trial jury in a criminal case be comprised only of jurors *sworn* to try the cause is echoed in Penal Code section 1093, which governs the order of proceedings at trial. The prefatory clause in that section states:

> The jury having been impaneled and *sworn*, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court: . . . (Pen. Code, § 1093, in relevant part; emphasis added.)

Further demonstration that a trial jury in a criminal case must be comprised only of jurors *sworn* to try the cause may be found in Penal Code section 1089, another of the few Penal Code provisions surviving the Trial Jury Act. Section

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[51]. Penal Code section 1046 provides: "Trial juries for criminal actions are formed in the same manner as trial juries in civil actions."

1089 establishes the procedure for the selection and seating of alternate jurors and expressly states not only the requirement that the jury must be sworn, but also expressly requires that the alternate jurors be given the same oath as the trial jurors, which was not done here. Penal Code section 1089 provides in relevant part:

> Whenever, in the opinion of a judge of a superior court about to try a defendant against whom has been filed any . . . information, . . . the trial is likely to be a protracted one, . . . immediately after the jury is impaneled and *sworn*, the court may direct the calling of one or more additional jurors . . . to be known as "alternate jurors."
>
> The alternate jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already *sworn*, and be subject to the same examination and challenges. . . .
>
> The alternate jurors shall be seated so as to have equal power and facility for seeing and hearing the proceedings in the case, *and shall take the same oath as the jurors already selected*, and must attend at all times upon the trial of the cause in company with the other jurors. . . . (Pen. Code, § 1089; emphasis added.)

Thus, Penal Code section 1089, in consonance with all other pertinent legislation regulating criminal jury trials, requires that criminal trial jurors must be sworn to try the cause before them. (See, e.g., Code Civ. Proc., § 234, providing for alternate jurors in civil and criminal actions in language paralleling that of Penal Code section 1089.)

It is thus readily established that a trial juror or a member of a trial jury must be *sworn* to try and determine by verdict a question of fact.[52]

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[52]. The "Trial Process" page of the "Jury Information Resource Center" posted at the official website of the California Courts (http://www.courtinfo.ca.gov/jury/step1.htm) informs the public and potential jurors about the significance and importance of the jurors' oath and the oath-taking process:

> The process of questioning and excusing jurors continues until 12 persons are accepted as jurors for the trial. Alternate jurors may also be selected. The judge and attorneys agree that these jurors are qualified to

C. NEITHER THE REQUIRED OATH, NOR ITS EQUIVALENT, WAS ADMINISTERED HERE

Code of Civil Procedure section 232, subdivision (b), governs the swearing of trial jurors. (*People v. Chavez* (1991) 231 Cal.App.3d 1471, 1484.) It provides:

> As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement, "I do":
>
> Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court.

In the present case, the acknowledgment set forth in Code of Civil Procedure section 232, subdivision (b), was never administered to Jurors Nos. 4965, 8971, and 2211, all alternate jurors who were subsequently seated as trial jurors.

Although Penal Code section 1089 requires that alternate jurors "shall take the same oath as the jurors already selected," the court in appellant's case

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> decide impartially and intelligently the factual issues in the case. When the selection of the jury is completed, the jurors take the following oath:
>
> Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?
>
> As a juror you should think seriously about the oath before taking it. The oath means you give your word to reach your verdict upon only the evidence presented in the trial and the court's instructions about the law. You cannot consider any other evidence or instruction other than those given by the court in the case before you. Remember that your role as a juror is as important as the judge's in making sure that justice is done.

administered a different oath to the alternate jurors. (See *People v. Gore* (1993) 18 Cal.App.4th 692, 704; *People v. Burgess* (1988) 296 Cal.App.3d 762, 768.) That oath, set forth above and reproduced here to facilitate its review, fails to duplicate the trial juror's oath in important aspects. The oath taken by the alternate jurors did not advise them of their primary duty as a juror, i.e., to render a true verdict "according only to the evidence presented to [them] and to the instructions of the court." Moreover, and equally as significant, the alternate jurors' oath failed to obtain the juror's agreement to render a verdict according only to the evidence presented and the instructions of the court. The alternate jurors at appellant's trial were sworn to the following oath.

> You understand and agree that you will act as an alternate juror in the case now pending before this court by listening to the evidence and instructions of this court, and will act as a trial juror when called up to do so. (4RT 856-857.)

Furthermore, ambiguity attends the language of the oath taken by the alternate jurors. While it may clearly bind the alternate juror to listen to the evidence and instructions and to "act as a trial juror" when called upon to do so, the oath itself fails to explain what "acting as a trial juror" entails. In short, the alternate jurors swore to an oath that failed to explain the meaning of acting as a trial juror, the thrust of which is to render a true verdict according to the evidence presented and the instructions of the court.

Whichever the intended result, it is nevertheless clear that a significant aspect of the juror's oath as set forth in Code of Civil Procedure section 232, subdivision (b), is omitted, *viz.*, the agreement to render a true verdict according only to the evidence presented to the jury and to the instructions of the court.[53] For that

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[53]. The importance of the juror's oath in the context of a criminal trial was recognized by our Supreme Court in *People v. Holloway* (1990) 50 Cal.3d 1098. There, the Court held it is misconduct for a juror to receive information outside

reason, the alternate juror's oath administered in this case may not be found to be the equivalent of the required oath.

A juror's obligation to base his or her decision on the facts and the law is also set forth in CALJIC No. 1.00. However, this instruction, as it was given to appellant's jury, is also not an effective substitute for the proper jurors' oath.[54] While

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of court relating to the pending case because jurors in a criminal action are sworn to render a verdict according to the evidence and made specific reference to Code of Civil Procedure section 232, subdivision (b). (*Id.*, at p. 1108.)

[54]. The court instructed the jury with CALJIC No. 1.00, as follows:

Members of the Jury:

You have heard all the evidence, and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A "fact" is something proved by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty. You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences. (37CT 10709-10710.)

the instruction informs the jurors that they must accept and follow the law as it is stated to them and that they must apply the law to the facts, the instruction is not a substitute for the oath because an important component of the oath, *the juror's agreement* to base his or her verdict only upon the facts and the law, is absent.

Code of Civil Procedure section 232, subdivision (b), requires that the oath, as stated therein and reproduced above, must be read to and agreed to by the jury as soon as jury selection is completed. (*People v. Chavez*, *supra*, 231 Cal.App.3d at p. 1484.) This was not achieved here.

In *People v. Cruz* (2001) 93 Cal.App.4th 69, the trial court incorrectly administered the juror's oath by giving a version that did not ask the jurors to agree to follow the instructions of the court. The Court of Appeal upheld the judgment, reasoning that statutory and case law separately established a juror's duty to determine the facts and render a verdict in accordance with the court's instructions on the law and further presuming that the jury had performed its "official duty" by following the instructions given. The Court of Appeal viewed both the court's instructions regarding the jury's duty and the juror's oath as mere reminders of the jurors' duty. Cruz argued that it was sophistic to rely on the trial court's instructions to the jury as a basis to conclude the jurors followed the law, unless they explicitly agreed to follow the instructions. However, the Court of Appeal rejected this contention on the ground the jurors had a separate duty, independent of that embedded within the jurors' oath, to follow the court's instructions. (*Id.*, at p. 73.)

Appellant respectfully disagrees with the holding in *Cruz*. The stating of an oath is not an empty formality. In other contexts, courts have recognized the important function of an oath. The United States Supreme Court has explained that out-of-court statements lack reliability and are traditionally excluded because such statements "'are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements.'" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, quoted in *People v. Garcia* (2005) 134 Cal.App.4th 521, 573.) A child

witness is not required to have a religious belief or a detailed knowledge of the meaning of an "oath." However, courts require that there be the functional equivalent of an oath. The child must demonstrate on the record that he or she understands it is bad to lie and that some consequence may fall upon him or her if he or she does not tell the truth. (*People v. Berry* (1968) 260 Cal.App.2d 649, 652.) The United States Supreme Court has also distinguished between "actual jurors sworn under oath" and all others in evaluating the use of studies predicting the behavior of actual jurors on issues pertaining to death qualification of jurors. In *Lockhart v. McCree* (1986) 476 U.S. 162, the Court considered the question of whether the exclusion of jurors opposed to capital punishment either resulted in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. The Court expressed serious doubts about the value of studies based on responses by individuals randomly selected from a segment of the population in predicting the behavior of actual jurors. (*Id.*, at p. 171.) And, in *Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, the United States Supreme Court discussed several alternatives to the imposition of prior restraint upon pretrial publicity. Here, once again, the Court recognized the importance of a juror's oath in two ways. First, the Court identified as an alternative to prior restraint of publication "the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." The next alternative identified by the Court was sequestration of the jury after it was sworn. Sequestration, the Court noted, "emphasizes the elements of the jurors' oaths." (*Id.*, at p. 564.)

Appellant respectfully asserts that it is as sophistic to rely on a juror's supposed awareness of his or her duty, apart from the juror's sworn oath to follow the law and instructions of the court, to determine the facts and follow the law given by the court in rendering a verdict as it would be sophistic to contend that trial witnesses need not be sworn to tell the truth because witnesses have an independent duty to tell the truth in a court of law. The reality is that trial jurors today, and certainly jurors in

Los Angeles where appellant was tried, are drawn from a multiethnic, multicultural, multinational, polyglot stew. An understanding of a juror's duties is not a prerequisite to citizenship and the ensuing responsibilities of jury duty. If the functional mechanics of the trial process were so well known to all of us, i.e., if we were all aware of our duties as a juror to the degree contemplated in *Cruz*'s reliance on that awareness, the California Courts official website would not find it necessary to explain these very duties to us. (See fn. 52, *supra*.)

The juror's oath as set forth in Code of Civil Procedure section 232, subdivision (b), serves a necessary function in ensuring a criminal defendant will receive the constitutionally mandated fair and impartial trial. The oath informs the juror of his duties and obligations and secures his agreement to carry out those duties and obligations.

D. STANDARD OF REVIEW AND PREJUDICE

Here, the rendering of verdicts at guilt and penalty phases of the trial by jurors who were not bound by the court to base their verdicts only upon the facts adduced at trial and the law as provided by the court constituted structural error that requires automatic reversal. In *Arizona v. Fulminante* (1991) 499 U.S. 279, the United States Supreme Court discussed harmless error analysis and distinguished between "trial errors," which are subject to the general rule that constitutional error does not require automatic reversal, and "structural errors," which "defy analysis by harmless-error standards" and require reversal without regard to the strength of the evidence or other circumstances. (*Id.*, at pp. 306-310.) *Arizona v. Fulminante* characterized trial errors as those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." (*Id.*, at pp. 307-308.) Structural errors, on the other hand, are "structural defects in the constitution of the trial mechanism . . . affecting the

framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.*, at pp. 309-310.)

In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the United States Supreme Court held that a constitutionally deficient reasonable doubt instruction may amount to a structural defect in the trial mechanism. *Sullivan* explained why harmless error analysis cannot be applied to such an error. "Harmless-error review looks . . . to the basis on which the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Because a constitutionally defective reasonable doubt instruction renders it impossible for the jury to return a verdict of guilty beyond a reasonable doubt, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." (*Id.*, at p. 280.)

In the present case, the failure of the trial court to secure each of the 12 jurors' sworn oath to render a true verdict according only to the facts and the law makes it impossible to determine that the error was harmless beyond a reasonable doubt because it is impossible to assess "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) As appellant has noted above, the courts have recognized that the

sworn oath is an important element of the constitutional guarantee to a trial by an "impartial jury." "'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

Thus, the failure of the trial court to ensure that appellant was tried by a jury all of whose members were sworn to carry out their duty to be a fair and impartial jury created structural error requiring that the guilt and penalty phase verdicts be set aside.

In *People v. Cruz*, *supra*, the Court of Appeal imposed upon the defendant the burden of proving the error prejudiced him. The court reasoned that the presumption that the jury had properly performed its official duty affected the burden of proof by imposing the burden upon the party against whom the presumption operates. (*People v. Cruz*, *supra*, 93 Cal.App.4th at p. 74.) However, as appellant has discussed above, *Cruz*' presumption the jury had properly performed its official duty was predicated upon its determination that statutory and case law establish a juror's duty independent of the juror's oath.

A presumption that the jury had properly performed its official duty derives from Evidence Code section 664.[55] Appellant respectfully asserts that in relying on this presumption the Court of Appeal in *Cruz* failed to consider that California state law establishes that a citizen who does not take the required juror's oath is manifestly not a "trial juror" with "official duties," from which the regular

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[55]. Evidence Code section 664 states in relevant part: "It is presumed that official duty has been regularly performed. . . ."

performance of such duties may be presumed. Appellant has pointed out above[56] that in California "trial jurors" are those "sworn" to try the cause and that a "trial jury" is a body of persons "sworn" to try the cause. (Code Civ. Proc., § 194, subds. (o), (p); Pen. Code, §§ 1089, 1093.) California law further recognizes that an important distinction exists between a sworn juror, i.e., a juror with official duties, and a prospective juror, i.e., one without official duties. Code of Civil Procedure section 226, subdivision (a), affords protection to the sworn juror invested with official duties, i.e., the juror invested with the power to act in a case, by prohibiting challenges to an individual juror once the juror is sworn.[57] Moreover, the presumption the jury will obey the court's instructions and fulfill their duties as jurors is based on the fact the jury has sworn to do so. This Court has long stated this to be so. "It will be presumed that jurors are true to their oaths and follow the various admonitions and instructions of the court." (*People v. Sparks* (1967) 257 Cal.App.2d 306, 309, citing *People v. Burkhart* (1931) 211 Cal. 726, 733; *People v. Isby* (1947) 30 Cal.2d 879, 896; *People v. Green* (1939) 13 Cal.2d 37, 45.) Thus, it appears that *Cruz* relies upon a presumption (official duty regularly performed) that this Court has historically grounded in the existence of a jury sworn to an oath to prove that all members of a jury need not take the juror's oath. An analysis such as this cannot be sustained. For that reason, appellant respectfully submits it is respondent and not he that bears the burden of persuasion here.

Cruz noted that in *People v. Lewis* (2001) 25 Cal.4th 610, this Court also placed the burden upon the defendant to show that he was prejudiced by the trial court's failure to administer the jury oath not to commit perjury during voir dire (Code Civ. Proc., § 232, subd. (a)). Appellant respectfully contends there is an

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[56]. Please see Section B, *supra*, "The Right to a Jury Trial Encompasses the Right to a Jury of Twelve Sworn Jurors."

[57]. Code of Civil Procedure section 226, subdivision (a), states: "A challenge to an individual juror may only be made before the jury is sworn."

important distinction in the prejudice that results from improperly administered oaths under subdivisions (a) and (b) of Code of Civil Procedure section 232. A defendant has the opportunity to mitigate any prejudice that flows to him from an omitted or improperly administered subdivision (a) oath through the voir dire process that permits court and counsel to vet both the prospective juror and his responses to the questions. For example, in *People v. Weaver* (2001) 26 Cal.4th 876, 909, this Court reasoned that when a trial court fails to admonish prospective jurors against discussing the case, or prematurely forming an opinion about the case, or viewing the crime scene, or doing legal research, the voir dire process can be used to excuse or rehabilitate offending prospective jurors. Under the circumstances described in *Weaver*, imposing the burden to show prejudice upon the defendant seems appropriate. In contrast, appellant has no opportunity to assess whether jurors improperly sworn under subdivision (b) determined the facts only from the evidence adduced at trial and applied it only to the law as provided by the court. In addition, fundamental differences distinguish the prospective juror's oath from that of the trial juror. The prospective juror promises to answer questions accurately and truthfully. The trial juror promises to try the cause and render a verdict according to the evidence presented and the instructions of the court. The trial juror's oath empowers the juror to act and exacts the juror's pledge to do so under certain conditions. (See Code Civ. Proc., § 232, subds. (a), (b), *supra*.)

Thus, as with the prejudice flowing from error pertaining to the reasonable doubt instruction discussed by *Sullivan v. Louisiana*, *supra*, the failure to administer and secure the oath to the jurors in this case is structural error because there is no object upon which to apply harmless error scrutiny. As *Sullivan* observed, the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) Accordingly, error resulting from the omission or improper administration of

Code of Civil Procedure section 232, subdivision (b), constitutes structural error warranting reversal of the judgment of conviction. Here, unsworn jurors participated in guilt and penalty phase verdicts, requiring reversal of the judgment of conviction.

Moreover, depriving appellant of the protection afforded under the principles here discussed is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a jury properly sworn to render a true verdict according only to the evidence presented to them and to the instructions of the court (Code Civ. Proc., § 232). (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Moreover, as appellant has noted above, properly sworn jurors who have agreed to carry out their duty serve to ensure the accuracy of the truth-finding process. Jurors who are not sworn to carry out their duty increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

PENALTY PHASE ISSUES

XI.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO SET ASIDE ALL PRIOR DISCUSSIONS RELATING TO PENALTY AND BEGIN PENALTY DELIBERATIONS ANEW WHEN TWO JURORS WERE REPLACED BY ALTERNATE JURORS AFTER THE GUILT VERDICT HAD BEEN REACHED AND THE PENALTY CASE HAD BEEN SUBMITTED TO THE JURY. THIS ERROR DEPRIVED APPELLANT OF THE RIGHT TO A JURY DETERMINATION OF THE PENALTY AND THE RIGHT TO DUE PROCESS OF LAW

Appellant's Fifth and Fourteenth Amendment rights to due process of law and his Eighth Amendment right to a reliable determination of penalty were violated when the trial court failed to instruct the jury that it was required to set aside and disregard all prior discussions relating to penalty and to begin penalty deliberations anew after two jurors were replaced in seriatim by alternate jurors. Reversal is required.

A. REPLACEMENT OF THE JURORS AND THE INSTRUCTIONS GIVEN THE RE-CONSTITUTED JURIES

The penalty phase jury began its deliberations at 11:20 a.m. on June 26, 2000. (38CT 11121-11122.) The jury deliberated for a full day on June 27th and for a half day on June 28. (39CT 11124-11127, 11130-11131.) On the morning of June 29, at 10:10 a.m., the jury foreperson delivered a note to the court reporting the jury was divided 10-2 on the penalty verdict and at an impasse. (38CT 11132; 18RT 4443.) The court then excused the jury for the day. Some minutes later, at 10:35 a.m., the jury foreperson returned to the courtroom and in an addendum to his earlier note stated that Juror No. 10 had discussed the case with

both her friend and her mother. (38CT 11130, 11132; 18RT 4443.) On the next court day, June 30, Juror No. 10 was discharged for misconduct and replaced by an alternate. (38CT 11134-11137; 18RT 4442-4459, 4467-4469.)

After the new Juror No. 10 was seated, the trial court addressed the jury, instructing them as follows:

> Members of the Jury:
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> A juror has been replaced by an alternate juror.
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> The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions, during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point. For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. Your function now is to determine along with the other jurors, in the light of the prior verdict or verdicts, and findings, and the evidence and law, what penalty should be imposed. Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial. (CALJIC No. 17.51.1; 38CT 11119; 18RT 4470.)

The jury began its deliberations with the newly seated Juror No. 10 at 9:20 a.m. on June 30. At 11:35 a.m., the jury foreperson sent a written note to the court disclosing that the jury numbers were divided at 11-1. The jury was excused for the day and ordered to return on July 3, 2000. (38CT 11133-11137.)

On Monday, July 3rd, court and counsel conferred over a written request from Juror No. 9 who asked to be excused from the jury because she felt the stress of continued service would be detrimental to the health of her unborn child. (3 Supp.CT 823; 18RT 4475.) Following a hearing with the juror, the court discharged

Juror No. 9 over the objections of the defendants and denied their motion for mistrial. (38CT 11138-11141; 18RT 4476-4484.)

Juror No. 9 was replaced at 10:45 a.m. on July 3rd. (38RT 11138-11141, 39RT 11146-11147, 18RT 4495-4498.)

After a new Juror No 9 was seated, the trial court repeated the instructions it had given after Juror No. 10 was replaced. (38 CT 11118; 18RT 4491.) The jury began deliberations with the newly seated Juror No. 9 at 10:45 a.m. Fifty minutes later, at 11:35 a.m., the jury announced it had reached its verdicts for both appellant and Satele. The jury was excused for the day. On July 6, the jury's verdicts setting the penalty at death for both defendants were read and recorded. (38CT 11138-11141; 18RT 4496-4497.)

These instructions were insufficient admonitions on how the jury should conduct its deliberations as a newly constituted panel because the instructions failed to require the newly reconstituted jury to disregard prior deliberations and begin anew.

B. THE RELEVANT LAW

The Sixth Amendment to the federal constitution guarantees the right to a "trial by jury" in "all criminal prosecutions." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) In *Johnson v. Louisiana* (1972) 406 U.S. 356 and *Apodaca v. Oregon* (1973) 406 U.S. 404, five Justices concluded that in federal criminal cases this right includes the right to a unanimous verdict. Justice Powell, who cast the deciding vote, reasoned as follows:

> In amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law. At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a

unanimous jury verdict to convict in a federal criminal trial. (*Johnson v. Louisiana*, *supra*, 406 U.S. 371, opn of Powell, J.; emphasis added; fn. omitted.)

The Supreme Court has not yet squarely concluded that the Sixth, Eighth, and Fourteenth Amendments require jury unanimity on alternative theories of murder in a capital case. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 630.) However, recent U.S. Supreme Court cases have signaled a trend in this direction. (See, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, 610, and *Blakely v. Washington* (2004) 542 U.S. 296, in which the majority's view is that aggravating factors subjecting a defendant to a greater penalty are facts "that a unanimous jury must find beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610.)

"[U]nder our Constitution, trial of a felony case by less than 12 jurors is valid only upon waiver as formal as that required for trial without any jury." (*Crump v. Northwestern Nat. Life Ins. Co.* (1965) 236 Cal.App.2d 149, 154.) This fundamental principle of law is reflected in numerous provisions which require full participation of all twelve jurors at the same time, in attendance at the same hearing, listening to the same evidence. During periods of recess, the individual jurors are prohibited from discussing the trial and/or deliberating until all 12 jurors are reassembled in the jury room. (BAJI No. 15.40, 7 Witkin, *California Procedure*. 4th (1997) Trial, §292.) When interpreters translate the testimonies of witnesses, jurors familiar with the particular language being interpreted must rely on the version provided by the interpreter so that all jurors are receiving the same evidence. (See, e.g., *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303-304.)

Prior to 1933, substitution of a juror with an alternate was prohibited after final submission of a case to the jury. (*People v. Collins* (1976) 17 Cal.3d 687, 691, overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) Penal Code section 1089 now authorizes such a substitution upon a showing of

good cause. However, while such substitutions are permissible, substitution of a juror after the case has been submitted to the jury creates special problems. Indeed, the recognition that all jurors must equally participate in rendering the verdict is the reason that many jurisdictions do not permit substitution of alternates after the jury has retired to deliberate.[58]

Whenever an alternate juror is substituted for an original juror after deliberations have begun, the trial court must instruct the jurors sua sponte to set aside and disregard their prior deliberations and begin deliberations anew. (*People v. Collins*, *supra*, 17 Cal.3d at p. 694; *People v. Martinez* (1984) 159 Cal.App.3d 661, 664-665.) *Collins* grounded its ruling on the jury trial provision of the California Constitution, article I, section 16. (*People v. Renteria* (2001) 93 Cal.App.4th 552, 558-559; *People v. Collins*, *supra*, 17 Cal.3d at p. 692, fn. 3.) In *Collins*, this Court recognized that, while Penal Code section 1089 does not expressly require an admonition to disregard previous deliberations and to begin anew, the statute must be construed to require such an admonition to pass constitutional muster. "We accordingly construe section 1089 to provide that the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew." (*People v. Collins*, *supra*, 17 Cal.3d at p. 694.)

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58. See *People v. Ryan* (New York, 1966) 19 N.Y.2d 100, 278 N.Y.S.2d 199, 224 N.E.2d 710; *Woods v. Commonwealth* (Kentucky, 1941) 287 Ky. 312, 152 S.W.2d 997, 998-999; *People v. Burnette* (Colorado,1989) 775 P.2d 583, 588; *Claudio v. State* (Delaware, 1991) 585 A.2d 1278, 1285; *State v. Bobo* (Tenn.Crim.App 1989) 1989 WL 134712, 13.)

The federal rules also prohibit the substitution of jurors after deliberations had begun, although several federal cases had found harmless error when the federal rule was violated. (*United States v. Phillips* (5th Cir. 1981) 664 F.2d 971, cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); accord, *United States v. Kopituk* (11th Cir.1982) 690 F.2d 1289.)

This Court and the appellate courts have regularly applied *Collins* in the years since it was decided. (*People v. Valles* (1979) 24 Cal.3d 121, 128 [admonition must be given even though alternate who was substituted to replace discharged juror had been in jury room during deliberations]; *People v. Odle* (1988) 45 Cal.3d 386, 405 [instructing jury to start deliberations "from scratch" was proper, but implication that new juror could be brought up to speed with respect to earlier deliberations was not]; *People v. Anderson* (1990) 52 Cal.3d 453, 482 [court not required to voir dire jurors upon substitution of alternate during penalty phase deliberations in capital case to ascertain their ability to follow instruction to disregard previous deliberations and begin anew]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1028 [admonition not required when alternate is substituted in after guilty verdict in capital case but before deliberations on penalty phase have begun]; *People v. Martinez* (1984) 159 Cal.App.3d 661, 664 [not enough to instruct jury to begin deliberations anew; jury also must be admonished to disregard all past deliberations, lest views of discharged juror be used in reaching decision]; *People v. Renteria* (2001) 93 Cal.App.4th 552, 556-561 [failure to give newly reconstituted jury mandatory instruction that it must disregard its previous deliberations and begin deliberations anew constituted reversible error.)

Collins' holding is covered in CALJIC No. 17.51, which the trial court failed to give. Instead, the trial court instructed appellant's jury with the pattern instruction set forth, as noted above, in CALJIC No. 17.51.1. This latter pattern instruction was prompted by *People v. Cain* (1995) 10 Cal.4th 1, 66-67, and is intended for use on the occasion when an alternate juror is substituted in after guilt determination but before the penalty phase is submitted to the jury. The seating of alternate jurors as members of the trial jury in discussion here occurred after penalty phase deliberations began. Hence, CALJIC No. 17.51.1, which the trial court gave, or its equivalent, was *not* required to be given here.

Rather, the instruction the trial court was required to give appellant's jury was CALJIC No. 17.51, which states:

> Members of the Jury:
>
> A juror has been replaced by an alternate juror. You must not consider this fact for any purpose.
>
> The People and the defendants have the right to a verdict reached only after full participation of the twelve jurors who return the verdict.
>
> This right may be assured only if you begin your deliberations again from the beginning.
>
> You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.
>
> You shall now retire to begin anew your deliberations in accordance with all of the instructions previously given.[59] (CALJIC (6th ed. 1996) CALJIC No. 17.51.)

In *People v. Renteria*, *supra*, 93 Cal.App.4th 552, an alternate juror was seated in place of a deliberating juror who had become ill. The Court of Appeal, relying on *Collins*, *supra*, held that the trial court erred in failing to instruct the newly

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[59]. CALCRIM No. 3575 is the equivalent pattern instruction in the CALCRIM series. The Bench Note to the instruction informs: "The court has a **sua sponte** duty to give this instruction if an alternate juror has been seated. [Citations.]" (Emphasis in the original.)

CALCRIM No. 3575 states: "One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. [¶] Do not consider this substitution for any purpose. [¶] The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendants have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place. [¶] Now, please return to the jury room and start your deliberations from the beginning."

constituted jury that it was required to disregard its previous deliberations and begin new deliberations.

The jury in *Renteria* had deliberated a number of hours and had sent out a note announcing that it was unable to reach a verdict. Within minutes, a juror declared she was ill, was excused by stipulation, and replaced by an alternate. The trial court instructed the jury to "go back into the jury room and continue your deliberations." The alternate had been permitted to be in the jury room during its earlier deliberations, but was under an instruction not to participate. Thirty minutes after the jury was reconstituted by substitution of the alternate, it returned with guilty verdicts and true findings on the special allegations. (*Id.*, at p. 557.)

The Court of Appeal found that the failure to give the jury that included the newly seated alternate the mandatory instruction that it disregard its previous deliberations and begin deliberations anew was constitutional error under the California Constitution, requiring reversal under the standard of *People v. Watson* (1956) 46 Cal.2d 818.

C. APPLICATION OF THE LAW

The chronological record of the case demonstrates that the failure to properly admonish the jury prejudiced the outcome. Here, the trial court replaced Jurors 10 and 9 with alternate jurors, in seriatim. On each occasion, the trial court was required to instruct the newly constituted juries to disregard its previous deliberations and begin deliberations anew (CALJIC No. 17.51). On each occasion, the trial court failed to fulfill this duty and in so failing created error of constitutional proportions reviewable under the standard of *People v. Watson* (1956) 46 Cal.2d 818.

The penalty phase jury began its deliberations at 11:20 a.m. on June 26, 2000. (38CT 11121-11122.) The jury deliberated for a full day on June 27 and for a half day on June 29. (38CT 11124-11127.) On the morning of June 29, the jury resumed its deliberations at 9:30 a.m. (38CT 11130-11131; 18RT 4437-4441.) At

10:10 a.m., the jury foreperson delivered a note to the court reporting the jury was divided 10-2 on the penalty verdict and at an impasse. (38CT 11132; 18RT 4443.) The court then excused the jury for the day. Some minutes later, at 10:35 a.m., the jury foreperson returned to the courtroom and in an addendum to his earlier note stated that Juror No. 10 had discussed the case with both her friend and her mother. (38CT 11130, 11132; 18RT 4443.) Juror No. 10 was replaced with an alternate on the next court day, June 30th. (38CT 11134-11137; 18RT 4442-4459, 4467-4469.) The jury with the newly seated Juror No. 10 began its deliberations at 9:20 a.m. At 11:35 a.m., the jury foreperson informed the court in a written note that the jury was divided at 11-1. The trial court excused the jury for the day to July 3, 2000. (38CT 11133-11137.)

On July 3, the court held a hearing concerning a written request for disharge for medical reasons by Juror No. 9. Juror No. 9 was replaced by an alternate at 10:45 a.m. (38CT 11138-11141; 18RT 4476-4484.) At 11:35 a.m., a mere fifty minutes later, the jury announced it had reached its verdicts. (38CT 11138-11141; 18RT 4495-4498.)

This record shows that appellant would have received a better result but for the trial court's failure to properly instruct his jury. The cold face of the record shows that the jury had deliberated for the equivalent of two and a fraction days before the first reconstitution of the jury occurred. Immediately prior to the seating of the new Juror No. 10, the jury had declared itself divided at 10 to 2 and at an impasse. In a little over two hours *after* the reconstituted jury began its deliberations, the jury was again at an impasse but its numbers had shifted to 10 to 1. Because the jury ultimately fixed the penalty at death for appellant it is reasonable to infer that the shift in jury numbers from 10 to 2 to 10 to 1 was adverse to appellant's interests.

The second reconstitution of the jury occurred on the morning of the next court day. Jury deliberations began at 10:45 a.m. with a newly seated Juror No.

9. Within fifty minutes, the jury delivered unanimous verdicts in the case for both appellant and Satele.

The immediacy with which each of the two reconstituted juries reached a reportable decision (first, the 10 to 1 split, and then the penalty verdicts) is powerful evidence that these two incarnations of the jury had not disregarded prior deliberations and deliberated anew as appellant was entitled to have it do. Rather, the extremely short timeframes suggest that the majority's view carried in the absence of meaningful deliberation that included the views of the jury's most recent member.

And, the shift in the division of the numbers strongly suggests appellant would have achieved a better result had the jury been properly instructed to begin anew. Here, the penalty phase jury as originally constituted was divided at 10 to 2 after deliberating for the equivalent of two-plus days, during which time it presumably reviewed and considered all of the evidence before it. The short time that elapsed between seating of the alternate as Juror No. 10 and the reported shift in jury division and impasse strongly suggests that the majority view prevailed in the absence of proper deliberation. The even shorter time that elapsed between the seating of the alternate as Juror No. 9 and the verdict fixing the penalty at death *confirms* that the majority view prevailed in the absence of proper deliberation. And, significantly, the jury reached and returned verdicts for both appellant and codefendant Satele under the timeframes reported here.

In *People v. Renteria*, *supra*, the Court of Appeal found prejudicial error under the *Watson* standard in part on the basis of the shortness of time between the substitution of the alternate and the verdict. Although *Renteria* considered the failure to instruct a reconstituted jury to begin anew in the context of a guilt, rather than penalty, determination, its analysis informs the present discussion and so appellant reproduces it here:

> In the case before us, the jury had deliberated some hours before the substitution was made, but reached a verdict some 30 minutes after

> it was made. The jury had reported itself at impasse, unable to reach a verdict, at almost the same time the ill juror said she could not continue to serve that afternoon, and was discharged for that reason. The entire case depended on identification: there was no doubt that a carjacking had occurred, the only question being whether defendant was the carjacker. It could have been he, or one of the other men at the house where the carjacked vehicle was found. The victim, the only eyewitness to the crime, recanted his on-the-scene identification. The crime itself was brief, and committed in the nighttime. Finally, there were some discrepancies in identification. On the other hand, there was the victim's field identification, apparently admissible under the prior inconsistent statement and prior identification hearsay exceptions (Evid. Code, §§ 1235, 1238), and the inference that he had changed his testimony out of fear of gang retaliation. Resolution of the conflicting evidence was for a properly instructed jury to determine.
>
> Taking all the circumstances into account, including especially the fact that the only contested issue in the case was identification, the only eyewitness did not testify that defendant was the carjacker, and the very short time that elapsed between substitution of the alternate to the jury and the verdict, we cannot say the error was harmless. (*People v. Renteria*, *supra*, 93 Cal.App.4th at p. 560-561.)

In appellant's case, the jury was tasked with determining whether to fix the punishment at death for both appellant and Satele in a case in which the prosecution had not only failed to establish the identity of the actual killer but any of the events that occurred within the car from which the shots were fired before, during, and after the shooting. Consideration of the evidence received during any part of the trial, circumstances of the crime, and conflicting evidence concerning appellant's character were but a few of the matters for the jury's consideration. Taking all of these circumstances into account, the trial court's failure to correctly instruct the jury that it must disregard its prior deliberations and begin its deliberations anew was not harmless error.

Depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment

to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in having the jury correctly instructed to set aside deliberations and begin the process anew as a means of ensuring that the verdict is the product of the deliberations of all twelve jurors. Indeed, as noted above, in *People v. Collins*, *supra*, 17 Cal.3d 687, this Court explained that failing to give this admonition would impinge on the right to trial by jury. Therefore, to deprive appellant of this protection is a violation of due process of law. (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold appellant's convictions in violation of these established legal principles would also be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Finally, the participation of all twelve jurors helps ensure that the death penalty is imposed as a result of full and fair deliberations. As such, it is an essential part of ensuring the greater reliability of the verdict, as required in capital cases by the Eighth and Fourteenth Amendments of the Constitution of the United States. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334.); *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

D. CONCLUSION

For the reasons set forth above, appellant respectfully submits the trial court created error of constitutional proportion when it failed to correctly instruct the jury that fixed his penalty at death that it was required to disregard its prior

deliberations and begin deliberations anew when the court replaced Juror 9 and Juror 10 with alternate jurors. The error was prejudicial as explained above and reversal of the penalty phase verdicts is warranted.

XII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR UNDER *WITHERSPOON V. STATE OF ILLINOIS* (1968) 391 U.S. 10 AND *WAINWRIGHT V. WITT* (1985) 469 U.S. 412, VIOLATING APPELLANT'S RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY EXCUSING A PROSPECTIVE JUROR FOR CAUSE DESPITE HER WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

The trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating appellant's rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, by excusing a prospective juror for cause despite her willingness to fairly consider imposing the death penalty.

A. THE RELEVANT LAW

The Sixth Amendment to the federal constitution guarantees the right of a jury trial to criminal defendants in state courts. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) This right is also secured by article I, section 16, of the California constitution. (Cal. Const., art. I, § 16.)

In *Witherspoon*, *supra*, the United States Supreme Court held that a sentence of death violated the Sixth and Fourteenth Amendments and could not be carried out where the jury that recommended it was chosen by excluding venire persons for cause simply because they voiced general objections to the death penalty. At the time, the relevant statute in Illinois allowed for challenges to prospective jurors who had "conscientious scruples against capital punishment." (*Id.*, at p. 512.) The prospective jurors at issue in *Witherspoon* all had made clear that their reservations

about capital punishment would not prevent them from making an impartial decision as to the defendant's guilt. (*Id.*, at p. 513.)

The Supreme Court reasoned in *Witherspoon* that excluding all people with scruples against the death penalty from the jury eliminates a substantial portion of the population and results in a jury that is not representative of the community. (*Id.*, at pp. 519-520.) Therefore, *Witherspoon* held that it is not permissible to excuse prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," as long as they could obey their oath to follow the law. (*Id.*, at p. 522.)

The Court modified the *Witherspoon* standard in *Adams v. Texas* (1980) 448 U.S. 38, a capital case involving the murder of a police officer. The Court explained that *Witherspoon* and its progeny "establish the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Instead, a state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*) Prospective jurors could **not** be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." (*Id.*, at p. 50.) Rather, a prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (*Id.*, at p. 48.) Moreover, as the Court later made plain in specifically re-affirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 423.)

Witt explained that *Witherspoon* is not based on the Eighth Amendment prohibition on cruel and unusual punishment, but on the Sixth Amendment jury rights.

(*Id.*, at p. 423.) Thus, it is for the party seeking the exclusion to demonstrate through questioning that the potential juror lacks impartiality. (*Ibid.*)

In two decisions involving the erroneous dismissal for cause of death-scrupled jurors, this Court has stressed the importance of adhering faithfully to *Witt*. (*People v. Stewart* (2004) 33 Cal.4th 425; *People v. Heard* (2003) 31 Cal.4th 946). Thus, this Court explained in *Stewart*:

> [T]he circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412, 105 S.Ct. 844. . . . A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Stewart, supra*, at p. 447)

" '[T]he burden of demonstrating to the trial court that this standard [is] satisfied as to each of the challenged jurors' is on the prosecution, as the moving party." (*Stewart*, *supra*, 33 Cal.4th at p. 445, citing *Witt*, *supra*, 469 U.S. 412, 423.)

Stewart's death sentence was reversed because the trial judge granted the prosecution's motion to excuse for cause five prospective jurors based solely on the answers on juror questionnaires which expressed reservations about the death penalty. The trial judge declined to question the prospective jurors further.

Similarly, in *Heard,* the trial court erroneously excused a prospective juror for cause who had given answers on the questionnaire that reflected a philosophical opposition to the death penalty. When questioned on voir dire, however, the prospective juror had stated that he would do "whatever the law states." (*Id.*, at p. 960.)

This Court explained that that prospective juror's initial responses on the questionnaire, "given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support H.'s excusal for cause." (*Id.*, at p. 964.)

In summary, while a prospective juror may be excused for cause when the juror indicates that his or her personal and/or religious beliefs would prevent the prospective juror from returning a verdict of death, mere generalized opposition to the death penalty is not a sufficient ground for cause when the prospective juror indicates that he or she would be able to overcome those beliefs and render a verdict according to the law.

B. APPLICATION OF THE LAW TO THE FACTS OF THE CASE

Applying the law as described above to the instant case, it is clear that the trial court erred in allowing the challenges for cause made by the Deputy District Attorney to Prospective Juror No. 2066.

After the prosecution made a motion to exclude Prospective Juror No. 2066 for cause based on his/her responses on the questionnaire, No. 2066 was questioned as to those responses. In response to Question No. 230A, which asked whether the prospective juror would refuse to convict to prevent the penalty phase from taking place in the circumstance that the prosecution had proven first degree murder beyond a reasonable doubt and the juror believed the defendant was guilty. No. 2066 had replied, "I don't know yet." (3RT 618-619.) When asked to clarify, No. 2066 said, "Undecided. I would kind of make it lenient." (3RT 619.)

In response to Question No. 230C, which asked if the defendant had been convicted of first degree murder with a finding of a special circumstance, whether the prospective juror would automatically vote for life imprisonment without considering aggravating or mitigating factors, No. 2066 had replied, "Yes." (3RT 619.) However, in the follow up questions which asked if the answer to the preceding

question had been "yes," whether she would change her answer if instructed by the court that she had to consider and weigh the aggravating and mitigating factors, No. 2066 had replied, "I might." (3RT 620.)

Seeking to clarify this seeming difference, the court noted that No. 2066 said in the questionnaire that she was "strongly opposed to the death penalty," but believed that there were "rare cases where a death sentence was appropriate." (3RT 620.) When asked, No. 2066 confirmed that was her view. (3RT 620.)

Asked again whether if instructed by the court to consider and weight the aggravating and mitigating factors, whether No. 2066 would be able to impose the death penalty if she felt it was warranted, No. 2066 answered, "I probably would be hesitant. I wouldn't want to vote for it [–]the death penalty." (3RT 620-621.)

In response to a question from the prosecution as to whether the decision to fix the penalty at death would be such a difficult decision to make that No. 2066 could not vote for death, No. 2066 replied, "Yes." (3RT 621.)

Counsel for appellant Mr. McCabe then asked No. 2066:

> Is it correct that after you hear all of the evidence you will follow the instructions on the law and do what the law requires you to do in this state based upon how you find the facts to be? (3RT 622.)

No. 2066 replied, "I'll do my best, yes." (3RT 622.)

The following exchange then took place:

> The Court: Okay. Let me get this straight in my mind. You feel not at ease with voting for the death penalty should you be required to do so. Right?
>
> Prospective Juror No. 2066: Yes
>
> The Court: But you would not automatically exclude that possibility if you feel the case is warranted, am I right?

Prospective Juror No. 2066: If there were other alternatives, I would probably choose – look at those first before choosing the death penalty.

The Court: All right, that sounds fair.

When we go – in a case, when it goes to the penalty phase, there will only be two alternatives, as I understood it. One is the death penalty, one is life imprisonment without possibility of parole.

Would you weigh the evidence to decide which alternative between the two you should choose? And if the evidence warrants that the person should get life imprisonment without the possibility of parole, would you vote for that?

Prospective Juror No. 2066: Yes.

The Court: And if the evidence on the aggravation and mitigation warrants that the imposition of the death penalty be imposed, would you be able to vote for death, knowing there is a possibility that you could chose life without the possibility of parole?

Prospective Juror No. 2066: Yes. (3RT 622-623.)

The following exchange then occurred between the Deputy District Attorney and No. 2066:

Mr. Millington: Ma'am, if confronted with the decision about death and other alternatives, would you look at the other alternatives?

Prospective Juror No. 2066: Right.

Mr. Millington: And with the other alternatives to death would you automatically choose the other alternatives?

Prospective Juror No. 2066: I would have to see what the other alternatives were. (3RT 623-624.)

Asked if she would automatically vote for life in prison, No. 2066 replied, "Yes." The prosecutor then asked: "Even if I put on a bunch of aggravating factors about various things, would you still vote for that life sentence?" No. 2066 replied: "Yes, I think I would." (3RT 624.)

In response to questions from counsel for appellant, No. 2066 indicated that she would never vote for death. (3RT 625.) However, in response to a follow up question by Mr. McCabe and the trial court she indicated that there could be a case so bad that she could vote for the death penalty, although she would not want to do so. (3RT 626.)

In response to a question from Satele's trial attorney, Mr. Osborne, No 2066 stated that if the prosecutor established that appellant was "a really bad person and that person deserves the death penalty," she stated it would be hard for her to impose that penalty, and she did not know if she could do so. (3RT 627-628.)

The prosecution argued that No. 2066 should be excused for cause because she indicated she would vote for death if it was the only thing she could do, but given a choice between the death penalty and life in prison without possibility of parole, she would vote for the latter as the lesser of two evils. (3RT 628.)

The defense argued that although she hesitated, she did say that she would consider the evidence and that she would make an honest decision. (3RT 629.)

Thereafter, the trial court excused No. 2066 for cause, stating that ruling was based on the trial court's observation of her demeanor and the answers she had given in her questionnaire and in open court. (3RT 630.)

In excusing No. 2066, the trial court erred.

In essence, No. 2066's belief was that it would be difficult to impose a death verdict. However, this manifestly did not preclude her from serving as a juror. As this Court explained in *Stewart*

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. . . . [A] prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her

> duties as a juror. (*Stewart, supra,* at p. 446; accord *Smith v. State* (1887) 55 Miss. 413, 415 – "Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man," quoted in *Witherspoon, supra,* at p. 515.)

No. 2066's answers were similar to those of prospective jurors from other cases who were found to have been wrongfully excused for cause. Namely, while No. 2066 did express philosophical qualms about the death penalty, she stated that she could return a verdict of death.

Thus, No. 2066 is indistinguishable from the juror in *People v. Heard* who initially expressed anti-death penalty views on the juror questionnaire, but then reconsidered his views based on the trial court's explanation of the law.

Furthermore, No. 2066 clearly stated that if she were ordered to consider aggravating factors, she would do so.

Appellant submits that this is exactly the type of juror the state should want on a jury – willing to follow the law in spite of personal beliefs, able to change his or her mind to follow the instructions of the court, and honest enough to express views that may not be popular in the particular setting.

Although No. 2066 had answered questions in the questionnaire which could indicate a bias against the death penalty, this is not a sufficient basis for a challenge for cause when she ultimately indicated a willingness and ability to impose the death penalty when allowed to expand upon her answers after hearing the court's explanation of the law.

Furthermore, depriving appellant of the protection afforded under the principles discussed above is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447

U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Appellant has a constitutionally protected liberty interest of "real substance" in not improperly disqualifying jurors who may have been sympathetic to appellant's position, and yet have indicated that they can be fair jurors to both sides. Consequently, the improper removal of this juror for cause deprived appellant of the right to due process of law. (See *Sandin v. Conner* (1974) 515 U.S. 472, 478). To uphold appellant's conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Because the prohibition against removing all jurors who may have moral qualms about the death penalty, even when those jurors have indicated a willingness to follow the law, tends to skew the jury panel in favor of death, this further impacts the reliability of the decision to impose the death penalty, in violation of Eighth and Fourteenth Amendments which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334); *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Appellant respectfully submits that the foregoing discussion establishes that the trial court erred in granting the prosecution's challenge for cause to Prospective Juror No. 2066.

C. PREJUDICE

Because the *Witherspoon-Witt* standard is based on the constitutional right to an impartial jury, and because the impartiality of the adjudicator goes to the very

integrity of the legal system, the improper exclusion of even one juror under the *Witt-Witherspoon* standard is reversible penalty phase error *per se* even if the prosecutor could have excused the juror anyway by using one of his or her unexhausted peremptory challenges. (*People v. Stewart*, *supra*, 33 Cal.4th 425; *People v. Heard*, *supra*, 31 Cal.4th 946; *Davis v. Georgia* (1976) 429 U.S. 122; *Gray v. Mississippi* (1987) 481 U. S. 648, 668.)

XIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY WHEN IT ERRED IN OVERRULING APPELLANT'S CHALLENGE FOR CAUSE AGAINST JUROR NO. 8971 FOR IMPLIED BIAS AND MISCONDUCT

A. BACKGROUND

The prosecution's theory, as expressed in the pleadings and in the prosecutor's opening statement and summation, was that appellant shot and killed Robinson and Fuller for the benefit of their gang, the Westside Wilmas. (37CT 10674-10676; 4RT 886;14RT 3220-3223.) The information, including gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) allegations contained therein, was read to the prospective jurors at the commencement of the jury selection process. (See, e.g., 2RT 333.) In addition, the written jury questionnaire contained 21 questions devoted to the matter of gangs. (See, e.g., 37CT 10652-10654.) Accordingly, the prospective jurors were each aware that the case they were being called upon to try included evidence and allegations pertaining to criminal street gangs.

At the beginning of the jury selection process, the court gave certain instructions to the prospective jurors, including an instruction that the prospective jurors were not to discuss any subject connected with the trial amongst themselves or with anyone else. "You are admonished that you are not to converse with the other jurors or anyone else on any subject connected with the trial. It is also your duty as a juror not to form or express any opinion thereon until the case has been submitted to you for a decision." (2RT 336.)

At a point during the selection of the jury, the court learned that a prospective juror had described to other prospective jurors how he would resolve the "gang problem." During the inquiry that followed, the court learned that in fact two

prospective male jurors had separately described their solutions to the "gang problem" to other prospective jurors.

After hearings with Prospective Jurors Nos. 2421 and 8971, the court excused Prospective Juror No. 2421 after finding the juror had not complied with the court's instruction to not discuss the case with other jurors and to not form an opinion about the case. (4RT 727-728.)

The court, however, overruled the defense request that Prospective Juror No. 8971 be excused for cause for the same reasons. The record shows that Prospective Juror No. 9825 reported hearing an elderly, tall, slender African-American prospective juror say of gangs: "He would gather all the gangs, put them on an[] island,[60] and let them rule themselves." (4RT 737-738.) Prospective Juror No. 6582 reported that a tall, medium to thin build, prospective juror who used a cane said to him: "He knew what he would do if he had his way. He would send out gang members on a Pacific Island and let them take care of each other." (4RT 742-744.)

Prospective Juror No. 8971 told the court he made the following statement on one occasion when he was out on the courthouse balcony: "I said one of the best solutions that could happen is that all these people that are involved in the gangs, take them out, put them on an island and let them be there, and let them do their own thing, and let them to their own thing without hurting innocent people." (4RT 747.) Prospective Juror No. 8971 said he stated this opinion, which he has held since 1981, to one person. (4RT 748.) The court did not ask the prospective juror whether he thought he could be an impartial juror, nor did the juror offer that

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[60]. The reference to placing gang members on an *island* distinguishes statements attributed to Prospective Juror No. 8971 from those attributed to excused Prospective Juror No. 2421, who reportedly said police should round up gang members and take them into the *desert* and finish up with them in a day. (3 RT 713-714; 4 RT 723.)

evaluation. Appellant asked that the prospective juror be excused because he had considered matters concerning the case and discussed them in violation of the court's instructions and the prospective juror's sworn oath. (4RT 749-751.)

The court found that the prospective juror's statement was an "innocuous comment" and not a willful violation of the court's instruction and made to only one other prospective juror. (4RT 751-752.) The trial court also denied the related defense motion for mistrial based upon the court's failure to excuse Prospective Juror No. 8971. (4RT 753.) After the jury was sworn, counsel for appellant expressed his dissatisfaction with the "result of the picking," i.e., with the jury ultimately selected. (4RT 870.)

Prospective Juror No. 8971 eventually was seated as Alternate Juror No. 2, one of the six alternate jurors on the case. (4RT 851, 857.) The defense exhausted the six peremptory challenges to which it was entitled in the selection of alternate jurors. (4RT 855.) Subsequently, during penalty phase deliberations, Alternate Juror No. 2 (*viz.*, Prospective Juror No. 8971) was seated as Juror No. 10 and was thus a member of the jury that returned multiple death verdicts against appellant. (38CT 10941-10944; 18RT 4463, 4470, 4497-4498.)

B. ANALYSIS

"The right to trial by jury in criminal cases derives from common law and is secured by both the federal and state constitutions. [Citation.]" (*People v. Trejo* (1990) 217 Cal.App.3d 1026, 1029; U.S. Const., Art. III, § 2, cl. 3, and the Sixth and Fourteenth Amendments; Cal.Const., art. 1, § 16.) A jury trial in a criminal case in a state court is now a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 48-149; 5 Witkin and Epstein Cal. Crim. Law (3d), Criminal Trial, §438.)

It is well established that a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

"An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it.'" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217." (*In re Hamilton* (1999) 20 Cal4th 273, 294.)

Depriving appellant of the protection afforded under the principles here discussed is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a trial before an impartial jury. (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

An impartial jury serves to ensure accuracy in the truth-finding process. Improperly influenced jurors increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor*

(1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

"To preserve a claim based on the trial court's overruling a defense challenge for cause, a defendant must show (1) he used an available peremptory challenge to remove the juror in question; (2) he exhausted all of his peremptory challenges or can justify the failure to do so; and (3) he expressed dissatisfaction with the jury ultimately selected. (*People v. Cunningham* (2001) 25 Cal.4th 926, 976; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.)" (*People v. Maury* (2003) 30 Cal.4th 342, 380.)

Accordingly, appellant's claim the trial court erred in failing to excuse Prospective Juror No. 8971 is preserved for review.

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' (*Id.*, at p. 1147.) A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. (*Ibid.*)" (*People v. Weaver* (2001) 26 Cal.4th 876, 910.)

Here, the record establishes that the trial court's findings and conclusions are not supported by substantial evidence. The court found and ruled:

> I'm not going [to] excuse hi[m] for cause. It appears the conversation was an innocuous comment. This court finds that it is not a willful violation of the court's instruction not to talk about the case. They were just talking about issues in society. While admit[t]edly, it's not the best choice of issues, the only one person he talked [to] about it, obviously, was not influenced by it. [¶] You are welcome to use a [per]emptory. Nor was that person, did that person feel that that was a

misconduct, that was never conveyed to the court. That being the case, are there any motions before we move forward? (4RT 751-752; see also 4RT 753.)

First, the court's finding was factually inaccurate. The court based its decision in part on the finding that Prospective Juror No. 8971 spoke to one juror. In fact he spoke to at least two separate jurors, Nos. 9825 and 6582, both of whom reported the juror hypothesized sending gang members to a Pacific island. The court's finding of one conversation with one juror is thus not supported by substantial evidence. Rather, the record establishes Prospective Juror No. 8971 had two separate conversations about gangs with two separate jurors. In addition, the court characterized the juror's statements about gangs as an "innocuous comment" made during a conversation about "issues in society." This conclusion is also not supported by substantial evidence. Rather, substantial evidence shows Prospective Juror No. 8971 had seriatim conversations about his resolution of the gang problem with two separate jurors. It reasonably follows from such a showing that the juror was not making "idle comment while waiting for the case to go forward," as the court characterized the juror's conduct in ruling on the defense mistrial motion. (4RT 753.) The record more accurately establishes that Prospective Juror No. 8971 had an entrenched (since 1981) biased opinion concerning gangs he was eager to share with other jurors despite the court's instruction that jurors not discuss trial-related topics. In fact, when the court asked whether anyone else was around when the statements were made, Prospective Juror No. 9825 answered that though the statements were made in the jury room he and Juror No. 8971 were in a close conversation at the time. (4RT 736-738.) Juror No. 6582 reported he and Prospective Juror No. 8971 were in a "side-by-side" conversation when Juror No. 8971 said he would send gang members to a Pacific island and let them take care of each other. (4RT 742-743.) And, Prospective Juror No. 8971 remembered making these statements on the courthouse balcony (4RT 747), which suggests the occurrence of yet a third conversation with other unidentified prospective juror(s). The trial court has an obligation to determine

whether the prospective juror will faithfully and impartially apply the law in the case. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) That the court so found of Prospective Juror No. 8971 is implicit in the court's finding the juror should not be excused for cause. However, such a finding is unsupported by substantial evidence. The juror expressly stated that he had held his particular opinion about gang members since 1981, some 19 years before appellant's trial in 2000. This juror's conversations about gang members, the content of which reflect a decided viewpoint, made separately to two other jurors in violation of the court's express order against such a conversational topic, place the juror's impartiality in issue and yet the court made no inquiry of the juror as to his impartiality. The record fails to provide substantial evidence to support the conclusion of the juror's fairness and impartiality inherent in the court's refusal to excuse the juror for cause.

Moreover, reports of the juror's long-held views toward gang members constituted serious allegations of misconduct in this case in which the prosecution's claim was that appellant and Satele were motivated to commit the charged crimes to meet gang objectives. Substantial allegations of misconduct warrant full and aggressive investigation by the trial court. In circumstances dealing with claims of a juror's suspected bias or misconduct, as here, trial counsel necessarily must proceed with some circumspection. "While a trial is ongoing, lawyers may not conduct the kind of aggressive investigation of jurors they would of other witnesses. (*Dyer v. Calderon* (1998) 151 F.3d 970, 978.) "Given the extremely delicate situation when a juror is suspected of prejudice or misconduct, the trial judge must assume the 'primary obligation . . . to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial.' (*United States v. Boylan* (1st Cir. 1990) 898 F.2d 230, 258.)" (*Ibid.*) "Where juror misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias; rather, the judge has an independent responsibility to satisfy himself that the allegation of bias is

unfounded." (*Ibid.*) Here, as appellant has shown, the trial court's finding was factually incorrect.

Accordingly, appellant respectfully asserts the trial court's findings are unsupported by substantial evidence and therefore not binding on this reviewing Court and that on the evidence before it this Court should find that the trial court abused its discretion in failing to excuse Juror No. 8971 for cause. This juror participated in penalty phase deliberations and the resulting verdicts of death. Accordingly, the penalty verdicts must be set aside.

XIV.

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW WHEN IT DISCHARGED JUROR NO. 10 FOR MISCONDUCT

A. INTRODUCTION AND THE CHRONOLOGY OF PENALTY PHASE JUROR DISCHARGES

It is axiomatic that a criminal defendant has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) "An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it."' (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217." (*In re Hamilton* (1999) 20 Cal4th 273, 294.)

During penalty phase deliberations, the trial court, in separate actions, discharged Jurors No. 9 and 10 for cause over the objections of appellant.

In discharging the jurors, the court acted under the authority of Penal Code section 1089, which invests trial courts with the discretion to discharge jurors, either at their request or otherwise, on a finding of cause.[61] The trial court excused

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[61]. Penal Code section 1089 provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

Juror No. 10 after finding she had committed misconduct by discussing the case with her mother and her friend. A few days later, the court excused Juror No. 9 at the juror's request after she expressed concern about the effect of the stress of continued jury service upon her unborn child.

Appellant sets forth here the sequence of the discharges in the chronological context of the deliberations because that chronology and the related record of the vote division among jurors are relevant to the discussion of prejudice set forth below. The facts and discussion relevant to the discharge of Juror No. 10 is set forth in this argument. The corresponding information pertinent to the discharge of Juror No. 9 is set forth in the argument that immediately follows, which adopts and incorporates this chronology by reference.

The jury began its penalty phase deliberations on Monday, June 26, 2000. (38CT 11121-11122; 18RT 4386, 4433-4434.)

On Thursday morning, June 29th,[62] the jury resumed its deliberations at 9:30 a.m. (38CT 11130-11131; 18RT 4437-4441.) At 10:10 a.m., the jury foreperson delivered a note to the court reporting the jury was divided 10-2 on the penalty verdict and at an impasse. (38CT 11132; 18RT 4443.) The court then excused the jury for the day. Some minutes later, at 10:35 a.m., the jury foreperson returned to the courtroom and in an addendum to his earlier note stated that Juror No. 10 had discussed the case with both her friend and her mother. (38CT 11130, 11132; 18RT 4443.)

On the next court day, June 30, 2000, the court and parties heard first from the jury foreperson and then from Juror No. 10. When the hearing ended, the

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[62]. The jury deliberated a full day on Tuesday, June 27, and on Wednesday afternoon, June 28. (38CT 11124-11127.)

trial court discharged Juror No. 10 for misconduct over the objection of appellant's counsel. (38CT 11134-11137; 18RT4442-4459, 4467-4469.)

The jury began its deliberations with a new Juror No. 10 at 9:20 a.m. At 11:35 a.m., the jury foreperson sent a written note to the court disclosing that the jury numbers were divided at 11-1. The jury was excused for the day to July 3, 2000. (38CT 11133-11137.)

On Monday, July 3d, court and counsel conferred over a written request from Juror No. 9 who asked to be excused from the jury because she felt the stress of continued service would be detrimental to the health of her unborn child. (3 Supp.CT 823; 18RT 4475.) Following a hearing, the court discharged Juror No. 9 over the objections of the defendants and denied their motion for mistrial. (38CT 11138-11141; 18RT 4476-4484.) The jury began deliberations with a new Juror No. 9 at 10:45 a.m. Fifty minutes later, at 11:35 a.m., the jury announced it had reached its verdicts. The jury was excused for the day. On July 6, the jury's verdicts setting the penalty at death for both defendants was read and recorded. (38CT 11138-11141; 18RT 4496-4497.)

The court's decision whether to discharge a juror under section 1089 is reviewed for abuse of discretion and is upheld if supported by substantial evidence. (*People v. Williams* (2001) 25 Cal.4th 441, 447; *People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Beeler* (1995) 9 Cal.4th 953, 975.) The juror's inability to perform must appear as a "demonstrable reality" and will not be presumed. (*People v. Johnson* (1993) 6 Cal.4th 1, 21.)

The most common application of the statute permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1100 [anxiety over new job would affect deliberations]; *People v. Johnson* (1993) 6 Cal.4th 1, 22 [sleeping during trial]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [sleeping

during trial]; *People v. Dell* (1991) 232 Cal.App.3d 248, 254 [juror involved in automobile accident]; *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 629 [inability to concentrate]; *In re Devlin* (1956) 139 Cal.App.2d 810, 812-813 [juror arrested on felony charge], disapproved on another ground in *Larios v. Superior Court* (1979) 24 Cal.3d 324, 333.)

Appellant discusses why the trial court abused its discretion in discharging Juror No. 10 below. In the Argument that follows, appellant discusses why the trial court's decision to discharge Juror No. 9 was not supported by substantial evidence and therefore constituted an abuse of discretion on the part of the court.

B. JUROR NO. 10

On Thursday, June 29th, at a time when the jury was divided at 10-2 and at an impasse, the jury foreperson notified the court of the following: "Jury member #10 [name omitted] stated that she had confided with her friend & mother and that they sided with her doubts – possibly replacing her would be appropriate." The bailiff's accompanying notation indicates this sentence was added at 10:35 a.m. to an earlier note received by the bailiff at 10:10 that same morning.

The trial court took up this matter the next morning (Friday, June 30th) in a hearing held in the presence of the parties. The court first verified with the jury foreperson, Juror No. 6, that he had authored the note and learned from him that he and other jurors had heard the comment by Juror No. 10, which had been made at the jury table. (18RT 4443-4444.)

Court and counsel then met with Juror No. 10, who readily confirmed that she had discussed issues relating to the case with a friend and with her mother on Wednesday night. The conversations took place at a time when the jury had completed two days of deliberations and at a time after, in the juror's view, the jury

had reached its verdict.[63] (18RT 4445-4446, 4448.) Cautioned by the court to withhold information relating to the deliberation process in her answers to his questions, Juror No. 10 stated she did not tell either her friend or her mother the facts of the case; she did not tell them about specific evidence in the case; and she did not ask them about their views as to the death penalty. She did speak to them about the two defendants in the case. (18RT 4446.)

Juror No. 10 said she discussed the defendants with her mother for a minute or two at the end of a telephone conversation initiated by her mother. She did not reveal her vote on the verdict to her mother. (18RT 4447.) Neither did she describe to her mother the issues that were troubling her or her views on the death penalty. (18RT 4451-4452.)

Juror No. 10 said she spoke with her friend about the case for about five minutes during a conversation on other topics that lasted about 20 minutes. She did not discuss either the proceedings or the facts of the case with her friend. Instead she told her friend that the jury was going to turn its verdict into the court the next morning and that she was still prohibited from revealing her vote. Using hand gestures, the friend asked whether she had gone one way or the other and Juror No. 10 said, "yeah," to one of the gestures. Her friend then made a statement relating to views on the death penalty. (18RT 4449-4451.)

Juror No. 10 confirmed that this was the extent of her discussions about the case with her friend and her mother. (18RT 4452.)

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[63]. Juror No. 10 reported to the court that the comments that were the subject of the court's concern had occurred after her mother had asked her how the case was going and she replied the case was done. (18 RT 4451.) Correspondingly, when the court asked Juror No. 10 whether she had revealed in her conversation with her friend the vote she planned to cast during the following day's deliberations, Juror No. 10 said, "No, No, No, No, No. We had already reached the verdict. Wednesday night we had reached the verdict." (18 R T 4448.)

The prosecutor asked that the juror be discharged because she discussed her deliberations with outside sources. Significantly, the prosecutor stated, "It appears that the jury came to some sort of decision." (18RT 4453.) The trial court responded by pointing out that the jury was still deliberating and that the court had not yet received the jury's verdicts. The prosecutor responded by saying that even if the jury had not reached a formal decision it had reached "some sort of agreement" on Wednesday. (18RT 4453.) Then, although nothing in the colloquy between the court and Juror No. 10 tended to establish in any way that the juror had solicited counsel from either her mother or friend or that she had been influenced by the conversations, the prosecutor further argued for the juror's discharge by stating that she had sought counsel from outside sources, which had influenced her deliberations in the case. (18RT 4453.)

Counsel for appellant disagreed with the prosecutor's reasoning. (18RT 4453.) Counsel pointed out that but for the earlier-described incident with the friend's hand gestures Juror No. 10 had received no advice or statement from anyone and further observed there was no indication that the juror was acting upon any suggestions or advice she had received from outside sources. (18RT 4455.)

Counsel further asked that the court seek clarification as to whether the jury had in fact reached a verdict on Wednesday afternoon because if such were the case Juror No. 10 would not have committed misconduct in her conversations. As a basis for his request for clarification, counsel pointed out that Juror No. 10 had said that she spoke with her mother and her friend after a decision had been reached and the case was over. Counsel further noted that at least one other juror had inferentially corroborated the representation that a decision had been reached on Wednesday afternoon.[64] (18RT 4453-4454.)

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[64]. Counsel's reference to a juror who said she couldn't serve after Thursday (18 RT 4453) appears to be to Juror No. 3 who earlier notified the court that

Counsel for codefendant Satele stated that he had listened very closely to the responses made by Juror No. 10 to the court's inquiry. He heard the juror state several times that the deliberations were complete on Wednesday afternoon. Counsel for Satele joined in appellant's request that the court inquire as to Juror No. 10's understanding of what the jury had accomplished on Wednesday and broadened the request to include an inquiry into what the other 11 jurors thought the jury had accomplished on Wednesday. (18RT 4454-4455.)

The trial court thereupon found on the basis of her statements that Juror No. 10 had committed misconduct. The court further found that the juror may have mistaken a jurors' vote for a verdict. (18RT 4455-4456.)

The court stated that it was guided by *People v. Daniels* (1991) 52 Cal.3d 815 and stated without further explanation that the juror's discussion with outside parties effectively precluded the court from giving further instructions or readbacks, which the court said tainted the process. (18RT 4456, 4458.) The court also found that the only thing Juror No. 10 disclosed to other jurors is that she confided in her mother and her friend. (18RT 4456.)

The court thereafter informed Juror No. 10 that he was excusing her from the case and ordered her not to discuss the case with anyone. (18RT 4458-4459.)

After the court discharged Juror No. 10, counsel for appellant protested the removal of the juror once more. Counsel requested that the trial court ask the foreperson about Wednesday afternoon's "so-called termination" of deliberations because the jury had reached a verdict. Counsel stated that it was improper to remove a juror after a jury had reached an impasse and was hung. (18RT 4467-4468.)

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she would not be able to serve after Thursday, June 29. (38 CT 11124; 18 RT 4438-4439.) Following a subsequent hearing, Juror No. 3 agreed to the court's request that she reschedule her vacation. (18 RT 4459-4462.)

The trial court stated it would not ask that question of the foreperson because the foreperson's note stating the jury was hung was delivered to the court at 10:00 a.m. on Thursday while Juror No. 10 spoke with her mother and friend on the Wednesday night before. (18RT 4468.)

Counsel for Satele protested that the court's findings misstated what Juror No. 10 said, which was that the jury was at an impasse on Wednesday night before she went home. (18RT 4468.)

The court responded that even if the jury had been at an impasse at the end of the day on Wednesday, or even if the jury had an agreement at that time, so that the only thing the jury did on Thursday was that the foreperson wrote his note to the court, the court was still foreclosed from being able to further instruct the jury or get the jury to deliberate. (18RT 4469.)

On the morning of the following court day, July 3, 2000, the trial court revisited the issue of Juror No. 10. The court restated and clarified its ruling for the record. The court explained it had found good cause to discharge Juror No. 10 in the juror's demeanor and statements and further stated the juror's conduct raised a presumption of prejudice similar to that found in *People v. Daniels*, *supra*. Although the court's inquiry with the juror produced no evidence the juror had been influenced by her conversations with others, the court stated the fact that the juror had been influenced by her mother and her friend precluded the court from both offering the jury more instructions on testimonial readbacks and from permitting the juror to continue in the jury's deliberations. The court stated its reliance upon *People v. Keenan* (1988) 46 Cal.3d 478, 534, fn. 27, and upon *Lowenfield v. Phelps* (1988) 484 U.S. 231 in so concluding. (18RT 4473-4474.)

C. THE TRIAL COURT ABUSED ITS DISCRETION IN DISCHARGING JUROR NO. 10; THE COURT'S FINDING OF JUROR MISCONDUCT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

It is well established that a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

"An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it."' (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217." (*In re Hamilton* (1999) 20 Cal4th 273, 294.)

Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. (*People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, citations and fn. omitted.) As the United States Supreme Court has explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it." (*Smith v.*

Phillips (1982) 455 U.S. 209, 217; accord, *Dyer v. Calderon* (9th Cir.1997) 113 F.3d 927, 935; *Hughes v. Borg* (9th Cir.1990) 898 F.2d 695, 700.)

However, courts have been mindful of the "'day-to-day realities of courtroom life' (*Rushen v. Spain* (1983) 464 U.S. 114, 119) and of society's strong competing interest in the stability of criminal verdicts (*id.*, at pp. 118-119); *Carpenter*, *supra*, 9 Cal.4th 634, 655). It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' (*Smith*, *supra*, 455 U.S. 209, 217.) Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. (*Marshall*, *supra*, 50 Cal.3d 907, 950.) '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*Carpenter*, *supra*, 9 Cal.4th at pp. 654-655.)

As noted above, Penal Code section 1089 and Code of Civil Procedure section 233 specify that a juror may be substituted at any time before the jury returns a verdict if upon "good cause shown to the court [the juror] is found to be unable to perform his duty." (Pen. Code, § 1089.) Neither section 1089 nor Code of Civil Procedure section 233 define "good cause."

In *People v. Daniels* (1991) 52 Cal.3d 815, this Court stated: "It is clear to us, however, that a juror's serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty. Misconduct raises a presumption of prejudice (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156; *People v. Conkling* (1896) 111 Cal. 616, 628), which unless rebutted will nullify the verdict." (*People v. Daniels*, *supra*, at p. 863.) The juror's inability to perform must appear in the record as a demonstrable reality. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)

In *People v. Daniels*, *supra*, and *People v. Ledesma* (2006) 39 Cal.4th 641, this Court found substantial evidence of juror misconduct warranting discharge in the conduct of jurors who spoke about their respective cases with non-jurors. The juror conduct in these two capital cases is distinguishable from that of Juror No. 10 here with regard to the mental state with which the respective jurors entered into conversations with others, by the extent of information shared with non-jurors, and by the number of forbidden contacts in which the juror engaged.

In *Ledesma*, this Court considered the matter of Juror Stephen W., who, like Juror No. 10, had been discharged by the trial court during penalty phase deliberations. During the trial court's inquiry into the matter, Stephen W. admitted he had violated the instructions of the court by discussing the case with his wife. Stephen W. said he had discussed the facts of the case with his wife because he needed to straighten things out in his head. She gave him an opinion. He said the discussion allowed him to think more clearly. In short, Stephen W.'s doubt about his opinion was removed after a discussion with his non-juror wife. This Court agreed with the trial court that on these facts Stephen W. had committed willful and serious misconduct by discussing the case with his wife in violation of the court's admonition. This Court held that the trial court's conclusion Stephen W.'s misconduct rendered him unable to perform his duty was supported by substantial evidence. (*Id.*, at pp. 742-743.)

Stephen W.'s reported conduct differs in significant ways from that of Juror No. 10 in this trial. Stephen W. deliberately initiated a conversation with his non-juror wife in violation of the court's order to the contrary for the purpose of clearing his head about the case. He went over the evidence in the case with his wife, listened to his wife's opinion, and declared that his lingering doubt about his intended vote was removed after the conversation. In contrast, Juror No. 10 said she spoke about the case with her mother and her friend. She did not seek out either of them, nor did she initiate the discussion of the case in either conversation. Moreover, the

juror's conversations were about a completed event, i.e., that she had cast a vote earlier that day, and not for the purpose of determining how she would vote at a later time. (18RT 4445-4446, 4447-4448.) Thus, there was no reasonable likelihood Juror No. 10 was influenced by either her mother or her friend. Importantly, unlike Stephen W., Juror No. 10 did not talk with either her mother or her friend about the facts of the case or about specific evidence in the case. She did not solicit their views on the death penalty. She did talk to them about the two defendants. (18RT 4446.) She specifically said that though she was troubled by the vote she had cast, she did not discuss her concern about the vote with her friend and further told her friend that she was still not permitted to disclose her vote. This reveals that Juror No. 10 did not act in intentional disregard of the court's order. However, she did respond to hand gestures made by her friend concerning the vote and her friend did state her views relating to the death penalty. (18RT 4450-4451.) She had no analogous discussion with her mother. (18RT 4452.) Both conversations were brief and neither was initiated by Juror No. 10. (18RT 4447, 4449.)

Significantly, the prosecutor and both defense counsel all agreed that Juror No. 10 believed the jury had reached an agreement on Wednesday well before the time she spoke with either her mother or her friend. When the court's questions to her seemed to suggest that she had sought out these conversations for the purpose of either reaching a decision about how to vote or to settle a question in her own mind about her vote, Juror No. 10 reacted quickly and firmly to disabuse the court of its belief.[65] This colloquy establishes that the juror's intent at the time of the

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[65]. "The Court: 'But you told her what you're thinking about making – ' [¶] Juror No. 10: '*No, No, No, No. We had already reached the verdict. Wednesday night we had reached the verdict.*'" (18 RT 4448; italics added.) "The Court: 'So did you talk about what was not sitting right with you?' Juror No. 10: '*Wait a minute. Wait a minute. No. I didn't talk about what was not sitting right with me*, but she said – She said what decision did you make?'" (18 RT 4450; italics added.)

conversations was *not* to disobey the court's order. It reasonably follows that, unlike Stephen W., Juror No. 10 did not intentionally engage in willful misconduct in these conversations. Moreover, her conversations concerned the fact she had cast a vote, though not the nature of the vote, and were not intended to solicit input for purposes of deciding how she would vote. As counsel for appellant told the court, there was no evidence that reasonably tended to show the juror had been influenced by the statements or questions of her mother and her friend. (18RT 4455.)

In *People v. Daniels*, *supra*, upon which the trial court stated its reliance, this Court considered the trial court's removal of juror Lloyd Francis for serious misconduct. During the hearing that preceded the discharge, the trial court learned that Francis had discussed specific facts of the case with the manager of his apartment complex. The manager reported that Francis "'couldn't see how a man that was in a wheelchair could shoot another man and get out of the wheelchair and get another gun to shoot the other officer' and that Francis 'can't see how that nigger was able to kill two policemen.'" (*People v. Daniels*, *supra*, 52 Cal.3d at p. 863.) Other witnesses provided corroborating evidence of the conversation. The manager further reported that Francis had also read a newspaper article concerning the case during the trial. (*Id.*) This Court found Francis' conduct constituted serious misconduct that is willful and stated that serious and willful misconduct provides good cause to believe the juror will not be able to perform his duty. (*Ibid.*, at p. 864.)

The contrast in conduct between that of Juror No. 10 and Francis are manifest. Juror No. 10 did not reveal to either her mother or her friend information anywhere equivalent to the wealth of evidentiary detail reflected in the opinionated disclosures by juror Francis. Nor did Juror No.10 state her opinion of the prosecution's penalty phase case, as did juror Francis concerning the guilt phase evidence in his case. Contrary to the trial court's reasoning, *People v. Daniels*, *supra*, concerned as it was with serious and willful juror misconduct much more egregious

than that under consideration here, fails to support the conclusion that discharge of Juror No. 10 was appropriate here.

Appellant respectfully submits that when viewed against the conduct of jurors Francis and Stephen W., the conduct of Juror No. 10 was neither willful nor serious nor substantial. Rather it appears to be inadvertent conduct not amounting to misconduct.

Viewed most critically for the sake of argument, and without regard to the trial record, Juror No. 10's conduct in discussing the case with her mother and her friend, and her consequent receipt of information outside the court proceedings may be considered "misconduct" giving rise to a rebuttable presumption of prejudice on appellate review. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 578; *People v. Zapien* (1993) 4 Cal.4th 929, 994.) Here, however, as explained below, the record rebuts the presumption of prejudice and shows the trial court abused its discretion in discharging Juror No. 10.

"'[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled.' [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 1127, 1156.)

In *People v. Zapien*, *supra*, a deliberating juror reported that on the previous night he had inadvertently overheard a television news report announcing that the defendant had made "threats against the guards . . . if he were given the death penalty." The juror told the court he could base his verdict solely upon the evidence and still could be fair and impartial. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 993.)

This Court held that substantial evidence supported the trial court's decision to keep the juror on the panel.

In *People v. Stanley* (2006) 39 Cal.4th 913, a sitting juror read a newspaper article recounting the prosecutor's opening argument describing the defendant's two-month string of Oakland area robberies and the defendant's complaint about the racial makeup of the jury during jury selection. (*Id.*, at p. 946.) During the hearing that followed, the juror said he read through the entire article, recalled it "sort of summarized" the opening arguments and did so accurately, but then claimed he had no recollection of having read anything about the defendant's prior criminal record or the defendant's discussion with the court concerning the jury's racial makeup. The juror maintained nothing he had read would affect his ability to be a fair juror and the trial court found the juror credible and permitted him to remain on the jury. The Supreme Court found the trial court's credibility determinations were supported by substantial evidence and concluded the presumption of prejudice from the juror misconduct had been rebutted in the case. (*Id.*, at p. 951.)

"[J]udicial discretion is . . . 'the sound judgment of the court, to be exercised according to the rules of law.' [Citation.] . . . [T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] Moreover, discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Here, nothing in the colloquy between the court and Juror No. 10 established that either the prosecutor's burden had been lightened or that a defendant's affirmative defense had been adversely affected or that the jury's impartiality had been affected. Neither the prosecutor nor defense counsel made the analogous argument. Any presumption of misconduct on the part of Juror No. 10 was effectively rebutted on the record by the juror's explanation of the events to the court.

Finally, the trial court here stated its reliance upon *People v. Keenan* (1988) 46 Cal.3d 478, 534, fn. 27, and upon *Lowenfield v. Phelps* (1988) 484 U.S. 231. (18RT 4473-4474.) The court's concern, as reflected in its reliance upon footnote 27[66] in *People v. Keenan*, appears to be that because Juror No. 10 had heard her friend's view on the death penalty the trial court was precluded from instructing the jury, which was then divided 10 to 2 and at an impasse, that the jurors could consider each others' opinions because Juror No. 10's opinion had been influenced by the comments concerning the death penalty made by her friend. However, as appellant has discussed above, the court's conclusion that Juror No. 10 was influenced by her friend's opinion is unsupported by substantial evidence. Moreover, an admonition would have cured any presumption of prejudice as occurred in the cases discussed above where jurors inadvertently read newspaper accounts or heard newscasts concerning the trial. The court's dismissal of the juror was precipitous and arbitrary.

And, as the chronological record of deliberations demonstrates, the dismissal prejudiced appellant because the jury, which had announced itself divided at 10 to 2 before the discharge of Juror No. 10, soon thereafter announced itself divided 11 to 1. Appellant has further discussed the prejudice flowing from the erroneous discharge of Jurors Nos. 10 and 9 collectively in Argument XV concerning the erroneous discharge of Juror No. 9. Appellant incorporates the prejudice discussion here and respectfully refers the reader to that discussion.

Appellant additionally asserts that depriving him of the protection afforded under the principles here discussed is a misapplication of a state law that

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[66]. *People v. Keenan* (1988) 46 Cal.3d 478, 534, fn. 27, states: "The United States Supreme Court recently approved instructions to a deadlocked capital penalty jury which were substantially similar to the instant court's charge that jurors must consider the opinions of other panelists and reach a verdict if possible without violation of individual judgment or conscience. (*Lowenfield*, *supra*, 484 U.S. [231].)

constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in an impartial jury. (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold their conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

An impartial jury serves to ensure accuracy in the truth-finding process. Improperly influenced jurors increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

XV.

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW WHEN IT DISCHARGED JUROR NO. 9 FOR CAUSE

A. INTRODUCTION AND CHRONOLOGY OF PENALTY PHASE JUROR DISCHARGES

At a time when the jury was divided 11 to 1, and over the objection of counsel for appellant that the jury was hung and that Juror No. 9 was the holdout juror, the trial court removed Juror No. 9 based upon her claim that the "high amount of stress" created by the case was detrimental to her health and that of her unborn child. The court replaced the juror with an alternate. Fifty-five minutes after the newly constituted jury began its deliberations it delivered verdicts of death for appellant.

Rather than repeat the history of penalty phase deliberations here, appellant incorporates by reference and respectfully refers the reader to the Introduction and Chronology of Penalty Phase Juror Discharges set forth in Section A of Argument XIV.

B. JUROR NO. 9

On Friday, June 30, 2000, after the court had replaced discharged Juror No. 10 with an alternate and after the newly composed jury had commenced deliberations, the jury foreperson sent a note to the court, which was received at 11:35 a.m. The note stated: "We have a juror that feels 'God' has the final judgment and that she feels 'God's' judgment on herself if she found death as her conviction would

go against her on Judgment Day[.] My question is should she have been placed on the jury with special circumstances. We are at 11-1." (38 CT 11133; 18RT 4474.) The court chose not to make further inquiry, in reliance on *People v. Keenan* (1988) 46 Cal.3d 478, and with the agreement of both defense counsel. (18 RT 4474, 4485-4487.)

On Monday morning, July 3, 2000, court and counsel considered the following note dated July 2, 2000, from Juror No. 9. The court read the note from Juror No. 9 into the record, as follows: "Your Honor, respectfully, I am asking if I may be removed from this case. I feel the high amount of stress this case created will be detrimental to the health of my unborn child, as well as towards myself. Because I am considered high risk in this pregnancy, I want to make sure I do everything possible to increase my chances of being able to carry this baby full term. I wish to thank you for your time, effort, and compassion in the rendering of your decision. Sincerely, [signed by Juror No. 9]." (18RT 4475.)

The court inquired whether counsel thought the court should hear from the juror. The prosecution asked for an inquiry regarding the juror's health. Counsel for appellant objected: "Your honor, I think this jury is hung, and I think there's pressure being placed on one particular juror. I suspect it's this No. 9 is the juror in question, and I think this jury is hung, and I think what we're doing is moving other people in that may have a different viewpoint." (18RT 4476.)

Counsel for Satele reminded the court that the court had given the juror additional time in which to rest on a previous occasion and had spoken with the juror's physician and been assured that the juror was capable of continuing with her jury duty. Counsel contended there was no legal cause to inquire of the juror in the absence of a further statement by her doctor. (18RT 4476-4477.)

The trial court, relying once more on *People v. Keenan*, *supra*, called the juror in for an inquiry. (18RT 4477.) The court confirmed with the juror that she had written the note he had read into the record earlier (18RT 4479) and that the court

had recessed the trial for three days on an earlier occasion to provide the juror with the opportunity for bed rest at a time when she was two months' pregnant and experiencing pain as the result of a hemorrhagic cyst. (3CT 817; 18RT 4478.)

During the inquiry the court elicited the following information from Juror No. 9, who provided "yes" and "no" answers to questions that resulted in the following information. She had suffered a previous miscarriage at a time when she was in her fifth month of pregnancy. She thought that job-related stress had a lot to do with the miscarriage. (18RT 4480.) She believed that her continued participation in the case would cause her stress. She said the case had caused her a great amount of stress, adding, "especially Friday" [i.e., Friday, June 30]. She believed being excused from the case would be in her best interests and in the best interests of her child. She believed she would be unable to discharge her duty in the case. (18RT 4480.) The juror stated she began to feel pains on Friday, but had not seen a doctor since then. (18RT 4481.)

After the juror was excused the prosecutor asked that she be discharged. (18RT 4481.) Counsel for appellant argued against the juror's discharge. Counsel stated the jury had been accepted by the defense because of its gender makeup and because Jurors Nos. 9 and 10 were the only African-Americans on the jury.[67] Counsel pointed out that the juror had been cleared for jury service by her doctor and had not seen a doctor with regard to the present complaint. Counsel asked that she remain on the jury. Counsel further stated he believed the jury was hung and asked that a mistrial be declared. The mistrial motion was denied. (18RT 4482.)

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[67]. The court subsequently made the following record concerning the racial and gender composition of the jury: Juror No. 10, an African-American female was replaced by an African-American male. Juror No. 9, an African-American female was replaced by an African-American female. When Juror No. 9 was excused, six of the eleven jurors in the box were female jurors. (18 RT 4492.)

Counsel for Satele objected to the discharge of Juror No. 9 because there was no evidence to support the juror's assertion of medical concerns. Counsel noted the juror had not seen a doctor and had not said that she had begun to hemorrhage, as she had on the earlier occasion. (18RT 4482-4483, 4487-4489.)

The trial court found good cause existed under Penal Code section 1089 and Code of Civil Procedure section 233[68] to excuse the juror. The court found the juror was unable to perform her duty; that she had suffered a miscarriage two years ago in the fifth month of her pregnancy because of work-related stress, that she had suffered one hemorrhage, and that she had experienced pain on Friday, and that she was unable to perform her juror's duty because she was sick with a "stomach ache" related to the pregnancy. The court thereupon excused Juror No. 9. (18RT 4483-4484.)

Counsel for codefendant Satele asked the court to inquire whether the excused juror was the juror who was "holding out." The court denied the request. (18RT 4487-4489.)

The court then seated an alternate juror as Juror No. 9. The newly constituted jury began its deliberations at 10:45 a.m. At 11:35 a.m., the jury announced it had reached its verdicts. (38CT 11139, 11141.)

Subsequently, in his motion for new trial, counsel for appellant once more argued that Juror No. 9 was a holdout juror whose discharge was not supported by good cause. (18RT 4564-4565.) In ruling the juror had been properly discharged,

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[68]. Code of Civil Procedure section 233 states in relevant part: "If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall be designated by the court to take the place of the juror so discharged. . . ."

the trial court again noted the jury had previously suffered a hemorrhage and stomach pains and had a history of miscarriage. (18RT 4584.)

Because court and counsel referred to the prior medical absence of Juror No. 9 in their colloquy, it is appropriate to consider those events here. On June 20, 2000, just before the jury was given penalty phase instructions, the trial judge informed counsel that Juror No. 9 had called the courtroom to say that she was pregnant and going to the hospital with a medical emergency. Court and counsel agreed to recess the trial for the day. After the jury was excused, the trial court reported that Juror No. 9 had just called the courtroom to say that her husband would be delivering a doctor's note stating she would not be able to continue in the case. (17RT 4175-4177.)

Later that morning, the trial court shared the note from Dr. Michael Bianchi with the parties. The note stated that Juror No. 9 had a hemorrhagic cyst of the right ovary with severe pain and was unable to serve as a juror for 48 to 72 hours. (3 SuppCT 817; 17RT 4225.) Counsel for both Nunez and Satele stated their preference to have the juror remain on the jury. (17RT 4225-4226.) The court decided to telephone Dr. Bianchi for further information about the juror's availability. Dr. Bianchi stated that in his "best medical opinion" Juror No. 9 would be able to return to jury duty "most likely within 48 to at the most 72 hours." He did not anticipate that she would have to be removed from jury duty or that she would be disabled past that time period. (17RT 4233-4234.) Thereafter, with the parties' consent, the court recessed the trial to allow Juror No. 9 to rest for a period of 72 hours. (17RT 4238.)

C. THE RELEVANT LAW

"The right to trial by jury in criminal cases derives from common law and is secured by both the federal and state constitutions. [Citation.]" (*People v.*

Trejo (1990) 217 Cal.App.3d 1026, 1029; U.S. Const., Art. III, § 2, cl. 3, and the Sixth and Fourteenth Amendments; Cal. Const., art. 1, § 16.) A jury trial in a criminal case in a state court is now a federal constitutional right, unless the charge is of a "petty offense." (*Duncan v. Louisiana* (1968) 391 U.S. 145,148-149; 5 Witkin and Epstein Cal. Crim. Law (3d), Criminal Trial, §438.)

It is well established that a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

"An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098) and every member is '"capable and willing to decide the case solely on the evidence before it."' (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217." (*In re Hamilton* (1999) 20 Cal4th 273, 294.)

Depriving appellant of the protection afforded under the principles here discussed is a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (1998) 50 F.3d 1105, 1117; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant has a constitutionally protected liberty interest of "real substance" under state law in a trial before an impartial jury. (See *Sandin v. Conner* (1974) 515 U.S. 472, 478.) To uphold his conviction in violation of these established legal principles would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480 ["state statutes that may create liberty interests are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment]; *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

An impartial jury serves to ensure accuracy in the truth-finding process. Improperly influenced jurors increase the possibility that an innocent person may be unjustly convicted and sentenced to death in violation of the Eighth and Fourteenth Amendments, which have greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

In *People v. Cleveland* (2001) 25 Cal.4th 466, this Court summarized the law regarding removal of a juror as follows: "Penal Code section 1089 provides, in pertinent part: 'If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.' (See also Code Civ. Proc., §§ 233, 234.) 'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror' must appear in the record as a demonstrable reality. [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) [¶] The most common application of these statutes permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1100 [anxiety over new job would affect deliberations]; *People v. Johnson* (1993) 6 Cal.4th 1 [sleeping during trial]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [sleeping during trial]; *People v. Dell* (1991) 232 Cal.App.3d 248 [juror involved in automobile accident]; *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 629 [inability to concentrate]; *In re*

Devlin (1956) 139 Cal.App.2d 810, 812-813 [juror arrested on felony charge], disapproved on another ground in *Larios v. Superior Court* (1979) 24 Cal.3d 324, 333.) (*People v. Cleveland, supra*, 25 Cal.4th at p. 474.)

Trial courts have also relied upon Penal Code section 1089 in removing jurors who, like Juror No. 9, asked to be discharged. In that context, our Supreme Court found trial courts acted within their discretion in circumstances in which the juror was removed before trial and without conducting a hearing on the ground the juror's brother had died during the night (*In re Mendes* (1979) 23 Cal.3d 847, 852, or in the midst of the penalty phase because of the unexpected death of the juror's mother the previous night (*People v. Ashmus* (1991) 54 Cal.3d 932, 986-987).

On the other hand, in *People v. Beeler* (1995) 9 Cal.4th 953, this Court found the trial court acted within its authority pursuant to Penal Code section 1089 when it decided to continue penalty phase deliberations with a juror whose father had died. The court sent the juror back to deliberate for one hour until it was time for the juror to leave to go to the airport. The court determined that if the jury could not reach a verdict in that time the jury was to resume deliberations six days later upon the juror's return. In fact the jury reached its verdict within that time. Nothing in the record showed a "demonstrable reality" that the juror was unable to discharge his duties and there is no presumption that a juror who has suffered a loss in the family is unable to discharge the duties of a juror. (*Id.*, at pp. 988-991.)

Here, of course, the "demonstrable reality" is that Juror No. 9 was the holdout juror as defense counsel advised the court in the discussion that preceded the juror's discharge. The jury, divided 11 to 1 before Juror No. 9 was replaced by an alternate, returned a verdict of death about 50 minutes after it was newly reconstituted.

In *People v. Cleveland* (2001) 25 Cal.4th 466, this Court determined that "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence." (*Id.*, at p. 483.)

Cleveland also recognized that "often the reasons for a request by a juror to be discharged . . . initially will be unclear" and that "a court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged. . . ." (*Id.*, at pp. 483-484.)

In *Cleveland*, the trial court removed a deliberating juror for failing to deliberate. This Court concluded the trial court abused its discretion in so doing because the record failed to establish as a "demonstrable reality" that the juror refused to deliberate. Rather the record showed that the juror viewed the evidence differently from the way the rest of the jury viewed it. The Supreme Court observed that the juror may have employed faulty logic and may have reached an "incorrect" result, but it could not be said he refused to deliberate. The Court deemed the error prejudicial requiring reversal of the judgment. (*Id.*, at p. 486.)

In the present case, the trial court found that Juror No. 9 was unable to perform her duty in that she had previously lost a child because of work-related stress, that the trial was causing her stress, that she had suffered a hemorrhage on an earlier occasion, and that she had experienced pain since the previous Friday. The court found that if the juror were to continue she would be endangering her life and that of her child. (18RT 4485.)

This record fails to support as a "demonstrable reality" the trial court's conclusion that Juror No. 9 was unable to perform her duty. When this juror had experienced pain during the penalty phase, she went to a hospital Emergency Room for treatment. When she experienced pains during penalty deliberations on Friday, she tried but was unable to see her doctor. The record is devoid of evidence that she made further attempts at seeking treatment over the weekend or went to a hospital's Emergency Room. During the juror's penalty phase medical emergency, the court consulted with the patient's doctor. At the time of the juror's penalty deliberation complaints, the court did not consult with her doctor though the juror's failure to seek medical treatment over the weekend suggested that her reasons for seeking a

discharge might be, in *Cleveland*'s phrasing, "unclear." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.) Significantly, when the trial court had consulted with the doctor during the juror's penalty phase medical emergency, the doctor had attributed the juror's pain to a cyst and not to stress, had discounted any suggestion the juror might not be able to complete her service, and stated what the juror needed at the most was 72 hours of rest.

The trial court discharged the juror after finding that continued jury service would endanger her life and that of her child. But, the record fails to support that the court's conclusions regarding the medical health of the juror and her unborn child are a "demonstrable reality."

In order to affirm a trial court's decision to discharge a sitting juror, "[the] juror's inability to perform as a juror must 'appear in the record as a demonstrable reality.'" (*People v. Johnson* (1993) 6 Cal.4th 1, 21; *People v. Compton* (1971) 6 Cal.3d 55, 60; *People v. Marshall* (1996) 13 Cal.4th 799, 843.) As Justice Werdegar explained in her concurring opinion in *People v. Cleveland*, *supra*, "Repetition of the 'abuse of discretion' formula in this context is potentially misleading, for the substitution of a juror after the jury has retired to deliberate 'may trench upon a defendant's right to trial by jury. (U.S. Const., Amend. VI; Cal. Const., art. 1, § 16[.])' (*People v. Collins* (1976) 17 Cal.3d 687, 692, fn. omitted.) Thus, discharge of a juror who may be holding out in a defendant's favor raises the specter of the government coercing a guilty verdict by infringing on an accused's constitutional right to a unanimous jury decision. In light of this constitutional dimension to the problem, it is inappropriate to commit to the trial court – subject only to the deferential abuse-of-discretion standard of review on appeal – the important question of the substitution of jurors after deliberations have begun." (*People v. Cleveland*, *supra*, 25 Cal.4th, at p. 487.) Thus, under the standard set forth in *Johnson*, *Compton*, and *Marshall*, a trial court would abuse its discretion if it

discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror was unable to discharge her duty.

Under these circumstances, the trial court abused its discretion in excusing Juror No. 9. The error is prejudicial and requires reversal of the judgment. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 486.)

D. PREJUDICE

The record manifestly establishes that appellant was prejudiced by the discharge of Jurors Nos. 10 and 9.[69]

The record shows that on Thursday morning, June 29,[70] the jury resumed its deliberations at 9:30 a.m. (38CT 11130-11131; 18RT 4437-4441.) At 10:10 a.m., the jury foreperson delivered a note to the court reporting the jury was divided 10-2 on the penalty verdict and at an impasse. (38CT 11132; 18RT 4443.) The court then excused the jury for the day. Some minutes later, at 10:35 a.m., the jury foreperson returned to the courtroom and in an addendum to his earlier note stated that Juror No. 10 had discussed the case with both her friend and her mother. (38CT 11130, 11132; 18RT 4443.)

On the next court day, June 30, 2000, the court and parties heard first from the jury foreperson and then from Juror No. 10. When the hearing ended, the trial court discharged Juror No. 10 for misconduct over the objections of counsel for both defendants. (38CT 11134-11137; 18RT4442-4459, 4467-4469.)

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[69] Appellant respectfully requests that the reader apply this discussion regarding prejudice to the arguments that the trial court committed prejudicial error in discharging Jurors Nos. 10 and 9, respectively.

[70]. The jury deliberated a full day on Tuesday, June 27, and on Wednesday afternoon, June 28. (38CT 11124-11127.)

The jury began its deliberations with a new Juror No. 10 at 9:20 a.m. At 11:35 a.m., the jury foreperson sent a written note to the court disclosing that the jury numbers were divided at 11-1 and questioning whether a juror with certain views regarding God had been properly placed on the panel. The jury was excused for the day to July 3, 2000. (38CT 11133-11137.)

On Monday, July 3rd, court and counsel conferred over a written request from Juror No. 9 who asked to be excused from the jury because she felt the stress of continued service would be detrimental to the health of her unborn child. (3 Supp.CT 823; 18RT 4475.) Following a hearing, the court discharged Juror No. 9 over the objections of the defendants and denied their motion for mistrial. (38CT 11138-11141; 18RT 4476-4484.) The jury began deliberations with a new Juror No. 9 at 10:45 a.m. Fifty minutes later, at 11:35 a.m., the jury announced it had reached its verdicts. The jury was excused for the day. On July 6, the jury's verdicts setting the penalty at death for both defendants was read and recorded. (38CT 11138-11141; 18RT 4496-4497.)

The trial court erred in discharging both Jurors 10 and 9 for the reasons stated in the respective arguments and the chronology set forth here shows the discharges led prejudicially and inexorably to the verdicts of death for appellant. The verdicts of death were wrongly achieved through the seriatim removal of the two hold-out jurors. Reversal of the penalty verdicts is warranted.

XVI.

THE COURT ERRED IN ALLOWING THE JURY TO MAKE MULTIPLE MURDER SPECIAL CIRCUMSTANCE FINDINGS AS TO EACH COUNT

The information alleged and the jury specially found the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) to be true as to appellant in conjunction with both Counts 1 and 2. (2CT 386, 38CT 10927.) The finding of the multiple murder special circumstance as to each count was error and one of the findings must be vacated.

A defendant is subject to a sentence of death or life imprisonment without the possibility of parole if he is convicted of first degree murder and a special circumstance is charged and specially found to be true that, in the current proceeding, the defendant has been convicted of more than one offense of murder in the first or second degree. (Pen. Code, § 190.2, subd. (a)(3).)

When a defendant is charged with more than one offense of murder in the first or second degree, the charging papers may allege only one multiple-murder special circumstance under Penal Code section 190.2, subdivision (a)(3). Alleging two or more special circumstances to reflect each murder inflates the risk that the jury will arbitrarily impose the death penalty. (*People v. Allen* (1986) 42 Cal.3d 1222, 1273, cert.den. 484 U.S. 872; *People v. Harris* (1984) 36 Cal.3d 36, 67.) Following *Harris*, this Court has consistently held that when a defendant is charged with more than one multiple murder special circumstance and each is found to be true, all but one special circumstance must be stricken. (See *People v. Sanders* (1995) 11 Cal.4th 475, 537; *People v. Champion* (1995) 9 Cal.4th 879, 936.)

In *People v. DeSimone* (1998) 62 Cal.App.4th 693, the court explained that due process requires that the "multiple murder" special circumstance be alleged

only once in each case rather than once as to each murder count. *DeSimone* distinguished the multiple murder special circumstance from Penal Code section 667.61, subdivision (e)(5), which provides for a term of 25 years to life for a defendant convicted of committing an enumerated sexual offense upon more than one victim. The court explained that the limitation on the number of multiple murder allegations in a death penalty case is necessary to protect the defendant's right to a fair trial by avoiding the danger of improperly inflating the risk the jury would fix the penalty at death based on the number of special circumstances. The court observed that because only one multiple murder special circumstance is required for the death penalty, "this risk of prejudice is not offset by any competing interest in obtaining true findings on each particular count." (*Id.*, at p. 71.) In contrast, a Penal Code section 667.61 sentence is based on the number of victims involved. Further, "the court, rather than the jury, sentences the defendant under the One Strike Law, so there is no danger of undue prejudice as a result of multiple findings under subdivision (e)(5)." (*Ibid.*)

Burdening a defendant with two multiple murder special circumstances is akin to improperly admitting irrelevant character evidence in that no legitimate purpose is served by such evidence, the only function of which is to burden the defendant and inflate the risk the jury will fix his penalty at death. As with character evidence improperly admitted that makes no contribution of substance, this error violates the right to due process of law. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.) Errors violating a defendant's due process rights require reversal of the conviction unless the reviewing court is able to declare a belief the effect of the error was harmless beyond a reasonable doubt. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Such a finding is not possible here. In this case, the risk that the fact of two multiple murder special circumstances would prejudicially inflate appellant's risk of having the jury fix his penalty at death was substantial. The prosecution's case

against appellant was problematic in that it lacked definitive evidence as to appellant's role in the murders of Robinson and Fuller. Was appellant the actual killer or was he the aider and abettor? The prosecutor admitted he lacked the evidence to prove appellant was the actual killer, whose mens rea was arguably inferable from the act of killing. Proof that appellant was the aider and abettor who held the required mens rea to be held liable for the murders and special circumstances was plagued by jury instructions that incorrectly stated the law and verdict forms that incorrectly reflected the legally available verdict options and the findings to be made by the jury. Appellant has explained in this brief that the trial court gave legally inadequate jury instructions regarding the special circumstance mens rea requirement for the aider and abettor, regarding the Penal Code section 186.22, subdivision (b)(1), gang benefit enhancement, regarding the Penal Code section 12022.53, subdivision (d), personal and intentional firearm discharge resulting in death enhancement. As a result of these errors, the jury found that appellant personally and intentionally shot Robinson and Fuller. The jury made the identical finding for Satele. The identical findings are in conflict with the weight of the evidence there was but one actual killer. The improperly instructed jury further found that appellant committed the crimes to further the objectives of his gang and that the multiple murder special circumstance was true as to him under an instruction that allowed the jury to make that finding under a legally incorrect theory.

As the result of these improperly obtained findings, the jury's view of appellant in contemplating his penalty was of a defendant who personally and intentionally shot and killed Robinson and Fuller to further the objectives of his gang and who by these actions created a circumstance for which the State of California has said death is an appropriate penalty. Viewed from such a perspective, the additional factors considered by the jury of a second multiple murder special circumstance carrying the imprimatur of the State's recognition that death is an appropriate penalty

for such conduct was not harmless beyond a reasonable doubt. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Chapman v. California* (1967) 386 U.S. 18, 24.)

XVII.

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) 126 S.Ct. 2516, 2527, fn. 6.)[71] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital

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[71]. In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly

a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH 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 s the statute contained 21 special circumstances[72] purporting to narrow the category of first degree murders to those

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[72]. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now twenty-two. This figure counts as one class the thirteen different felonies that trigger the eligibility for capital punishment under the felony-murder rule.

murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass 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.[73] (See Section E. of this Argument, *post*).

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[73] In a habeas petition to be filed after the completion of appellate briefing, Appellants will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in their habeas petition, Appellants

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[74] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[75] or having had a "hatred of

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will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[74] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[75] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

religion,"[76] or threatened witnesses after his arrest,[77] or disposed of the victim's body in a manner that precluded its recovery.[78] 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. (*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

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[76] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[77] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[78] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the

fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

C.1. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; THEIR 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) 127 S.Ct. 856 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts

supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 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 p. 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 p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

C.1.A. IN THE WAKE OF *APPRENDI, RING, BLAKELY,* AND *CUNNINGHAM,* ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79

[penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[79] 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 (18RT 4432),"an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[80] These factual determinations are essential prerequisites to death-eligibility,

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[79] 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.)

[80] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[81]

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. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[82] In *Cunningham* the principle that any fact which exposed a defendant

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[81] 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.)

[82] *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

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.*, pp. 863-863.) That was the end of the matter: *Black*'s interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham*, *supra*, pp. 869-870.)

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. 870.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 869.)

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*

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type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

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)[83] 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 on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life

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[83] 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."

imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In

California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

C.1.B. WHETHER AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS IS A FACTUAL QUESTION THAT MUST BE RESOLVED BEYOND A REASONABLE DOUBT

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[84])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique

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[84] 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).

in its severity and its finality"].)[85] 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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[85] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri* (1981) 451 U.S. 430,] 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California* (1998) 524 U.S. 721, 732 (emphasis added).)

C.2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS EXIST AND OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY

C.2.A. FACTUAL DETERMINATIONS

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

C.2.B. IMPOSITION OF LIFE OR DEATH

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 745, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri* (1981)] 451 U.S. 430], 441 (quoting *Addington v. Texas* (1979) 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.3. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of their federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (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.)[86] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

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[86] 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.)

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.

C.4. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (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 A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

C.5. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

In this case, there was substantial evidence of unadjudicated criminal activity.

As to appellant, the prosecution introduced evidence of the following acts: 1) the battery of Esther Collins on September 16, 1997 (4RT 922, 924-926, 928); 2) manufacturing a sharp object while in custody (13RT 3106-3108); 3) the attempted escape of August 17, 2000, as described by Deputy Schickler, based on his testimony that appellant removed his handcuffs and performed jumping jacks while on the transport bus (16RT 3911-3917); 4) the attempted escape May; 18, 2000, based on the testimony of Deputy Baltierra that he found a heavy duty staple in appellant's mouth, an item that can be used as a handcuff key (16RT 3936-3940); 5) possession of a sharp instrument while in custody on May 15, 2000, based on the testimony of Deputy Estes that she found a razor blade hidden in a Bible appellant was carrying and bringing to court (16RT 3927-3930).

As to codefendant Satele, the prosecution introduced evidence regarding the battery of November 9, 1999, testified to by Deputy Arias 1999, describing the incident where Satele approached a handcuffed inmate and hit him in the face. (13RT 3119-3124.)

The trial court listed these acts and instructed the jury that it could use them as aggravating factors. In doing so, the trial court instructed the jury that before a juror could use any of the incidents, the juror had to be convinced beyond a reasonable doubt that these acts occurred. However, the trial court also instructed the jury that it was not necessary for all the jurors to agree as to which criminal acts did occur. (17RT 4426.)

These acts of appellant were argued by the Deputy District Attorney as aggravating factors. (17RT 4321-4325, 4328.) The Deputy District Attorney also argued the incident involving codefendant Satele's assault on another inmate as an aggravating factor. (17RT4323.)

These incidents were presented and argued as aggravating factors, upon which the jury could have based its decision to impose the death penalty, in spite of the fact that the jury never unanimously found these facts to be true.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

C.6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) The instruction containing these adjectives was read to the jury in this case. (18RT 4421.)

C.7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness

or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing toward 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* [(1996)], *supra,* 13 Cal.4th [92,] 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.) (*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j), constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[87]

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[87] There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be

The very real possibility that appellant's jury aggravated their sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated their sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

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mitigating in order to *aggravate* the sentence. See *People v. Cruz*, No. S042224, Appellants' Supplemental Brief.

Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[88] as in *Snow*,[89] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which

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[88] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[89] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[90]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[91] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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[90] In light of the Supreme Court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[91] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND 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, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159

U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, 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."[92] Categories of criminals that warrant such a comparison include persons suffering from mental illness or

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[92] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

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.

XVIII.

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR; THE COLLECTIVE THRUST OF THE ERRORS, REINFORCED BY PROSECUTORIAL ARGUMENT AND DEFECTIVE VERDICT FORM LANGUAGE, OBSCURED THE JURY'S DUTY TO JUDGE APPELLANT ON HIS INDIVIDUAL CULPABILITY AND, IN PARTICULAR, WITH REGARD TO THE NECESSARY MENS REA DETERMINATIONS

A. INTRODUCTION

On reflection, certain things stand out about appellant's trial. The most noteworthy of these is the state of the evidence regarding those basic elements of a defendant's criminal culpability for the crimes with which he is charged – his actus reus and mens rea. In this case, the prosecution had a theory of guilt premised on familiar and inherently inflammatory patterns of human conduct arising out of racial hate and criminal street gang activities.

The prosecution's theory went like this. Juan Carlos Caballero, codefendant Satele, and appellant were all members of the Westside Wilmas, a criminal street gang with a history of race-related actions against African Americans. According to the prosecutor, Caballero, Satele, and appellant got into a car one night with a gun named "Monster" and went in search of African Americans they could shoot and kill for reasons related to their gang. Caballero drove. Satele and appellant were in the car, but the evidence was ambiguous as to which seats they occupied and the roles they played. At some point that night, according to the prosecutor, an occupant of the car shot and killed two African Americans named Robinson and Fuller.

The prosecutor told the jury there was one actual killer and that actual killer was either Satele or appellant. It was not Caballero, who was an aider and abettor. The prosecutor's inability to prove the identity of the actual killer logically

meant he was also unable to prove the identity of the second aider and abettor. Thus, the case was problematic from a proof perspective because no evidence directly or circumstantially tended to show that appellant either actually killed or with the required mental state aided and abetted the actual killer.

The second noteworthy thing about appellant's trial is that it was plagued by instructional errors and flawed language in verdicts forms on key jury determinations including the murders charged in Counts 1 and 2, the gang benefit enhancement, the personal firearm discharge/death enhancement, and the special circumstance enhancement. The legal misdirection in each of these instances concerned proof of the required mens rea. As a result it is likely the jury, or some jurors, approached their task in determining appellant's individual culpability with an obscured view of its task regarding proof of mens rea.

The third noteworthy thing about this trial is that the guilt phase jury recognized the evidentiary weakness in the prosecution's case with regard to the hate crime enhancement and the hate crime special circumstances. This suggests that the guilt phase jury provided with the proper tools in the form of correct jury instructions and verdict forms may have also recognized the evidentiary lacunae in the prosecution's case against appellant.

B. THE LAW REGARDING THE CUMULATIVE EFFECT OF GUILT PHASE ERRORS

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in an unfair trial in violation of due process]; accord *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; see also *People v. Hill* (1998) 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution]; *Donnelly v. DeChristoforo* (1974) 416 U.S.637, 642-643 [cumulative errors may so

infect "the trial with unfairness as to make the resulting conviction a denial of due process.")

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.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Furthermore, when errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. In *People v.* Williams (1971) 22 Cal.App.3d 34, 58-59, the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, was not harmless error. [Citations.] (See also *Harrington v. California* (1969) 395 U.S. 250, 255.)

A cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. This is because of the recognition that the curative effect of any instruction is uncertain and lingering prejudice can remain even after an admonition. Thus, if there are errors which individually may have been cured by instruction or admonition, the trace of prejudice may remain and be a factor in an analysis of cumulative prejudice. (*United States* v. *Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; *see also United States* v. *Necochea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

In this case, the cumulative effect of these errors requires a reversal. This is especially so because the prejudice is geometrically multiplied because the errors were

so inter-related. Therefore, they must be evaluated together and the prejudicial effect of each should not be considered separately from the prejudicial effect of the other.

C. THE LAW REGARDING THE CUMULATIVE EFFECT OF PENALTY PHASE ERRORS

In the preceding section, appellant has set forth authority for the principle that even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal of the guilt phase. When the above-described principles are considered in the context of a capital case, the resulting prejudice requires that the verdict of death must be reversed. Guilt-phase errors also have a considerable impact on the penalty determination, and the impact of these errors must also be assessed in evaluating the prejudice resulting from the penalty phase errors. An error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609.) Indeed, the effect of guilt phase errors on the penalty phase must be considered. (Pen. Code, § 190.4, subdivision (d)), and as a matter of federal law (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888.)

The fact that there were multiple homicides is not dispositive. Terry Nichols, convicted of killing 169 people in the bombing of the Alfred P. Murrah Federal Building, received a sentence of life in prison[93]. (See also, Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care* 1993 U. Ill. L. Rev. 323, 365, fn. 290.)

The discussion of each error identifies the way in which the error prejudiced appellant and so requires reversal of the death judgment. "Although the

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[93]. "Terry Nichols Receives 161 Life Sentences," Associated Press/August 9, 2004 http://www.rickross.com/reference/mcveigh/mcveigh37.html

guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; *see generally* Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases* (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses and Their Penalty Phase Effects"].)

This court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt* (1984) 37 Cal.3d 436, 459.) Moreover, "the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Zant v.* Stephens (1983) 462 U.S. 862, 885).)

D. THE TRIAL ERRORS WERE RELATED AND THEY CUMULATIVELY OBSCURED THE JURY'S DUTY TO JUDGE APPELLANT BASED ON HIS INDIVIDUAL CULPABILITY

Under the instruction given appellant's jury for the personal firearm use enhancement (Pen. Code, § 12022.53, subd. (d)), the jury was instructed that it could hold appellant liable for the enhancement as a principal in the commission of the crimes because he had been *charged* as a principal. (See Argument I.) The jury, or some jurors, likely understood the declarative language of the instruction to mean that the definitions distinguishing principal and aider and abettor liability (CALJIC Nos. 3.00, 3.01) did not apply and that they were free to find that appellant was a principal because he was charged as such without first determining his individual culpability by

deciding questions regarding what, if anything, he did (actus reus) and the mental state (mens rea), if any, with which he did it.

This same instruction allowed the jury to find appellant vicariously liable if it found Penal Code section 186.22, subdivision (b)(1), enhancement (gang benefit enhancement) pled and proved. However, in instructing the jury on the charged gang benefit enhancement, the trial court incorrectly instructed the jury instead on the elements of the substantive offense of being an active participant in a criminal street gang. (See Argument IV.) The jury, or some jurors, likely understood these linked instructions to mean that they could hold appellant liable for the personal weapon use enhancement because he was a self-admitted gang member. The instructions then allowed the jury to hold appellant liable because of his status – as a defendant in a case and as a gang member – and without deciding whether he had the required mens rea. Evidence of status used in this manner constitutes the use of profile evidence to prove guilt. In *People v. Erving* (1997) 63 Cal.App.4th 652, 663, the court explained, "Profile evidence is inadmissible because 'every defendant has the right to be tried based on evidence tying him to the specific crime charged, and *not on general facts accumulated by law enforcement* regarding a particular criminal profile.' Moreover, such evidence encourages the jury to engage in circular reasoning." (*People v. Erving*, *supra*, 63 Cal.App.4th at p. 663 [citations omitted; italics added].)

As a result of these instructions, the likelihood is great that the jury, or some jurors, found appellant liable for the personal weapon use enhancement, i.e., found that appellant personally and intentionally shot and killed Robinson and Fuller, without deciding his individual culpability for the enhancement. The legal misdirection in the instruction was echoed in the prosecutor's argument and in the flawed verdict forms, which failed to set forth all of the legally available options for liability under the enhancement. (See Argument I.) Having decided that appellant was an actual killer, the jury, or some jurors, likely held appellant liable for the

murders without giving proper consideration to the mens rea requirements. (See Argument I.)

When the trial court refused the defense request for an instruction informing the jury that it could not impute appellant's guilt from evidence he was in the company of someone who had committed the crime (Argument VIII), the court refused at least one opportunity to refocus the jury's attention on its duty to separately determine the individual culpability of each defendant.

When the jury was allowed to find that appellant committed the murders "for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members" (38CT 10928) on the basis of his active participation in a criminal street gang (37CT 10761) (Argument IV), the jury, or some jurors, likely held appellant liable for the enhancement based on his status as a gang member without making the mental state finding required for the enhancement.

When the jury convicted appellant of willful, deliberate, premeditated murder (38CT 10925, 10926) with the use of court-supplied verdict forms couched in that limiting language, although the prosecution had argued and relied upon two other theories of first degree murder (with knowing use of armor-piercing ammunition and by drive-by murder requiring the specific intent to kill (37CT 10768, 10769), the jury, or some jurors, likely confused or failed to consider the varying mens rea requirements for the various theories because legally erroneous instructions and argument had allowed it to find appellant was the actual killer and because the jury understandably believed the court had provided it with correct verdict forms. (Argument I.)

When the trial court incorrectly instructed the jury that it could find the special circumstance true as to appellant if it found appellant was a major participant who acted with reckless indifference to human life (Argument V), the likelihood is great that the jury, or some jurors, failed to consider whether appellant possessed the

requisite mental state before finding the special circumstance allegation true as to him. It is likely that the jury, or some jurors, received the impression that individual determinations of culpability (and, in particular, the mens rea component) were not significant determinations to be made in appellant's trial, since it apparently was not so under the special circumstance instruction. When the trial court allowed the jury to make two multiple murder special circumstance findings (Argument XVI), such impression was likely reinforced for the jury, or some jurors, because the jury reached the separate determinations under the same instruction.

When the trial court failed to properly secure the sworn oaths to return verdicts according to the evidence and instructions of the court of the jurors who participated in guilt and penalty phases of the trial (Argument X) and when it replaced penalty phase holdout jurors (Arguments XIV, XV) and failed to instruct the reconstituted juries to disregard all prior deliberations and begin deliberations anew (Argument XI), and when it accepted penalty phase verdicts for both defendants made within 50 minutes of the jury's reconstitution, the trial court implicitly sanctioned a deliberative process that glossed over questions pertaining to the determination of each defendant's individual culpability.

The question of appellant's individual culpability was the issue in this case in which evidence of individual culpability was so sparing the prosecution could not even articulate the evidence of appellant's culpability as either the actual killer or the aider and abettor. Each of the errors described here contribute in greater or lesser degree to the outcome by allowing the jury to make key findings related to appellant's culpability without considering as it was required to do the acts and mental state that proved his liability.

The events at appellant's trial set forth here were contrary to the established principle that the right to a fair trial includes the right to be judged on one's "personal guilt" and "individual culpability." (*United States v. Haupt* (1943, 7th Cir.) 136 F.2d 661, cited in *People v. Massie* (1967) 66 Cal.2d 899, *supra*, 66

Cal.2d 899, 917, fn. 20.) It also violates the Eighth and Fourteenth Amendment requirements of an individualized capital sentencing determination. (See *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

As a result of these errors, appellant was denied a fair trial, the verdicts are inherently unreliable, and reversal of the judgment of conviction and the death penalty are required.

XIX.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS COAPPELLANT THAT MAY ACCRUE TO HIS BENEFIT

Appellant Daniel Nunez joins in all contentions raised by his coappellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant DANIEL NUNEZ that the judgment of conviction and sentence of death must be reversed.

DATED:August 26, 2007

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 95,200 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 101,294 words.

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. I am an employee of Bleckman & Blair, Attorneys at Law, and my business address is Suite 3 Ocean Plaza, 302 West Grand Avenue, El Segundo, California 90245.

On **September ___ , 2007**, I served the

APPELLANT'S OPENING BRIEF
on behalf of Appellant Daniel Nunez
in People v. Daniel Nunez and William Satele (S091915; NA039358),

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