SUPREME COURT COPY

SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. JOHN MYLES, Defendant/Appellant.	No: S097189 APPELLANT'S OPENING BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
SAN BERNARDINO COUNTY
SUPERIOR COURT CASE NO. FSB10937

THE HONORABLE MICHAEL A. SMITH, JUDGE

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JOHN MYLES
(Appointed by the Court)

MylesAOB

DEATH PENALTY

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I. STATEMENT OF APPEALABILITY

This appeal is automatic because a judgment of death was rendered. (Penal Code sec.1239, subd.(b).)

II. INTRODUCTION

Appellant John Myles' trial was decidedly unfair. This unfairness started with the trial court's refusal to sever for separate trials the two wholly separate cases charged against appellant. The first case, which by itself did not give rise to any special circumstance, involved the shooting of Ricky Byrd. The second case, which occurred nine days later, was exceedingly prejudicial. It involved the shooting of Fred Malouf, a retired policeman, by co-defendant Tony Rogers during a robbery of a restaurant. Although the jury heard and decided the restaurant case first, having the same jury hear and decide both cases was overwhelmingly prejudicial to appellant.

The unfairness continued with the trial court's denial of appellant's pretrial motion for a lineup with the participants wearing ski masks. In the restaurant shooting case, Rogers' cohort was wearing a ski mask, thus making the witnesses' identifications questionable. Therefore, to ensure the fairness of the identification procedure, and replicate as closely as possible the conditions at the scene, appellant sought to have the lineup participants wear ski masks. The trial court, however, denied the motion, thus perpetuating the problematic, unreliable nature of the identifications of appellant as Rogers' accomplice.

The guilt phase in the restaurant case was rendered fundamentally unfair when the trial court allowed the prosecution to introduce evidence suggesting that appellant made threatening telephone calls to a witness. Of course, the prosecution had no evidence that appellant had done any such thing. Yet the prosecution was permitted to present this devastating evidence to the jury. Appellant suffered further prejudice in the restaurant case when the trial court allowed the sobbing, distraught policeman's widow to remain in the courtroom in full view of the jury. Such a sympathetic figure engendered in the jury nothing but animosity toward appellant.

The guilt phase of the restaurant case was infected with prejudicial instructional error. The trial court failed to instruct the jury on the partial defense of voluntary intoxication, where the evidence showed that appellant was under the influence of drugs during the restaurant incident. The erroneous circumstantial evidence instructions contributed to the overall unfairness of appellant's trial in both cases.

The unfairness of appellant's trial did not end with the guilt phase. The victim impact evidence presented by the prosecution was not limited to only the facts and circumstances known to appellant when the offenses were committed. Instead, wide-ranging inflammatory and heartrending victim impact evidence was introduced, which resulted in a penalty decision based on emotion, not on reason or facts.

The capital conviction and death sentence of appellant John Myles were the product of numerous prejudicial errors which compounded to deprive appellant of his

fundamental constitutional rights to due process, a fair trial, trial by an impartial jury, a reliable determination of guilt and penalty, protection from cruel and unusual punishment, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 15, 16, 17, and 28 of the California Constitution. Appellant's conviction and sentence are the direct result of constitutionally deficient proceedings. Reversal is therefore required.

III. STATEMENT OF THE CASE

On November 1, 1996, after a preliminary examination (1RT 21-184),[1] an amended information was filed charging appellant John Myles with a violation of Penal Code section 187, subdivision (a), the murder of Harry Byrd (count 1). Pursuant to Penal Code section 12022.5, subdivision (a), it was alleged that appellant personally used a handgun. In count 2, appellant and co-defendant Tony Rogers were charged with a violation of Penal Code section 187, subdivision (a), the murder of Fred Malouf. Pursuant to Penal Code section 190.2, subdivision (a)(17), it was alleged that count 2 was committed during the course of a robbery. Pursuant to section 190.2, subdivision (a)(3), a multiple murder special circumstance was alleged as to counts 1 and 2. In count 3, appellant and Rogers were charged with a violation of Penal Code section 211, robbery. In count 4, appellant was charged with robbery. In count 5, appellant was charged with a violation of Penal Code section 12021, subdivision (a)(1), felon in possession of a

[1] "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcript.

firearm. As to counts 2, 3 and 4, personal use of a handgun was alleged. A prior "strike" offense was also charged against appellant. (1CT 55-60.)

On November 14, 1997, appellant's motion to sever count 1 from counts 2, 3, 4, and 5 (1CT 91-102) was denied. (1RT 236-239.)

On July 16, 1998, appellant filed a motion to strike the Penal Code section 190.2 allegations on the ground that the statute is unconstitutionally overbroad. (1CT 115-118.) The prosecution filed opposition. (1CT 159-164.) Motions to reconsider the denial of the severance motion (1CT 119-125) and to recuse the district attorney's office (1CT 126-132) were also filed. The Attorney General and the district attorney filed opposition to the recusal motion (1CT 139-145, 147-152), which was denied without prejudice on August 6, 1998. (1CT 153; 2RT 295-301.)

On July 17, 1998, appellant filed a "motion for aggravating evidence the people inten[d] to rely on in penalty phase" (1CT 133-135) and a notice that appellant's objections are based on both the Federal and California constitutions. (1CT 136-138.)

On August 17, 1998, appellant filed supplemental points and authorities regarding the severance reconsideration motion. (1CT 155-158.) The prosecution filed opposition. (1CT 165-167.) Appellant filed a response. (1CT 169-170.)

On September 3, 1998, the motion to strike the section 190.2 allegations was denied. (1CT 161; 2RT 312-313.)

On November 5, 1998, the motion to sever count 1 from the other counts was

denied. The prosecution's request for dual juries was denied. The parties therefore agreed to defense counsel's "alternative request" that counts 2 through 5 involving both appellant and Rogers would be tried to verdict and then count 1, involving only appellant, would be tried to the same jury. (1CT 173; 2RT 330-363.) The procedure was confirmed on August 31, 2000. (2CT 334-335; 3RT 683-684.)

On November 6, 1998, the prosecution filed a notice of evidence to be presented in aggravation. (1CT 174-176.)

On April 21, 1999, appellant filed a motion to limit victim impact evidence. (1CT 179-183.)

On June 30, 1999, appellant filed a motion to suppress eyewitness identification. (1CT 185-186.) On August 3, 1999, the prosecution filed opposition. (1Ct 200-202.) On February 14, 2000, after an evidentiary hearing, the motion was denied. (1CT 230-231; 3RT 439-509.)

On June 30, 1999, appellant filed a motion regarding closing argument and lingering doubt. (1CT 193-198.)

On February 14, 2000, appellant himself filed a request for trial separate from Rogers. (1CT 211-230.)

On March 15, 2000, appellant filed a "motion for lineup wearing ski mask." (1CT 232-249.) The prosecution filed a response. (1CT 269-271.) On May 11, 2000, the motion was denied. (1CT 298-299; 3RT 546-549.)

On March 15, 2000, appellant filed a "motion for discovery of '*Brady*' material contained in police personnel files." (1CT 250-265.) Opposition was filed by the prosecution (1CT 272-291), the San Bernardino Police Department (2CT 308-312), the San Bernardino Sheriff's Department (2CT 313-325), and the City of Colton. (2CT 326-329.) The trial court issued an order to show cause regarding the police personnel files and the San Bernardino Police Department objected. (2CT 300-302.) On June 8 and 14, 2000, the trial court, in camera, reviewed police officer personnel files and ordered that records regarding a May 17, 1997 incident were discoverable. (2CT 330-332; 3RT 592-638, 639-649, 650-651.)

On December 6, 2000, trial on counts 2 through 5 commenced. (2CT 338; 4RT 703.) For purposes of the felon in possession charge, appellant admitted a prior robbery conviction. He also admitted the alleged "strike." (10RT 2118-2126.) On February 5, 2001, appellant and Rogers were found guilty as charged. The gun use allegations and special circumstance of a murder committed during a robbery were found true. (2CT 483-491; 11RT 2475-2486.)

On February 26, 2001, trial on count 1 commenced. Appellant's motion for a new jury for count 1 was denied. (2CT 510-512; 11RT 2487-2491.) On March 6, 2001, the jury found appellant guilty. The firearm use and multiple murder special circumstance allegations were found true. (2CT 577-580; 12RT 2798-2803.)

On March 12, and 17, 2001, the parties and the trial court discussed the penalty

phase evidence. Appellant objected that section 190.3 was unconstitutional. (3CT 604-605, 610-613; 12RT 2804-2840; 13RT 2851-2875.) Appellant waived his right to be present during the penalty phase. (12RT 2840-2850.)

On March 13, 2001, the penalty phase commenced in front of the jury. (3CT 610-613; 13RT 2875.) On March 26, 2001, the jury determined that the penalty for the deaths of Byrd and Malouf shall be death. (3CT 718; 14RT 3212-3213.)

On April 12, 2001, appellant filed a motion to reduce the penalty to life without possibility of parole (3CT 728-730) and a motion for new trial. (3CT 731-734.) The prosecution filed opposition to the motion for the new trial. (3CT 735-740.)

On April 23, 2001, the motions to reduce the penalty and for a new trial were denied, as was the automatic motion to reduce the penalty. On counts 1 and 2, appellant was sentenced to death. (3CT 758-760; 14RT 3218-3252.)

The "Commitment (Murder) Judgment of Death" (3CT 743-747) and the trial court's "memorandum and order re. Penal Code section 190.4(c) application to modify penalty of death" (3CT 748-757) were filed on April 23, 2001.

On April 24, 2001, the previously imposed sentence on counts 3, 4 and 5 was vacated. Appellant was thereafter resentenced to 10 years in prison on count 3 (stayed), plus 10 years for the gun use (not stayed). On count 4, sentence was stayed. On count 5, a consecutive term of 1 year, 4 months was imposed. Two consecutive 10-year terms were imposed for the gun use on counts 1 and 2. (3CT 761-766; 14RT 3253-3262.)

IV. STATEMENT OF THE FACTS

A. THE APRIL 11, 1996 MAGNOLIA DRIVE INCIDENT

Juli Inkenbrandt, a methamphetamine user, testified that, on April 11, 1996, Jshakar "Solo" Morris asked her for a ride "[o]ver to the west side." Morris was "a dope dealer." Appellant was with Morris. Inkenbrandt did not know appellant's name; she "just knew him by his face. (12RT 2609-2612, 2615-2617, 2624-2636.)

Morris got in the front passenger seat. Inkenbrandt's year-old baby was seated behind her in a baby seat. Appellant was in the back seat behind Morris. It was Inkenbrandt's understanding that Morris and appellant were going to collect some money. (12RT 2612-2618, 2636.)

Appellant directed Inkenbrandt to drive to Magnolia Drive and to pull up by a group of men outside 2005 Magnolia. She stopped "in the middle of the street." (11RT 2503, 2515; 12RT 2618.)

Lewis Hopkins, Latroy Campbell, Harry ("Ricky") Byrd, Daniel Robinson, and Robert Gaston were among the people gathered outside the house on Magnolia. They were talking and "just all hanging out." There were a number of cars parked nearby. (11RT 2500-2503, 2531-2534, 2541-2545; 12RT 2585-2587, 2658-2659.)

A white Sierra stopped in the road in front of the house. A white female was driving. A black male was in the front passenger seat and a black male, identified as appellant, was in the back. The man in the back was "a big-sized guy" with a "stocky

build," about 25 years old, with long curly hair. The man in the back asked, "'Do you know where Smoke is' or somebody Smoke, something." The man may have asked for Smoke Dog. Someone, possibly Ricky Byrd, pointed and said, "'Go over to the dark side." The white car drove off in the direction it had been headed. The group of men continued to talk. (11RT 2503-2509, 2511-2512; 12RT 2587-2592, 2595-2600, 2604-2605, 2659-2661.)

Inkenbrandt testified that as she pulled away, Myles and Solo, but mainly Myles, told her to "go down a few streets" and then to go back to the group of men. When they got back a few minutes later, appellant told her to "pull over a little closer to them." Inkenbrandt stopped in front of the group. (11RT 2509; 12RT 2619.)

Appellant asked the group to "give Smoke Dog a message." Ricky Byrd approached the white car and said, "Okay. What's the message." Appellant pointed two guns out and fired twice. The men on the corner ducked down and the white car drove away. (11RT 2509-2512, 2524, 2538-2540; 12RT 2592-2593, 2600-2601, 2606-2607, 2619-2620, 2661-2663.)

When the men got up, they saw that Ricky Byrd remained on the ground. He had been fatally shot in the chest. A car had also been hit by one of the shots. (11RT 2512-2519, 2525-2526, 2540-2541, 2145; 12RT 2593-2594, 2597, 2601-2602, 2663-2664, 2749-2750.)

After the shooting, appellant and Morris said, "Go. Go," and Inkenbrandt "took

off." Appellant was telling her where to go. As they drove, appellant "was shooting out his window...at a Black guy... [H]e saw more Black folks, and he was shooting at those Black folks out of either side of the car." (12RT 2619-2623.)

At about 3:20 p.m., Gary Lee, who was Ricky Byrd's cousin, and Darion Robinson, nicknamed "Smoke,"[2] were standing on Colorado Street when a white car went by. The car was coming from California Street. (11RT 2547-2550.)

A few minutes later, Lee saw the same white car coming back from the direction of Magnolia. The person in the back seat of the car was a black male with long hair. He had what appeared to be a revolver in his hand. As the white car went by, the man with the gun shot at Lee and Darion. The gun "sounded like a .22." The two men ducked behind a car. When Lee looked up, he saw the white car going down Colorado. Lee and Darion jumped in a car and followed. (11RT 2555-2555, 2562-2564.)

Lee lost sight of the white car, kept looking for it in the "drug area" of San Bernardino. Lee had seen the car before and "[e]very time I seen the car, it was a Black woman driving..." Lee located the car near some apartments at E and Acacia. He then returned to the Magnolia area and learned that Ricky Byrd had been shot. (11RT 2555-2559.)

When Lee took the police to E and Acacia, the white car was not there. When the

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[2] Lee later told police that he did not know anyone named "Smoky." (11RT 2561-2562.)

car returned, Lee pointed it out. (11RT 2559; 12RT 2672-2673.)

After the shooting, Inkenbrandt drove to her apartment on E Street and parked in back. Appellant and Morris got the "bullet shells" out of the car and left. Inkenbrandt ran some errands. Upon her return, Morris and appellant "came running up" and asked for a ride. Inkenbrandt gave them a ride to "another dope spot they sell dope at" and returned to the apartment, parking in front. Shortly thereafter, the police arrived. Latroy Campbell, who was in the back of a police car, pointed out the white car, and identified Inkenbrandt as the driver. (12RT 2623-2638, 2664-2666.)

About three weeks after the shooting, Lewis Hopkins and Daniel Robinson attended a live lineup. They identified appellant, who was in position number 4, as the shooter. (11RT 2519-2520; 12RT 2594-2595, 2602-2604.) Inkenbrandt also identified appellant at a live lineup as the perpetrator. (12RT 2628-2632.)

At trial, Latroy Campbell testified that appellant shot Ricky Byrd. (12RT 2743-2746.)

Detective Filson recovered a live .380 bullet and a spent .380 casing at the scene of the Magnolia Street shooting. Photographs were taken at the scene. (12RT 2644-2650.) Filson also searched room 12 at the Phoenix Motel on North E Street.[3] Eight live .380 bullets and a live .22 bullet were found in the room. Expended .22 casings were located.

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[3] The parties stipulated that appellant's, Morris's and Kimine Randall's fingerprints were found in room 12 of the Phoenix Motel at 1363 North E Street, San Bernardino. (12RT 2747-2749.)

The .380 bullets had FC .380 stamped on it. This was the same manufacturer as the live rounds found at Magnolia Street. (12RT 2650-2654.) Clothing bearing Morris' name was found in the room. (12RT 2656-2657.)

On April 11, 1996, Filson interviewed Inkenbrandt. She described the Magnolia shooting. (12RT 2654-2656.)

On April 24, 1996, the police searched 1275 East Date Street, apartment 105. A Pontiac Firebird was parked in the apartment complex's parking lot. The car could be seen from the apartment. In the car's trunk, the police found a Lorcin .380 semiautomatic handgun wrapped in a white towel. (9RT 1917-1920.)

Firearms expert William Matty examined the Lorcin handgun and two Remington and two Winchester bullets which had been removed from the gun's magazine. He also examined the spent .38 cartridge (Ex. 112), and the unfired .38 cartridge (Ex. 113), both found at Magnolia Street. The headstamp of the unfired cartridge bears the marking "FC." Matty also examined a bullet fragment recovered from the victim (Ex. 111), a .22 caliber bullet from the headrest of a nearby car (Ex. 117), and eight unspent cartridges (Ex 115) and one spent .22 cartridge (Ex. 114) found in the motel room. (12RT 2678-2684.)

Matty testified that Lorcin handguns "just don't mark the bullets very reproducibly." With such guns, he has difficulty comparing fired and unfired cases and bullets. (12RT 2690-2693.) Regarding the bullet fragment recovered from the victim, Matty

could not match it to the Lorcin handgun, although there were similarities between it and the test-fired rounds. The casings and bullets from the scene could not be matched to the Lorcin. (12RT 2693-2696, 2700-2702, 2710-2712, 2714-2716.) The bullets could not be matched by a computer comparison. (12RT 2696-2698, 2702.) An unfired cartridge was the same brand, Federal Cartridge, which matched the brand of bullet recovered from the victim. (12RT 2698-2700.) Matty could not say whether the unfired cartridge found at the scene had been cycled through the Lorcin. (12RT 2702-2704.) Matty testified that the Federal cartridge case found at the scene had been manufactured by the same machine or tool used to manufacture some of the cartridges found in the motel room. They "could be from the same box of ammunition." But, he could not make a positive identification. (12RT 2704-2707, 2710.)

Morris's fingerprints were found in the white car; appellant's were not. (12RT 2747-2749.)

B. THE APRIL 20, 1996 PEPPER STEAK RESTAURANT INCIDENT

1. THE PROSECUTION'S CASE

a. Donna Malouf's testimony[4]

On Saturday, April 20, 1996, Donna Malouf was married to Fred Malouf, a retired Captain in the Colton Police Department. Donna worked at the Pepper Steak Restaurant,

[4] The witness's name was Donna Lynn Malouf-Lawrence. (7RT 1345-1346.) She will be referred to herein as Donna Malouf, Mrs. Malouf, or Donna.

and had gotten off work at 2:30 p.m. (7RT 1346-1348.)

At about 8:00 p.m., Donna and Fred and Donna's mother went into the Pepper Steak for a cup of coffee. Krystal Anderson, a waitress, came up and they started to talk. (7RT 1347-1349, 1377-1379, 1407, 1430-1431.) There were other customers in the restaurant. (7RT 1355-1356, 1374, 1384.)

At that point, a man "come running through the restaurant yelling, 'It's a robbery. I'll shoot. Get your money out.'" The man was "tall, stocky." He was wearing a dark-colored beanie and a mask which came "across the mouth and nose." Donna could see the man's eyes and a portion of his face. At some point, as the man screamed, the mask fell off so that Donna was able to see "all of his face except his mouth and the top of his head." The man may have been wearing black gloves. He had a semiautomatic gun in his right hand. (7RT 1349-1353, 1363, 1364-1367, 1379-1380, 1408, 1413, 1428, 1432-1433.)

Donna got up and started to walk to the kitchen to get a gun. The man grabbed her and started yelling and screaming at her. He called her a "white bitch." He wanted to know if she was the manager and the location of the safe. He said he was going to "blow [her] head off." Donna told him she was not the manager and that there was no safe. The man dragged Donna into the kitchen through the front entrance. (7RT 1353-1355, 1400, 1413-1415.)

When Donna got into the kitchen, she saw another man, about 5'8" - 5' 9", 150

pounds. The man, later identified as Tony Rogers, had a large semiautomatic gun. Rogers was not wearing a mask. (7RT 1355, 1357, 1359, 1367-1369, 1380-1388, 1406.) Appellant told Rogers to shoot Donna if she moved. (7RT 1400-1401.)

The next thing Donna saw was Fred Malouf's face at the window of the door in the back entrance to the kitchen. Donna heard a gunshot from inside the kitchen. Rogers ran toward the door. Inside the kitchen, Fred wrestled with Rogers, trying to get his gun. The two struggled. Fred fell down into the women's rest room. Rogers "stood over Fred and just opened fire and kept shooting and shooting." At some point Fred, who was armed with a gun on his ankle, took out his gun and shot Rogers, who screamed, "I've been shot." Donna saw that Rogers was bleeding. Rogers ran by Donna and out of the kitchen to the door that leads outside to Valley Boulevard. (7RT 1357-1359, 1369-1370, 1380, 1388-1392, 1395-1405, 1409-1410, 1434.)

After the incident, officers took Donna into Rogers' hospital room. Donna, who was extremely upset, said, "They drug me by the hair of my head and then he shot and killed Fred." (7RT 1360-1361.) She "positively" identified Tony Rogers as the shooter. (7RT 1404-1406.)

A few days later, the police showed Donna two photo lineups. She could not identify anyone in the first lineup. In the second lineup, Donna identified picture no. 4, appellant, as the man who had forced her to go into the kitchen. She told the police she was "80 percent sure." She made this identification by covering the hair, forehead, upper

lip, and bottom portion of the suspect's face with her hands . (7RT 1361-1364, 1415-1416, 1418-1419, 1423-1424 .) Regarding appellant, she remembered "[m]ainly the eyes. The cheek bones. The nose." She conceded she had trouble with the photo lineups as a result of the complexion of the individuals in the pictures. (7RT 1422.)

Donna attended a physical lineup on April 30, 1996. (7RT 1424-1427, 1432.) Although she was still upset, she recognized appellant. (7RT 1429.)

b. Testimony of the Lewises

Harold Lewis, his wife, LaVonne, and their grandson, Levi, were in the Pepper Steak restaurant seated in a booth across from the cash register. (7RT 1440-1441, 1467, 1470-1471; 8RT 1647-1648.) They noticed the Maloufs in the restaurant. (7RT 1473.)

LaVonne saw a man "coming through the doors, whirling a gun." Harold saw a tall black man, "over six foot," later identified as appellant, "running through the restaurant..., swinging a gun in the air and hollering, 'Everybody put their money on the table, billfolds, everything.'" Appellant was wearing gloves and dark clothes, and had some sort of mask covering his face, but, according to Harold "you could see his eyes and his mouth and his nose." Harold could not see all of his face. (7RT 1444-1446, 1459-1460-1462, 1464-1466, 1467-1771, 1474, 1482-1484.)

Appellant twisted Harold's arm behind the booth, pointed the gun behind his ear, and took his billfold and money. (7RT 1446-1448, 1453-1457, 1476-1477, 1481.) He then grabbed Donna Malouf by the hair, "dragg[ed] her around," and asked where the

safe was located. LaVonne claimed he asked Donna to open the cash register. Donna said there was no safe. Appellant was looking for the manager. The cash register was opened and appellant grabbed the money. A waitress was near the cash register. (7RT 1444, 1448-1449, 1452-1456, 1475-1476, 1481.)

Harold saw Fred Malouf at the back door to the kitchen. Harold saw him reach down, get a gun out of his boot, and go into the kitchen. LaVonne heard voices from the kitchen. (7RT 1450, 1459, 1481.)

Gunshots then rang out from inside the kitchen. (7RT 1448-1451, 1476, 1481.) Harold testified appellant "r[a]n back there and took a look through that hallway, and then..., came back out" and ran out the front or side door into the parking lot. (7RT 1457-1458, 1479-1480.) Ten or 15 seconds later, Harold "saw a guy on a motorcycle scream through the parking lot." (7RT 1460-1461.) LaVonne testified that when appellant went up to the "pass-through window" between the kitchen and restaurant area, he pointed the gun. She heard "[j]ust a click. It didn't go off." (7RT 1477-1480.)

On April 30, 1996, Harold attended a live lineup, filled out a card, and signed it. He picked picture no. 3 as the robber. Appellant was in position no. 4. (7RT 1462-1463, 1465; 10RT 1090.)

Levi testified that "a guy came out of the kitchen doors said, 'Put the money on the table.'" These were the kitchen doors behind the cash register. The person was over 6 foot, over 200 pounds and was wearing a hood , a mask, a pullover sweatshirt and a

bandanna covering his nose. The man took Harold Lewis' wallet. Lewis couldn't get his wallet out fast enough and the perpetrator grabbed him by the arm, pointed a gun at him and said, "Give me the wallet." The man pointed the gun at Levi. The man forced a waitress to open the cash register. (8RT 1647-1653.)

Levi then heard gunshots. The perpetrator in the restaurant area pointed his gun through the window, "went to fire" but nothing happened. Levi heard "just a click." After the click, the perpetrator ran out the door. (8RT 1653-1655.)

At a live lineup on April 30, 1996, Levi picked out individual no. 4 as the perpetrator. This was appellant. Levi testified in court that appellant looked like the perpetrator, but Levi could not identify him as the perpetrator. (8RT 1655-1657; 10RT 1090.)

Levi told the police that the perpetrator had a ski mask on. He told police that he did not see the suspect's face but could see a portion of the suspect's face around the suspect's eyes. (8RT 1657-1660.)

c. Testimony of waitresses Krystal Anderson and Carrie Hernandez

Anderson was working as a waitress at the Pepper Steak restaurant on April 20, 1996 at 8:00 p.m. Donna was "kind of a manager there that night." (8RT 1487-1480.)

Krystal was talking to Fred Malouf when she first realized a robbery was happening. She first noticed the robber when he came up behind her from the direction of the cash register. The cash register was near the two double doors in the front. The

robber, a tall black man, about 6'1", 200 pounds, was yelling. The man was wearing dark clothes and a zippered-front sweatshirt with matching pants that did not fit very well. The pants exposed the upper portion of his buttocks and some of his underwear. He was wearing gloves with the index finger part of the glove missing. The man was holding a gun which appeared to be a black 9 millimeter. The man was wearing a mask made out of knit material which covered the lower portion of his face to the bridge of nose. She saw the man's eyes and up to his forehead. (8RT 1490-1500.)

The perpetrator asked for the manager and asked where the safe was. Donna Malouf went toward the kitchen door. Before she got to the door, the perpetrator came up, grabbed her hair and took her to a booth and sat her down. He was screaming "where's the safe?" The perpetrator then grabbed Anderson, screamed at her, "fucking white bitch," and carried her to the cash register. She was kicking and hitting. He grabbed her with his right hand. He had the gun in his left. The man kicked her in the leg and told her to open the register or he would "fucking" kill her. Anderson had trouble opening the cash register. The man was waving the gun around and hitting her in the stomach with it. He was screaming, "Open the cash register." When she finally got the cash register open, the man took the fives and tens and some of the change out of the register. (8RT 1500-1505.)

The next thing Anderson remembered was hearing gunshots. She heard one and then several more. She heard maybe 3 or 4 gunshots from the kitchen. Anderson recalled

that a man was at the table where the Lewises were seated. She admited that the perpetrator could have been at the Lewis table before the gunshots were fired. (8RT 1505-1506.) After the gunshots were fired, the man in the restaurant area went toward the kitchen door. He then left the restaurant. (8RT 1506-1507.)

Anderson was shown two photo lineups but could not identify anyone. She could not identify anyone at the live lineup. However, she did pick someone from the live lineup who was in position no. 1. Appellant was in position no.4. She picked that person "by size." She testified that she did not see the person who robbed the Pepper Steak in court . (8RT 1508-1511; 10RT 1090.)

Anderson was interviewed by two different police officers on the day of the incident. Anderson recalled that the robber placed Donna Malouf in a booth by the kitchen door. Anderson does not remember the robber taking Donna Malouf up to the cash register. After Donna was placed in the booth, Anderson does not recall seeing her again before the shots were fired. (8RT 1511-1515.)

While Anderson was at the register, she saw the second perpetrator through the kitchen door window. He was a black male with pockmarks on his face. The man was not wearing a mask. After the incident, Anderson noticed a full-size Bronco with tinted windows leaving the parking lot going slow with its lights off. Anderson told the police that the robber's gun was dark in color. Anderson told the police she would probably be unable to identify the robber in the restaurant because he was wearing a mask. The

robber in the restaurant also took Anderson's tip money, between $40 and $60, out of her pocket. Anderson testified that co-defendant Rogers had the same complexion as the robber in the kitchen. (9RT 1515-1526.)

Carrie Hernandez was also working as a waitress at the Pepper Steak restaurant on April 20, 1996 at about 8:00 p.m. She remembers Donna Malouf at the restaurant along with Donna's mother. Carrie was by the register when she saw a perpetrator come through the double door from the kitchen, which was near the cash register, about 20 feet away. There was another door to the kitchen further away. She was at the cash register and looked back and saw the perpetrator with a mask on, "pulled up." The mask was across the bridge of the person's nose. He was always wearing a ski cap on his head. (8RT 1528-1537, 1575.)

The man asked where the manager was. When the perpetrator turned his back to Hernandez, she went into the kitchen where she saw "another guy with a gun." The other perpetrator in the kitchen "was littler, and he had scars on his face." The perpetrator in the kitchen was not wearing a mask but may have been wearing a cap. He was wearing dark clothing. The perpetrator who came into the restaurant from the kitchen was "tall and husky" and was wearing dark clothing. He was over 6' tall, about 6'3". He was maybe 225 pounds. The "little guy" in the kitchen had a gun. This person was 5'7" or 5'8". The gun was black. (8RT 1538-1542.)

After Hernandez went into the kitchen, Donna Malouf came into the kitchen

through the double kitchen doors. Through the other kitchen door window, Hernandez saw Fred Malouf looking in. Fred Malouf came into the kitchen. There was a struggle and Fred tried to take the gun from the "little guy," who then shot Fred. Fred fell down. The perpetrator shot Fred five more times. Hernandez never saw Fred Malouf with a gun. But, she knew he had a gun because, when Fred fell down, he "got one shot at the guy." Hernandez recalls the first perpetrator, the one from the restaurant area, trying to shoot through the service window, but the gun "didn't go off." She does not recall when he did that. The man was pointing no place in particular, "just in the air." (8RT 1537-1538, 1542-1548, 1554-1561, 1573-1575.)

Hernandez was shown a photo lineup. She picked out the individual in position no. 2, which was a photograph of appellant. But, Hernandez told the police she was not 100 percent sure. At the live lineup, Hernandez picked person no. 1 as the person she felt she saw on the night in question. No. 1 was not appellant. At trial, Hernandez identified appellant as the larger of the two perpetrators. She identified co-defendant Rogers as the second perpetrator. (8RT 1548-1552, 1572.)

d. Testimony of Mark Suchil

Mark Suchil was at the counter of the Pepper Steak restaurant drinking ice tea, facing the cash register area. He knew Krystal Anderson, the waitress, and Donna Malouf. Donna was sitting in one of the booths with Fred Malouf and Donna's mother. (8RT 1590-1593.)

Suchil saw a tall man, "six foot, broad, husky," come into the restaurant from the kitchen area. The man was wearing a mask, gloves, and dark clothes, and was dark complected. Suchil could only see the eye area of the person. The man was carrying a black gun, which appeared to be a 9mm semiautomatic. The man demanded Suchil's wallet. Suchil told him that he did not carry a wallet, that he just had money in his pocket. The man told Suchil to give him his money and Suchil emptied his pockets. Suchil had a $100 bill. The man put the $100 bill into his pocket. (8RT 1593-1602.)

The perpetrator then grabbed Krystal Anderson and went to the register to have her open it. Krystal initially had trouble opening the register but she got it open. Money spilled out of the cash register when the man grabbed it. Suchil testified that, all of a sudden, about six shots rang out from the kitchen area. (Suchil had told the police that he heard three to five shots.) The suspect in the restaurant area panicked and ran out of the restaurant. Before running out, the perpetrator went up to the service window and looked in. (8RT 1602-1610.)

On the night of the incident, Suchil described the perpetrator in the restaurant as 6'2" to 6'5" stocky, over 200 pounds, wearing a ski mask and black gloves and blue sweatshirt and blue levis. Suchil told police he saw Fred Malouf reaching toward his ankle area. Malouf was seated in the restaurant area. Suchil never saw Malouf's gun in Malouf's hand. He just assumed he was pulling the gun out. (8RT 1610-1614.)

In addition to Krystal, Suchil saw the other waitress at the cash register. He saw

Fred Malouf reaching down to his ankle area while he was sitting in the booth and saw Fred Malouf go into the kitchen. (8RT 1614-1616.) When the perpetrators were asking for the manager, Donna Malouf got up and tried to open the register to help out. Suchil saw Donna go into the kitchen before the shots were fired. Suchil could only see the eyes and possibly the suspect's lips through the mask. He could not identify anybody in court as the perpetrator. The robber was three feet in front of Suchil when the robber took his money. (8RT 1616-1623.)

e. Jose Santiago Lopez's testimony

Lopez was employed as a dishwasher at the Pepper Steak restaurant. He had finished cleaning the bathrooms, walked out into the customer area and sat on the bar, to the right of the cash register. He did not see two black males come in. (8RT 1623-1626.)

Lopez testified that a black individual with a handgun stood by the cash register and told "us" to take the money out of our pockets. (Lopez saw only the perpetrator who was in the restaurant area.) That person was tall and fat and wearing gray clothes. The perpetrator threatened the waitress and had her open the cash register. Lopez claimed the person was not wearing a mask. After Krystal got the cash register open, Lopez heard shots. Lopez could not identify anybody by their face from the photo lineup. Although he identified the person holding card no. 4 at the live lineup, he did not say he was sure. Lopez never saw the person's face. (8RT 1626-1635.) Appellant was no. 4. (10RT 1090.)

f. Rogers is apprehended

On April 20, 1996, at about 8:01 p.m., Officer Lester, who was on bicycle patrol, was given a dispatch about a robbery that had occurred at the Pepper Steak restaurant. He responded to the restaurant along with Officer Don Nelson. He checked the area and found a person, later identified as Rogers, "hunched over on the sidewalk" on the south side of H Street near Sperry. There was a black semiautomatic handgun next to him. Officer Nelson secured the gun, which appeared to be jammed. There were four bullets in the magazine. Rogers was approximately 5'6", 170 pounds wearing dark clothes. Rogers complained of a shotgun wound to the stomach and Officer Lester saw blood in his stomach area. Rogers was handcuffed. (8RT 1576-1589, 1673-1684.) Rogers had received "a through-and-through gunshot wound to the chest." (10RT 2030.)

g. Appellant and Rogers are seen at the apartments at 1275 East Date Street.

In April and May 1996, Dotti Summers was one of the owners of the apartments at 1275 East Date Street in San Bernardino. She was at the apartments almost every day except Sunday. Lateshia Winkler rented apartment 105. Several black men went in and out of Lateshia's apartment. For about a month or six weeks, a male named John was associated with the apartment. Summers identified this person as appellant. She would see appellant several times a week. Summers saw co-defendant Tony Rogers, whom Lateshia introduced as her brother, with appellant at the apartment. Tony and appellant "had a large car," a brown, older Cadillac. She may have seen both Tony and John

driving the Cadillac. When she was interviewed by the police on May 1, 1996, she said she had not seen Tony for a couple of weeks. She never saw defendant ride a motorcycle or drive a Bronco or a Blazer. (8RT 1660-1667.)

In April and May 1996, Patrick Walker was working for Dotti and Jimmy Summers at the apartments at 1275 East Date Street. He was the live-in resident maintenance person and manager. He became familiar with Lateshia Winkler, who rented apartment 105. On May 1, 1996, the police showed him photographs. He recognized appellant, who may have been Lateshia's boyfriend. Walker also recognized a "shorter fellow," identified as co-defendant Rogers. He had once asked the shorter fellow to move his Cadillac. Walker often saw appellant with Tony Rogers at the apartment. He never saw appellant on a motorcycle or a Bronco or Blazer. He just remembered the brown Cadillac. (8RT 1667-1673.)

h. <u>The testimony of Karen King and Earl Williams</u>

For two weeks in February 1996, Karen King was living at 6601 Victoria, apartment 446 in the city of Highland with her boyfriend, Daniel Jackson, known as D-Dog. Jackson's sister Angela was also staying there. Her nickname was Big A. At some point, appellant, known as "J-Dog" began living there also. Appellant used to wear his hair in a long ponytail. Without King's permission, appellant borrowed her car in early March 1996. The car was a black, 1992 Corsica. King recalled a gun in the apartment which "could have been anybody's," but was not hers. (8RT 1712-1716, 1718, 1727.)

King testified that Rogers was "the little boy who stayed downstairs" whom she saw with defendant. She did not know him but knew his nickname was Two-Tone or Tone-Tone. (8RT 1716-1717, 1728-1729, 1731.)

King knew appellant for approximately three weeks to a month. He stayed in the apartment for about two weeks, but not when she lived there. She did not talk to appellant. King saw appellant come and go with D-Dog and D-Dog's brother,[5] Sin Dog. (8RT 1720.) Several big black men lived at the apartment in February and March of 1996. (8RT 1727-1730.)

King told Detective Morenberg that Tone-Tone and J-Dog "would kick it together"; they could have been friends and acquaintances. (8RT 1731-1732, 1734.) King did not know Earl Williams, but knew a girl that apparently lived in his apartment, which was downstairs from hers. She saw appellant and other individuals at the apartment. (8RT 1732-1734.)

Earl Williams lived at 6601 Victoria, apartment 334 with his girlfriend, Shanita Thomas, her daughter, and Rogers. Karen King lived upstairs and across from him. Rogers would hang out with a few male friends at the apartment, including appellant ("J-Dog"). (8RT 1741-1745.)

Williams testified that Rogers' mother had been murdered in front of him by

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[5] There is also an A-Dog, whom King did not know very well. When asked, "How many Dogs do you know?" she replied, "The whole pound." (8RT 1728.)

someone using a gun. Rogers' uncle was also murdered in front of him by someone with a gun. After that, Rogers went to St. Louis to live with an aunt. When the aunt kicked him out, he came back and Williams put him up. At that time, Rogers was 15 years old. Rogers lived on the streets and with Williams. (8RT 1754-1756.)

On Saturday, April 20, the day before the police came to his house, Williams went to a funeral, got home and went to sleep. At about 11:00 a.m., Williams was awakened by appellant knocking on the door inquiring as to the whereabouts of Rogers. Williams told appellant that Rogers was at "Boogie's" house. Appellant did not say why he was looking for Rogers. Williams took appellant over to Boogie's house. They brought Rogers back to Williams' apartment and left. Regarding when the three of them were at Boogie's house, Williams testified that he did not hear appellant use the words "cash flow," "pay day," or "pay check." (8RT 1745-1749, 1757-1758.) In a lengthy interview with the police, Williams told the police that appellant had used the words "cash flow," "payday," or "pay check." (3CT 802-883, 884-945.)

They returned to his apartment from Boogie's at about 3:30 p.m. On the way back to Williams's apartment, Williams heard appellant say something like, "We got to be there by 8:00 o'clock," but he never heard anything about "hitting" anyplace. However, Williams was not sure whether this conversation occurred on April 20, 1996. After arriving back at the apartment, appellant and Rogers left. (8RT 1749-1752, 1757, 1759-1760.)

When the police came to his apartment about 2:30 a.m. on the 21st, Williams was on felony probation for assault with a deadly weapon. The police accused Williams of being the wheel man of the Pepper Steak robbery and threatened to arrest him. Williams had recently been arrested for robbery and murder, but no charges were filed. He had been convicted of a felony for possession for sale of cocaine. (8RT 1756-1762.)

When the police came to Williams's apartment on April 21 in the early morning, Williams told them that Rogers hung around with three big black guys, Wayne-Dog, J-Dog and D-Dog. Williams took the police to Lateshia Winkler's apartment where these people stayed. The police left and later brought Williams down to the police station. At the interview, he was scared that he was going to be arrested. The police threatened to send him to jail. In the interview, he made up whatever he could so he could avoid going to jail. The police kept pushing him. He told the police that he heard a conversation between Rogers and appellant about "they had to be somewhere at 8:00 o'clock." (8RT 1764-1774.)

Williams does not remember appellant having a gun when he came over to pick up "Tone-Tone." Williams never saw appellant with a gun and did not tell police he had. (10RT 2041:28.)

i. Lateshia Winkler's testimony

In April 1996, Latisha Winkler was living at 1275 East Date Street in San Bernardino, apartment 105, with her two boys, and a roommate. Appellant, whom

Winkler knew as J-Dog or Rac, stayed there occasionally. She had previously seen appellant with a handgun about the size of a 9mm or a .45. Appellant kept two loaded magazines to the gun on the back of the headboard and kept the gun in the trunk of her old car, a 1973 Pontiac Firebird. The car was parked downstairs in the parking lot by her apartment. She saw appellant carry a gun in his coat or under the seat in the car. (9RT 1786-1789.)

At about 6:00-6:30 p.m. on April 20, 1996, appellant was at Winkler's apartment with some friends. There were two people with appellant. One of them was co-defendant Rogers. Winkler did not know Rogers. She never saw the third person again and does not know who the third person is. Appellant used the telephone and the men left. Later that night, appellant came back alone. Appellant "was high." He was "schermed," which means he had used PCP. He was stumbling around. (9RT 1789-1792, 1804, 1824-1827.)

When appellant returned to the apartment, he went straight back to the bedroom. Winkler followed him. Appellant said he was tired of people chasing him and was tired of running. In their conversation, appellant stated, "Don't start. I've got a lot of shit on my mind." During the conversation, appellant said "that his homeboy got shot." In her police interview, Winkler claimed appellant said that "his homeboy got shot in a robbery, either by somebody who worked there or somebody who was staking it out." (9RT 1792-1795.)

The next day, Sunday, Winkler and appellant went to the movies. During the

police interview, Winkler told the police where they could find the movie ticket stub which was in the stairwell of her apartment. She told the police about the gun in the car. Winkler believed that on Sunday, appellant's mother called and asked to speak with him. When he was on the phone, he said, "What hospital is he in? What did they say? What are they going to do, did he die?" Appellant told Winkler that his friend had gotten shot and was at Loma Linda Hospital in police custody. He did not tell her why the friend had been shot or who did it. (9RT 1795-1803)

Winkler's police interview indicates that appellant was wearing brown shoes, brown khakis and a tan shirt on Saturday and that he only had $17 to $20. Appellant had some change when they went to the movies on Sunday night. Appellant did not have a lot of money on Sunday or Monday. (9RT 1801-1812.)

Winkler told the police that appellant said he felt one of his little homies had been shot and he needed to find out. The tape of Winkler's interview indicates that appellant said "one of my little homies down in L.A." got shot. She asked him, "one of your friends you grew up with?" and he said yes. He said some gang bangers, some "niggas" shot his friend. The tape of Winkler's interview shows that appellant, while on the phone with Winkler "said one of his friends shot someone and killed them..." The person who had been shot was in Loma Linda Hospital. Winkler denied telling a private investigator in November 1998 that appellant said anything about a friend being shot. (9RT 1812-1814.)

Winkler testified that she does not recall who paid for the movies on Sunday night. But, her police interview indicated that she did. Appellant bought a 40 oz. beer. Before they went to the movies, they went out to dinner and Winkler paid. She told the police that when appellant came home Saturday night at about 10:00 o'clock, he appeared mad and angry. She told the police that appellant said that a friend of his got shot while he was trying to do a robbery. He said that it was somebody who either worked there or was staking it out and that the person had been taken to Loma Linda Hospital. She told the police that appellant said "I think one of my little homies either killed somebody or got himself killed. I need to find out." He never told her that he had been involved in a robbery or that he saw his "homeboy" being shot. But, he never denied that he was in a robbery. On Saturday night appellant was "talking all out of his head." (9RT 1834-1850.)

On April 24, 1996 at about 8:41 a.m., Officer Thompson was at 1275 East Date Street in San Bernardino, apartment 105, which is upstairs above the manager's office. Next to the top stair of the stairway going up to apartment 105, Officer Thompson found and recovered a movie ticket stub jammed between the stair and the wall of the apartment. The date and time of the movie shown on the stub is April 21, 1996, 10:00 p.m. and the movie is "The Thin Line." At about 12:40 p.m., Thompson radioed Sergeant Poyzer that he had found the ticket stub. (9RT 1782-1786.) Winkler identified the ticket stub. (9RT 1797-1798.)

On April 24, 1996 at 1275 East Date Street, Sergeant Owens received from Officer

Thompson a movie ticket stub. Owens had previously discussed the ticket stub with Lateshia Winkler. People's Exhibit 40 is a copy of the ticket stub. The original ticket stub has fading or water damage. Exhibit 40 accurately reflects what the ticket looked like prior to the water damage or fading. (2067:12.)

Winkler never saw appellant on a motorcycle or in a Blazer or a Bronco. (9RT 1805.)

j. Detective Morenberg's testimony

Detective Morenberg monitored the April 23 or 24th interview with Lateshia Winkler. At times he was present in the interview room. During the interview, Winkler told the police that appellant left her residence at about 6:30 on Saturday night, saying that he would be gone for about 2 hours. He did not come back until 10:00 p.m. When she asked him why he was late, he said that he had a lot on his mind and didn't want to talk about it. He was mad or angry. He left and then came back after about a half-hour or 45 minutes. There was a longer conversation between appellant and Winkler. She asked appellant why he was late and he said that one of his homeboys had been shot during a robbery and that they thought the person who had done the shooting either worked there or had been staking out the place. Appellant related something about some homeboy being shot in LA. The person was in Loma Linda University Medical Center. (9RT 1850-1854.)

The night appellant came home he was "shermed out." He did not tell Winkler

that his friend had been shot in a robbery. But on the tape, she says he said a friend got shot in a robbery. She discussed buying clothes for appellant. They went to the movies on Sunday night. (9RT 1864:3.)

On April 24, 1996, the police searched Winkler's apartment at 1275 East Date Street, apartment 105. In the apartment complex's parking lot was a Pontiac Firebird. In the trunk, wrapped in a white towel, the police found a semiautomatic .380 caliber Lorcin handgun. (Ex. 54.) The Lorcin handgun was never processed for fingerprints. In the search of the apartment, the police did not find any ski masks or watch caps or bandanas or gloves with fingers cut off. (9RT 1917-1926.)

k. Investigation at the Pepper Steak

Lieutenant Francis Coe assisted in the investigation of the crime scene at the Pepper Steak restaurant. Fired 9mm cartridges were found in the kitchen area of the restaurant and in the men's bathroom area near the kitchen. A projectile or bullet slug was also recovered. Seven cartridge cases were recovered. A cartridge case was found outside the bathroom. Cases were found in the kitchen area. An expended bullet was found in the other restroom. Numerous bullet fragments and strike marks were observed. Some metal or dental-type of material was found. Bullet fragments were found on the floor of the ladies room. Blood was found. Money was found by the east exit door and in an alley-way area of the Pepper Steak restaurant parking lot. Seven $5 bills were found by the east exit door. A $10 bill was found outside. A .38 caliber revolver was found

inside the kitchen area. (9RT 1965-1982.) A Smith and Wesson revolver, four cartridges and one expended cartridge case were collected at the restaurant. (9RT 1922.)

The 9mm Browning automatic that was recovered where Rogers had been laying after the incident was given to Lt. Coe by Officer Nelson. There was a magazine with it, as well as ammunition. There were five 9mm bullets. Clothing from Rogers was photographed. (9RT 1982-1985.)

On April 24, 1996, technician Greenlea assisted in processing evidence at apartment 105 at 1275 East Date Street. She recovered a magazine/clip to a firearm from the headboard in the master bedroom of apartment 105. There were six live 9mm bullets in it. She did not collect a ski mask, beanie, muffler, bandana, gloves, or a sweatsuit. (10RT 2031-2036.)

Detective Richard Garcia attended the physical lineup on April 30, 1996 and translated for Jose Lopez. Lopez's form indicated that he could not identify anyone. When Detective Garcia spoke with Lopez, Lopez stated that he believed the suspect that he saw was in the number 4 position of the live lineup. He stated that he felt sure that subject no. 4 was involved in the incident. Detective Garcia spoke with Lopez on January 15, 2001. Lopez reiterated the identification he made previously. Lopez also stated that he had gotten a side view of the subject's face and that's how he made his identification. (10RT 2036-2040.) On April 30, 1996, Detective Morenberg attended the live lineup. Appellant was in position no. 4 in the lineup. (10RT 1090.)

l. Ballistics evidence

William Matty is a San Bernardino County sheriff's crime lab firearms expert. (9RT1869-1870.) In August and September 1996, he examined a 9mm Browning high powered handgun and a Smith and Wesson .38 handgun. Matty testified regarding how bullet and casing comparisons are made. Fired casings are ejected from a semiautomatic firearm after it is fired. Matty testified about how bullets are fired, and about "class characteristics," which are characteristics attendant to the size and shape of a particular manufactured item such as a firearm or a projectile or a cartridge case. "Individual characteristics" refers to the particular characteristics of the individual item such as the machining on a firearm. Individual characteristics are unique to the item. Unique features from the gun can be transferred onto the cartridge case. Matty discussed lands and grooves in the barrel of a hand-gun and how the lands and grooves can impart unique characteristics to a bullet fired from the gun. (9RT 1880.) According to Matty, it may be difficult to match a bullet to a firearm when the bullets become damaged by hitting objects after they are fired. (9RT 1870-1881.)

Regarding the present case, Matty examined a 9mm Browning high powered pistol. (People's Exhibit 51, co-defendant Rogers' gun.) He test-fired a bullet from the gun. He compared test-fired cartridges to seven fired 9mm caliber cartridges that had been recovered from the restaurant. Based on the comparison, Matty opined that all the cartridges found at the restaurant were fired from the Browning 9mm, Exhibit 51. (9RT

1881-1887.)

Exhibit 52 is a Smith and Wesson revolver. Matty examined and test fired this weapon. Evidence bullet no. A6, recovered from the Pepper Steak restaurant was compared with a test-fired bullet. Matty opined that item no. A6 had been fired from the Smith and Wesson revolver. (RT 9 1887-1894.)

Matty testified about the various sizes of bullets, a .38, a .357, a 9mm, and a .380. A .38 could be fired from a .357 but not vice versa. Exhibit 41 is a Colt .45 which, from its outward appearance, could also be a .22. The outward appearance does not necessarily show what type of ammunition the gun fires. (9RT 1889- 1894.)

Regarding the Browning 9mm, Exhibit No. 51, the magazine that was found where Rogers was lying after the incident was an improper magazine for that particular firearm. It would not latch into the handle of the gun. It is possible that the weapon could fire by manually holding the magazine into the gun. At the crime scene, the Browning 9mm was recovered with a magazine in the weapon that tested and operated properly. (9RT 1894-1915.)

m. Dr. Sheridan's testimony regarding Mr. Malouf

Dr. Frank Sheridan performed the autopsy on Frank Malouf. Dr. Sheridan testified there were five gunshot wounds that were entry wounds and five exit wounds. There were two grazing wounds. One bullet (bullet A) entered above the end of the left lip area and exited by the left ear. This was not a fatal wound but was certainly serious.

The muzzle of the gun was a few feet away when the shot was fired. One of the shots, B1, was in the abdomen. There may have been soot from the shot deposited. This would indicate relatively close range. But, the shot was probably fired from an "indeterminate range." Dr. Sheridan felt it was not soot but rather "a bullet wipe," which is residual oils on the bullet. Bullet B1 was the fatal shot. (9RT 1950.) Wounds C1 and C2 was a shot to the knee. The doctor believes the victim was already down on the ground when he was hit in the knee. Shot D was in the back of the left thigh. It exited the left buttock. The trajectory was upwards. The victim was probably down on the ground when the shot was fired. The final shot, shot E, was in the wrist. Other abrasion injuries may have been caused by bullets. Dr. Sheridan opined that the shot in the abdomen, which was a fatal shot (shot B), was the first shot that was fired. But, it is possible the other shots were fired first. (9RT 1933-1965.)

n. Stipulation re the Lorcin handgun

The parties stipulated that if called, witnesses would testify that before April 20, 1996, a person they believed to be the defendant, John Myles, had a handgun described as similar to that of Exhibit 54, the Lorcin handgun. (11RT 2358-2359.)

2. APPELLANT'S CASE

a. The witnesses' interviews with the police

Sergeant Owens interviewed Lateshia Winkler on April 24, 1996 regarding the case. He asked her questions about appellant and April 20 and 21, 1996. She told him

appellant was wearing khakis, a tan shirt and brown shoes. Whatever night she was referring to, she said he had tan pants on. She said they went to a swap meet and bought some brown clothes. She told Owens that appellant said "Yesterday he said that his friend shot somebody..." She said Sunday they went to the movies. Appellant said he thinks some gang bangers or "some niggas" shot his "little homie." Appellant had $17 to $20. The night when appellant came home and was "shermed out," he did not indicate that his friend had got shot during a robbery. Winkler was not sure whether the brown clothes had to do with Saturday or Sunday. She was sure that the night he was wearing the brown clothes was the night they went to the movies. On Saturday night when he came home around 10:00, appellant told Winkler that his friend had been shot while he was trying to do a robbery. Appellant told her that the friend hit somebody that worked in there. The next day, Sunday, was when appellant mentioned the little homey. Appellant kept his clothes at another location. Sergeant Owens never found a ski mask, a black cap, gloves, or a running/sweat suit associated with appellant. (10RT 2067-2075.)

$5 bills were recovered just outside the east door of the Pepper Steak restaurant. A ten dollar bill was recovered outside. (10RT 2072-2073.)

On April 20, 1996, Officer Kiecolt interviewed Krystal Anderson at the Pepper Steak restaurant. She described the weapon held by the man at the cash register as a chrome and black semi-automatic 9mm. Anderson said that the suspect said to her, "Open the register, bitch," and, while removing items from her pocket, said, "I'm going to

kill you." Anderson could not identify the person because he was wearing a facial covering of some sort. After the gunshots, Anderson said she saw a full size Bronco or Blazer driving northbound on Sperry. It did not have any lights on. Suspect no. 2 was the person with her out in the restaurant area. Suspect no. 1 was the one who was in the kitchen. Suspect no. 1 is described in the police report as Tony Rogers. (10RT 2092-2099.)

On April 20, 1996, Officer Schultehenrich separately interviewed Harold Lewis, LaVonne Lewis, and Levi Lewis at the Pepper Steak restaurant. LaVonne said the suspect in the front of the restaurant was a dark skinned black male, 6' to 6'3", heavyset. He was wearing a blue ski mask or a pulled down stocking cap and a dark blue pullover sweatshirt. LaVonne could not see the robber's face because of the ski mask. She did not mention anything specific about the robber's eyes. Harold Lewis could not give a description of this suspect because his attention was focused on the gun. Levi Lewis said the suspect was wearing a dark blue or black sweatsuit and a ski cap or ski mask. Levi could not see anything on the suspect's face because of the mask. LaVonne Lewis said the handgun was a semiautomatic, similar to the one the officer carried, and was either silver or chrome in color. The Lewises did not describe the mask slipping. They described the ski mask as having openings for the eyes and mouth. (10RT 2099-2108.)

Officer Valdez talked with Harold Lewis who stated that his wallet had been taken from him at gunpoint during the robbery. Lewis showed the officer some bruising on his

right arm. Regarding the money that was allegedly taken from him, Lewis said "there was $6 showing...and approximately five 100-dollar bills hidden in the wallet." (10RT 2219-2223.)

b. Dr. Shomer's eyewitness identification testimony

Dr. Robert Shomer is an eyewitness identification expert. (10RT 2128-2133.) He testified that various factors or "stressors" affect an individual's ability to take in, perceive and then communicate what they have seen: life threatening, unexpected, traumatic circumstances; cross-racial factors; differences between the people observed and people observing; the nature of identification process and procedure and when and how the procedure was administered; the initial description; and the precision of that description. (10RT 2173-2176.) Stress does not heighten a person's ability to identify. (10RT 2184-2197.)

Dr. Shomer testified there are many misconceptions about eyewitness identification. Eyewitness identification is not like a camera. People "don't work like cameras" (10RT2134, 2138) and are influenced by emotions, which severely deteriorate the accuracy of what people see. Memory for faces decays very quickly. People are not reliable at recognizing strangers. Life threatening, traumatic, sudden or unexpected violence may reduce accuracy of the concentration process and thus accuracy of the identification. Individuals in such situations are in a flight or fight mode rather than making careful observations. Cross-racial identification reduces accuracy. Older people

have more difficulty identifying younger people and vice versa. (10RT 2133-2137.)

Having a person's face obscured by a mask "is one of the most significant ways you reduce the accuracy of identification" because "eyes turn out to be very non-useful in terms of discriminating one person from another." (10RT 2137-2138.)

Memory can be altered by suggestive questions and the number of times a person is questioned. Motivation in answering can adversely affect accuracy. There is no reliable relationship between confidence in the identification and accuracy of the identification. Confidence in identification comes from a source other than the actual contents of the person's memory. Multiple presentations of the same individual in photo lineups tends to lead to significantly higher rates of erroneous identification of the person. It indicates to the victim that the individual showing the picture is interested in the person and it builds confidence in the victim that they have chosen the right person. An initially tentative identification can be become more positive with repeated presentation irrespective of initial accuracy. (10RT 2138-2141.)

Erroneous eyewitness identification can lead to erroneous convictions. To make identifications more accurate, the person presenting the lineup should not know who is in the lineup or whether the suspect is in the lineup. The presenter should not know the position of the suspect if they know the suspect is in the lineup. The lineup alternates should look essentially the same and the session should be audio and video taped. The same procedure should not be repeated with the same witness. (10RT 2141-2146.)

Dr. Shomer testified regarding other eyewitness identification factors: It is "very very difficult" for a person in a violent crime situation to correctly identify the perpetrator; it is not highly likely that a person in a violent situation can correctly identify the person in court; women are more accurate in identifying clothing than men; no one has a photographic memory regarding facial identification; there is no correlation between accuracy and confidence with regard to identification of strangers; and an individual is far less likely to identify someone who looks different than they do. (10RT 2146-2166.)

Dr. Shomer testified that DNA evidence has shown that prior identifications have been wrong. (10RT 2167-2168.)

Dr. Shomer testified that "gun focus" may make it difficult to later identify someone. This is so because, where a weapon is being used, people tend to focus on the weapon rather than the features of the person. Someone walking towards you with a gun is a life threatening stress. Actual violence is "even a more major stressor." When shots are fired, such a stressor is "way at the top of the chart." An unexpected event or one that happens over a short period of time can adversely affect accuracy of an identification. The more stressors present "makes it more difficult later to identify a person." (10RT 2176-2181.)

In attempting to make an identification, individuals may "confabulate, which is blending together information from outside sources with what a person actually saw to the point where the individual later believes that the outside sources is actually what he saw.

Confabulation can be innocent. (10RT 2181-2184.)

3. ROGERS' CASE

Rogers testified regarding the Pepper Steak Restaurant incident. (10RT 2224 et seq.) He testified that appellant was not at the restaurant during the incident. (10RT 2267-2268.)

Rogers testified that he was 17 years old in 1996, and had an eighth-grade education. He was too slow for the juvenile hall classes. He has had this problem all his life. (10RT 2224-2225, 2227-2228.)

Regarding the incident at the Pepper Steak Restaurant, Rogers testified that someone named G-Dog and another person picked him up from his apartment and they drove around. He passed out because he had been drinking and smoking marijuana. He woke up when they were in a parking lot. He asked the "driving dude" where they were and the "driving dude" said "homies went inside." Rogers said he had to use the bathroom so he went inside the restaurant. When he went inside, he was shot in the chest and, because he was scared, he took out his gun, which was tucked in his pants. The two people started struggling and the gun went off. Rogers "was in fear for my life." The shooting was an accident. As he turned around, the gun was just going off. He then ran, tried to get help and passed out on the sidewalk. He did not rob anybody in the restaurant. He did not take anything. (10RT 2225-2227, 2240-2258, 2259-2262, 2292-2295, 2299.) The "home boy" who was in the restaurant was G-Dog. He introduced himself as Steve.

The person who was driving the car was Dee. Rogers admits that he killed another human being. When he shot he was just reacting. It happened so quick. (10RT 2228-2230.)

Rogers testified that someone shot and killed his mother in front of him. (10RT 2227-2228.) He had his gun for protection because of "the dude who killed my mom, they had been threatening me." He did not go into the restaurant with the intention of committing a robbery or "backing up [his] home boy." (10RT 2226-2228.)

Rogers testified that appellant came over to Earl Williams's house three days before the Pepper Steak incident looking for some money that Rogers owed him. Rogers knew appellant from the apartments where Williams and Karen King lived. Appellant called Rogers "Tone." (10RT 2230, 2245-2246, 2208-2270.)

Rogers testified that the gloves and handkerchief recovered where he was found on the sidewalk were not his. The gun recovered at the scene where he was found was his gun. Rogers never saw any employees or Donna Malouf in the kitchen. When he ran out of the restaurant he ran trying to get help. He did not go back to the jeep that he had arrived in. Rogers testified that appellant had not been at the restaurant. (10RT 2259-2265, 2267-2268.)

During a conversation with a probation officer, Rogers denied that he used alcohol, but admitted that he used marijuana. Rogers does not recall stealing a teacher's coin purse in April 1991 at elementary school, but stated the taking of the coin purse

"could have happened." (10RT 2288-2291.)

4. PROSECUTION REBUTTAL

Detective Morenberg testified regarding the layout of the Pepper Steak restaurant in an effort to rebut Rogers' testimony about where and how he entered. Morenberg claimed it is not possible to enter the public restrooms of the Pepper Steak restaurant through the kitchen from the outside. To get to the public restrooms, you would have to go through the kitchen out into the restaurant area and then to the restrooms. One would have to walk through a corridor to the kitchen to get to the site of the shooting. Morenberg agrees that Rogers could have been mistaken as to which door he came in. The distance from the service door to the employees' restrooms is across the kitchen area, approximately 50 feet. The service door was always open during business hours. (11RT 2360-2371.)

C. THE PENALTY PHASE

1. The prosecution's case

a. The Denny's robbery

On October 28, 1992, Mark Repman was the manager at the Denny's restaurant in Victorville. At about 11:30 p.m., three African-Americans entered the restaurant. There were two pistols and a shotgun. One of the men grabbed Repman, turned him around, stuck a gun to the back of his head, and took him to the office. The other two told everybody in the restaurant to lay down. Repman opened the safe and gave the person the

cash, about $900 in bills and $300 in rolls of coins. Three to four hundred dollars was taken out of the cash register. After getting the cash, the person put the gun to Repman's head and told him to lay on the floor. Repman did so and the person walked out through the dishwashing area. As soon as the person left the office, Repman called 911 to report a robbery in progress. Repman received information regarding the direction of travel of the suspect's vehicle and reported that to the police. (13RT 2888-2892.)

Deputy Matthew Kitchen was informed of the Denny's robbery and of the description of the vehicle. A vehicle went by on Interstate 15 and Kitchen followed it southbound. The vehicle was going about 80 miles an hour. There were three occupants in the car. When additional units arrived, and after a few miles, Officer Kitchen turned on his overhead red and blue lights in an attempt to pull the car over. Instead, the vehicle accelerated to in excess of 120 miles an hour. The vehicle exited Interstate 138, failed to negotiate a turn, and crashed into the rear of a Texaco station. Two suspects ran from the vehicle. Police searched for the suspects who ran. (13RT 2895-2902.)

Officer Steven Urrea had been advised regarding three suspects in a vehicle that had crashed and that suspects had fled on foot. He and two other officers were walking on the railroad tracks when they saw a black male about 30 yards away. The male was taken into custody. The male said his name was James Brown, but it was stipulated that the person arrested was appellant. The officer also located money. A rifle or shotgun was lying close to the money. A pair of shoes was near the money and rifle. Appellant

was not wearing any shoes, just socks. He said he was a transient. (13RT 2902-2909.)

The police took Repman to an accident scene. He recognized the money and the pistol at the scene. It was stipulated that Repman saw appellant at the scene of the accident. At the restaurant, appellant was the one holding the shotgun. He did not take Repman into the back and did not hold a gun to Repman's head. All the guns were together in the car at the accident scene. Appellant had pointed the shotgun at guests and told them to get on the floor. (13RT 2892-2895.)

b. The Shawn Boyd incident

At the time of his testimony, Shawn Boyd was in custody at Pelican Bay State Prison because of a robbery committed in 1996 or 1997. Boyd knows appellant. (13RT 2909-2910.)

On February 23, 1996, Boyd was at the apartment of appellant's mother. Appellant, his mother, sister, another man, and some females were there. They were just hanging out. Boyd denied that he and appellant got into a disagreement. Appellant was not angry at him. (13RT 2910-2913.)

Boyd testified there was a "lot of chaos went on in the house," there was "a lot of ruckus" and he ended up getting shot in the mouth. He does not know who shot him. Boyd had been standing between the kitchen and living room when he was shot. After being shot, he fell through a bedroom door and jumped out the closed bedroom window from the second floor. After jumping through the window, Boyd landed on his feet and

walked to his car. The security guard came, got him from his car, and held him until the ambulance came and took him to Loma Linda Hospital. He had been shot in the lip and the bullet went through his tongue and out the back of his neck. Boyd never saw appellant with a .380 handgun. (13RT 2413-2417.)

Boyd did not want to testify and told the transporting officers so, but he was not concerned about testifying. Pelican Bay is on lockdown because of racial problems, not because of snitches. Boyd was not worried about anything happening to him regarding snitching. He never told any detective that testifying meant "his life." (13RT 2917-2922.)

Lt. Miller investigated the shooting of Shawn Boyd. He interviewed Boyd at Loma Linda University Medical Center. Boyd told Miller that appellant, also known as J-Dog, had shot him. Boyd said that they were at appellant's apartment and Boyd mentioned that he was doing very well and had a job and new clothes. Appellant was jealous. There was a conversation about appellant not doing quite as well and needing money. Boyd said appellant looked upset. He told Boyd to "get into the mother fucking room," while motioning to the master bedroom. Appellant "began pumping himself up as he was getting agitated." Boyd said appellant locked the front door and pushed him towards the master bedroom. Boyd said he was not going to go in and asked appellant, "what's the problem?" Appellant told Boyd that if he did not get into the bedroom, "I will plug you." Appellant then reached down with his right hand, pulled out a .30 caliber

handgun and shot Boyd in the face. Boyd ran through the master bedroom, across the bed, and jumped out a second-story window. Boyd said he later saw appellant and Patricia Herrod, appellant's mother, driving out of the complex. Boyd was on parole at this time. (13RT 2923-2931.)

Lt. Coe conducted forensic work at the apartment on February 23, 1996 in regards to the shooting of Boyd. He found blood drops and a fired cartridge case and a bullet slug that had lodged in a door in the apartment. A .380 cartridge case stamped RP was found outside of the master bedroom. The slug was consistent with a .380. The blood evidence led up to the window which had been broken out. There was blood on broken window pieces as well as the vertical blinds covering the window. Broken glass was found below the window. (13RT 2932-2939.)

Detective Schiller transported Boyd from Chino to the courthouse for his testimony in the instant case. During the ride, Boyd expressed that he was afraid that word would get back to the prison system that he had testified, which would put his life in danger. He referred to trial court transcripts as a death warrant if the copies were to make it to the prison system. This was a repetitive concern of Boyd. (13RT 2939-2940.)

The parties stipulated that Patricia Herrod, appellant's mother, would testify that, on February 23, 1996 at 11:45 p.m., appellant and Shawn Boyd were at the apartment. She was asleep in the bedroom with her 12-year-old daughter when she heard something loud, saw Boyd run through the bedroom, cross her bed, and jump out the second floor

window. Herrod grabbed her daughter, ran out of the residence, got into a vehicle and drove to her sister's. She did not see appellant shoot Boyd and did not see appellant with a gun. (13RT 2940-2942.)

c. The Thomas Realtors incident

Jacqueline Graff was the bookkeeper/receptionist at Thomas Realtors. She testified that, on April 3, 1996 at about 2:20 p.m., she was working with her head down when she noticed two black males walk into the office. One man, who was tall and heavy and had shoulder length, curly hair, walked directly up to her and put a gun to her head. She did not get a look at the second person, who was telling the people in the office to be quiet and to sit down and be still. There was an announcement that this was a robbery. The man who had put the gun to her head said, "Open the drawer and give me your money." Graff told the man that the owner had gone to the bank. She opened the drawer but there was no money in it. She opened all her drawers. The man said, "I want the money. Somebody is going to die if I don't get the money." A co-worker named Paul walked out of his separate office. The two men went toward Paul and one entered his office. The rest of the people in the lobby ran out the front door. Graff called 911. The two men then ran out of Paul's office and out the front door. (13RT 2949-2956.)

Paul Baumhoefner worked at Thomas Realtors in San Diego on April 3, 1996. Baumhoefner testified that he was in his office and came out when he heard commotion in the lobby area. He looked towards his secretary's desk, and a big black man with

"Michael Jackson hair" approached him. The hair was wavy, wet looking and shoulder length. The man had a gun in his hand. Baumhoefner thought the gun was a revolver. The person said, "Give me the money." Baumhoefner pulled back into his office. He did not see anybody else. Baumhoefner told the man that his boss had just left with the money to go to the bank. Baumhoefner opened all the drawers and pulled his pockets out. Baumhoefner pulled out a wad of money, about $20 or $30. People were running out of the office. The man grabbed the money and headed out of Baumhoefner's office. (13RT 2957-2961.)

Baumhoefner grabbed a gun out of his boss's desk, ran out the front door, jumped in his truck, and followed the man, who had gotten into a red car. Some tenants directed Baumhoefner to where the man had gone. These people jumped in the back of Baumhoefner's truck and he followed the red car. (13RT 2961-2967.)

At a stop light, Baumhoefner pulled behind the red car and got the license number. After getting the license number, he went back to give the license plate number to the police at his office. At his office, he heard someone on the police radio saying, "Shots fired on North Parkway by the post office," which is where he had broken off the chase. He never heard any shots. (13RT 2467-2969.)

On April 3, 1996 at about 2:30 p.m., Thomas Stone was driving down University Avenue in San Diego when he saw a group of people running. He followed them. He went down an alley and noticed somebody jumping into a red car which then took off.

The person who jumped into the passenger side of the red car was 6'1" or 6'2". The people who were running pointed at the car. Stone followed the red car and got a partial license plate number. (13RT 2969-2972.)

Stone saw the car stop at a stop light. He stopped, and put his car in reverse. He saw someone get out of the passenger side of the red car and start shooting at his vehicle. The person was about 190-195 pounds and about 6'. Stone's vehicle was struck in the windshield on the passenger side. One of the headlight lenses was struck and in the wheel well. The other car was a small Spectrum or Festiva. (13RT 2972-2978.)

The parties stipulated that on April 5, 1996, the police recovered four latent prints from a 1987 Chevrolet four-door sedan with California license plate 3PCN592. One print from the exterior of the passenger side rear window was positively identified as appellant's. The parties stipulated that on April 3, 1996 the Chevy vehicle was found in close proximity to where the shooting occurred. It is also stipulated that a bullet and expended cartridges were recovered in the west alley of the 4000 block of 30th Street in San Diego, about 35 feet south of a white pickup truck. It is also stipulated that the white pickup truck had a hole in the passenger side consistent with a fired bullet and a hole in the rear glass window of the truck behind the windshield. There was also a broken driver's side headlight. A bullet was recovered in the alley north of the truck. The parties stipulated that the police report indicates that Thomas Stone described the male who shot at him as a black male, in his 20s, 6'1" 175 pounds, wearing dark clothing. The parties

stipulated that the license number written down by Paul Baumhoefner and given to the police was 3PNC592. (13RT 2978-2982.)

Casings and a bullet were from the San Diego Realty robbery incident and were submitted to ballistics/firearms expert William Matty. The casings were .380 automatic caliber casings, Federal brand. The casings could have been fired from the Lorcin gun, but Matty was not able to make an identification. They had similar class characteristics. The bullet that was found was consistent with the Federal type cartridges in one of the other shootings. There was a near identification on two of the land impressions. The Federal cartridges from San Diego were the same kind as in the February 1996 Shawn Boyd incident. Matty testified that the bullet from the February 1996 "attempted homicide was in fact fired from that Lorcin pistol." (13RT 2982-2988.)

d. <u>The December 7, 1996 jail incident</u>

On December 7, 1996 about 10:30 p.m., Deputy Perea was assigned to assist in a shakedown in unit 6 of the West Valley Detention Center. During the shakedown, the prisoners are ordered out of their cells and searched with their underwear on. Their cells are also searched. Deputy Taylor asked appellant to follow him and step outside of his cell. Appellant mumbled something. Perea, Deputy Taylor, and appellant went into the multipurpose room. There, Deputy James was talking with another inmate. Deputy Taylor told appellant to sit down. He did so. Appellant was not paying attention and was not listening. Deputy James told appellant to pay attention and not disrespect the

deputies. Appellant stood up and James put his hand on appellant's shoulder and may have told him to sit down. Appellant then punched Deputy James on the left side of his face, apparently knocking him unconscious. Deputies Taylor and Perea moved towards appellant to try to gain compliance. Appellant swung and hit Taylor, who fell to the ground. Deputy Perea sprayed pepper spray at appellant in the face. Appellant threw a food cart at Deputy Perea, hit him in the arm, and ran into a utility room. Appellant came out swinging a push broom. Deputy Taylor got up, sprayed appellant with pepper spray, and radioed for assistance. Several other deputies arrived in the room. Appellant continued to swing the broom. A deputy threw a plastic chair at appellant, knocking the push broom out of his hand. The deputies tried to tackle him to gain compliance and were telling him to stop resisting. He did not comply. Eventually the officers were able to gain control of appellant and put leg shackles and handcuffs on him. (13RT 2289-3003.)

Deputy James testified that he was in the multipurpose room with an inmate when Deputies Perea and Taylor came into the multipurpose room with appellant, who they had sit in a chair. Appellant stared at the other inmate who avoided eye contact. James told appellant to look straight ahead and listen to what Deputy Taylor was telling him. Appellant said "something to the effect that he'll fucking do whatever he wants to do." James's report stated that appellant said, "I can fucking look where I want to." Appellant attempted to stand up and James put his hand on his chest to push him back into the chair.

Appellant got up and struck James in the left side of the head. This stunned James. Appellant then struck Deputy Taylor in the chin. James remembered seeing a food cart fly. Appellant picked up a broom. Taylor pepper sprayed appellant again. Appellant was swinging the broom. Plastic chairs were thrown at him. The broom fell out of appellant's hand and he was subdued. Deputy Gomez, who had put a choke hold on appellant, was bitten during the incident. The purpose of the "choke hold" is to render the person unconscious. It does not actually choke the person. (13RT 3003-3017.)

e. The May 17, 1997 jail incident

On May 17, 1997, Deputy Nichols was working at the jail at West Valley Detention Center in unit 5, where appellant was an inmate. Nichols was searching inmate Willy Schumacher, who had come up from an official visit. Deputy Llewellyn came into the multipurpose room and said that appellant was refusing to "lock it down." Nichols followed Llewellyn to where appellant was housed. He was going "to get Myles to comply with the order to lock it down, for disrespecting Deputy McInerny." (13RT 3107-3020.)

As they started walking up the stairs to the top of the second tier where appellant's cell was located, Llewellyn told appellant to go inside his cell and lock it down. Appellant disregarded Llewellyn's order, stepped to the top of the top step of the tier, took a combative stand and told Llewellyn, "Fuck you." Nichols reached around Llewellyn and pepper sprayed appellant. The pepper spray had no effect. Appellant

grabbed Deputy Llewellyn, They were striking each other with fists. Nichols came around appellant and attempted to apply a choke hold. Appellant threw Nichols off. As Nichols was getting up, appellant struck him in the back of the head or on the side of the head with a closed fist, three, four, or five times. Appellant lifted Nichols up off the ground and tried to throw him over the rail of the second tier. Nichols got his arms around the top rail and pulled himself down so appellant could not throw him over. Nichols head-butted appellant. Appellant released him and went back to deputy Llewellyn. They were throwing fists. Other deputies arrived and eventually gained control of appellant and cuffed and shackled him. (13RT 3020-3215.)

Deputy David Llewellyn testified that appellant refused to "lock it down" and that Deputy Nichols pepper sprayed appellant, who then attacked Nichols. Llewellyn got hit in the eye during the fight. Before the fight, appellant confronted Llewellyn. (13RT 3022-3039.)

f. The shank incident

Officer Alejandro Barrero works in the West Valley Detention Center. On Novembr 13, 2000, he was working as a deputy at the detention center in unit 14. On that date, he recovered a metal "shank," a prison-made knife, from appellant. The metal shank was wrapped with a cloth to enable one to get a grip on it. There was rope material on the handle so that if the shank fell out of one's hand, it could still be grabbed. A second shank was also recovered. (13RT 1943-2948.)

g. Victim impact evidence

i. The Ricky Byrd incident

Harry Byrd III was the father of Harry "Ricky" Byrd IV. The victim was referred to as Little Ricky. When Ricky was shot, Mr. Byrd was living in Boulder Creek in the Santa Cruz Mountains. He received a call from Kenny, his sister's fiancee, telling him that Ricky had been shot and was dead. Mr. Byrd fell to his knees and dropped the phone. He did not believe it. He called relatives and told them that Ricky had been murdered. He drove with his daughter down to the San Bernardino area and went to his mother's house at 1972 Magnolia, a few doors down from where Ricky was killed. (11RT 3039-3942.) Byrd's mother and sister told him what had happened. He went down the road to the scene and saw blood in the driveway. He eventually talked to Detective Voss and found out the details. He also talked to some of the men that were there when Ricky was shot. (13RT 3042-3043.)

The most difficult thing for Mr. Byrd was seeing his son laying in the coffin. At the funeral, the church was filled with friends and relatives. The last time he had seen his son Ricky was in '94 or '95. He talked to him the weekend before on the phone. They loved each other. Mr. Byrd had planned to come down the next weekend. Mr. Byrd testified regarding photos of Ricky when Ricky was 16 years old and of Ricky at graduation. Mr. Byrd also testified regarding a picture of his grandson, Harry Byrd V, who will never know his father, Ricky. Ricky never got a chance to see his son. (13RT

3042-3047.)

Eighteen months earlier, Mr. Byrd's only brother was murdered. (13RT 3041-3042.)

Dorothy R. McDowell-Byrd testified that Ricky Byrd was her grandson. She had just spoken with Ricky shortly before he went across the street to talk with "the guys." While she was hanging clothes in the back yard, she heard two shots and thought to herself, "Boy...that was close." When she was almost finished, she walked in her back door. Lewis came running through and said that Ricky had been shot. Dorothy, who works in the nursing field, went down the street with Lewis. When she got to the scene, Ricky was laying on his back between the sidewalk and the street. She knew he was "already gone." The police officer attempted CPR on Ricky. She knew that was not going to help. (13RT 2048-3051.)

Dorothy testified that Ricky had lived with her about 85 to 95 percent of his life. She was close to Ricky and he was more like one of her kids than a grandson. He would do little things to help around the house. He liked to sing, but he was an average singer. She thinks of Ricky now when she sees his son, who "looks so much like him." Little things remind her of Ricky on a daily basis. He never got to fulfill his dreams. He wanted to go to college and become a marine biologist. He was going to go to junior college and then transfer. He had just applied for a job at UPS. Ricky never had the opportunity to see his son. She testified regarding the two photos that Ricky's father

testified to. (13RT 3051-3055.)

ii. The Fred Malouf incident

Donna Malouf-Lawrence testified that she initially met Fred Malouf in 1974. They met again in 1985 and started dating in 1987. They got married January 1, 1994. Mrs. Malouf testified regarding a photograph of her husband, herself, her best friend Sandy, and Sandy's husband Ron. They were all best friends. Sandy died of cancer in 1994 and two years later Fred Malouf was killed. After she lost Fred and Sandy died, she continued to see Ron, Sandy's husband, and they eventually married. She thinks about Fred every day and has had counseling every week. Her grief turned to anger and the counseling helped. She testified, "Fred was, is, and always will be, my life." (13RT 3056-3059.)

Fred Malouf was Damon Simon's uncle. Fred Malouf taught Simon to hunt, fish, play cards, play chess, play checkers. Simon was very close to Fred Malouf, who was like a second father to him. Simon and Malouf would do lots of things together such as hunt and fish, meet for coffee and play games. Simon is a correctional officer and counselor at CYA and chose law enforcement because of Fred Malouf and his (Simon's) father, who was a reserve officer with the Colton police department. Malouf told Simon to succeed at whatever you do and to get a college degree before he went into law enforcement. Simon did so, receiving a bachelor's degree in criminal justice. Fred mentioned that life was more important than property. (13RT 3059-3063.)

It is difficult for Mr. Simon to talk about his uncle. He gave one of the eulogies at the funeral. Fred Malouf had a son, Richard. Simon and Richard were "pretty tight" with their fathers. They did things together. Fred was a practical joker. Simon testified regarding two photographs of Fred Malouf, one, a family portrait showing Malouf in uniform, and a picture of Malouf and Simon's father. Fred Malouf organized family reunions. Simon testified about a family picture and about a picture from a hunting trip. "Fred enjoyed life to the fullest." The thing Simon misses most about Malouf is Malouf's companionship. (13RT 2063-3068.)

Mr. Simon found out about the shooting when he was home with his wife. He received a phone call from Donna saying that Fred had been shot in the face. He did not think it was fatal because, as an officer, "You think you're bullet proof." When Simon was in high school, Fred Malouf would volunteer at the school and come into the classes and describe the police experience. Fred had a good sense of humor that you can't replace. Mr. Simon testified, "it's like when you lose something that you can't replace." (13RT 3068-3072.)

h. Appellant's prior robbery conviction

The parties stipulated that, in December 1992, appellant was convicted of second degree robbery and that a principle was armed. (13RT 2886-2888.)

2. Appellant's mitigation case

The trial court informed the jury that appellant wanted to call as witnesses three

inmates who witnessed the May 17, 1997 jail incident -- Casey Whigham, Lennard Roberson and Jack Dunnigan. However, the inmates were unavailable; thus, their recorded statements were played for the jurors who followed along with a transcript. (13RT 3087-3093.)

Casey Whigham stated that "all hell broke lose" when Deputy Llewellyn pushed appellant because he was not "locking down" as fast as the officer wanted him to. When the pepper came, Whigham ran into his cell. (4CT 1033-1035.)

Linnard Roberson stated that when appellant asked for a grievance form for Roberson, appellant was told to go back to his cell. As appellant was on his way to his cell, an officer "swung on him or...tried to mace him." Roberson said, "that's when shit hit the fan." The deputies "rushed" appellant as he was going to his cell. Although they were fighting, appellant was defending himself. The officers never asked him to stop. The officers "beat" appellant and "constantly stomped his head into the pavement" after they had subdued him. Roberson said that during the altercation, there was never a concern that someone might go over the edge of the railing; "Nobody tried to throw anybody over." (4CT 1035-1054.)

Jack Dunnigan stated that, while appellant was at the top of the stairs, two officers came up. One of them "got...right up close in his fac, it was some sort of words back and forth." Both of them were upset. An officer tried to pepper spray appellant. One of the officers pushed appellant "to begin with." Punches were thrown. Appellant had an

officer in a bear hug. After appellant had been handcuffed, the officers "slammed his head into the concrete...it's a wonder they didn't kill him." An officer "stomped" on appellant's head. What the officers did was "totally unnecessary." (4CT 1054-1069.)

Whigham has five burglary convictions, a convictions for escape, and three convictions regarding fraudulently selling access cards. (13RT 3091-3092.) Roberson has two burglary convictions and a conviction for assault with intent to commit mayhem or rape. (13RT 3092.) Dunnigan has two vehicle theft convictions, two convictions for evading a officer, and convictions for hit and run with death or injury and assault with a deadly weapon on an officer or firefighter. (13RT 3092-3093.)

Attorney David Call previously represented appellant in this case. He testified that he represents defendants in capital cases. In preparation for the penalty phase, he prepares for possible mitigation evidence to be presented to the jury. He discussed many times with appellant the presentation of mitigating evidence to the jury. Call wanted to present mitigating evidence regarding the history of appellant's family and, more particularly, appellant's mother and how appellant was raised. Appellant refused to allow him to present that evidence and said he would rather die than have his mother disgraced in the courtroom. He has never changed his position and "that's the reason I am no longer his attorney." Appellant would not allow Mr. Call to present any mitigation evidence regarding his mother and his family. In Call's opinion, the evidence would have

been mitigating evidence. (13RT 3094-3098.)[6]

V. ARGUMENT: PRE-TRIAL ISSUES

A. THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT DENIED HIS MOTION TO SEVER THE RICKY BYRD CASE FROM THE PEPPER STEAK RESTAURANT CASE; REVERSAL OF COUNT ONE, THE RICKY BYRD CASE, AND THE PENALTY DETERMINATION IS REQUIRED.

1. Introduction

Citing the incredible prejudice from having the same jury hear the evidence and decide his fate as to both incidents, appellant moved to sever the Ricky Byrd case (count 1) from the Pepper Steak Restaurant case (counts 2, 3, 4, and 5). (1CT 91-102.) The trial court denied the motion (2RT 236-241) and, adopting a suggestion of appellant's previous attorney, that current counsel objected to (3RT 657-662), ruled that the same jury would first hear and decide the Pepper Steak Restaurant case and then hear and decide the Ricky Byrd case. Appellant subsequently objected to this procedure and reiterated that severance should be granted. The motion was again denied. (3RT 683-685.) After the verdict in the Pepper Steak case, appellant, citing the Fifth, Sixth, Eighth, and Fourteenth Amendments, renewed the severance motion on the grounds that it was unfair to have the same jury to also hear the second case. He argued, "It's just fundamentally unfair." (11RT 2487.) The trial court denied the severance motion.

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[6] Appellant waived his attorney client privilege for the purpose of allowing Call to testify as he did.

(11RT 2487-2491; and see 12RT 2736-2737.)

The trial court's rulings denying severance were wrong, and resulted in severe prejudice to appellant. His rights to due process, a fair trial, a jury trial, a reliable determination of guilt and penalty, and fundamental fairness under the United States Constitution, Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, and 17 were violated. Reversal of count 1 and the penalty determinations is required.

2. Standard of review

The denial of a motion to sever is reviewed for an abuse of discretion. (*People v. Price* (1991) 1 Cal.4th 324, 388, 3 Cal.Rptr.2d 106, 139.)

3. The trial court's reasons for denying the severance motion.

In denying the severance motion, the trial court stated, "...even though they may be dissimilar incidents, they're still the same case." The trial court recognized that trying the two cases to the same jury "may tend to make him look worse in the eyes of the jury...[but] the current state of the law is that's appropriate." (3RT 343-344.) The trial court stated:

> "If that is -- to the extent that was a motion to sever the 187 counts as to Mr. Myles, that motion is denied. I'm satisfied that as to Mr. Myles the joinder of both of those counts is appropriate; that it does not create any undue prejudice; that although they are separate incidents, they are certainly the same class of crimes. They are relatively close in time; and it is appropriate that both of those counts as to Mr. Myles be tried together.

> So to the extent that that was a motion, or a request for severance of those two counts as to Mr. Myles, that motion is denied." (3RT 348.)

4. The trial court prejudicially abused its discretion when it denied appellant's severance motions.

The factors to be considered when ruling on a motion to sever one count from another for separate trials with separate juries was stated in *People v. Mendoza* (2000) 24 Cal.4th 130, 161, 99 Cal.Rptr.2d 485, 504:

> "The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case."

(Accord, *People v. Zambrano* (2007) 41 Cal.4th 1082, 1128-1129, 63 Cal.Rptr.3d 297, 338.)

Federal law is in accord: "Improper joinder...rise[s] to the level of a constitutional violation..if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn.8, 106 S.Ct. 725, 730, fn.8; accord, *Davis v. Coyle* (6th Cir.2007) 475 F.3d 761, 777 [same, citing *Lane, supra*]; *Hood v. Helling* (8th Cir.1998) 141 F.3d 892, 896 [severance required where "a joint trial [is] fundamentally unfair." Fundamental unfairness is shown where the jury is prevented "from making a reliable determination of guilty or innocence."]; *United States*

v. Kopituk (11th Cir.1982) 690 F.2d 1289, 1314 ["joinder of...offenses, even though proper..., can be so prejudicial as to require severance."])

Here, although the Pepper Steak Restaurant and Ricky Byrd offenses are "of the same class of crimes or offenses," and thus are properly joined under Penal Code section 954, severance should have been granted because they are "related only by being of the same type." Thus, "whatever efficiencies a joint trial does provide" were negligible in comparison with the fact that the only way for appellant to have a fair trial was to have separate trials with separate juries.

The factors stated in *Mendoza, supra,* clearly require severance here. First, there was no cross-admissibility of evidence between the two incidents. The offenses occurred nine days apart and were committed with different accomplices. The witnesses were different. The motives behind the two offenses were different -- robbery (Pepper Steak) and, perhaps, illegal drugs or some sort of personal vendetta with "Smoke." There were no highly distinctive or common marks between the offenses such that Evidence Code section 1101, subdivision (b)[7] might have been applicable.

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[7] Evidence Code section 1101, subdivision (b) states:

> "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that

Second, the Pepper Steak shooting was likely to arouse the jurors' emotions and inflame them against appellant. In that case, Mr. Malouf was murdered right in front of his wife, trying to defend her. She saw her profusely bleeding, bullet-riddled husband dying before her eyes. Also, Mr. Malouf was a retired police officer. The highly inflammatory nature of the Pepper Steak incident -- and the jury's guilty verdict in that case -- would carry over into and prejudice appellant in the Byrd case. Under such circumstances, no jury could ever objectively evaluate and consider any other case involving the same defendant.

Third, the Byrd offense alone was not a capital offense. *Alone*, it did not involve any special circumstance. (Penal Code sec.190.2.)[8] It became a capital case solely by reason of it being joined with the Pepper Steak proceedings. (Penal Code sec.190.2 subd.(a)(3) ["The defendant in this proceeding has been convicted of more than one offense of murder in the first or second degree."]) Had the Byrd offense been severed and tried in a separate "proceeding," it would not have been a capital case. This factor weighs heavily in favor of severance.

The above factors demonstrate that count 1 must be reversed for failure to have

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> the victim consented) other than his or her disposition to commit such an act.

[8] The 1996 version of section 190.2 did not include the special circumstance of an "intentional" murder "perpetrated by means of discharging a firearm from a motor vehicle." (Penal Code sec.190.2, subd.(a)(21).) Appellant recognizes that, if the Byrd offense had been tried with a separate jury after the Pepper Steak case, section 190.2, subdivision (a)(2) (multiple murder) may have been invoked by the prosecution.

separate trials. Reversal of count 1 also requires reversal of the penalty determination. Although there was a robbery special circumstance, there was evidence introduced in the penalty phase as to the multiple murder special circumstance, which is invalid with the reversal of count 1. The invalidation of this factor necessitates reversal of the penalty determination. (*Brown v. Sanders* (2006) 546 U.S. 212. 220, 126 S.Ct. 884, 892 ["An invalidated sentencing factor...will render the sentence unconstitutional by reason of adding an improper element to the aggravation scale."]) Further, it is obvious that a defendant in a penalty trial for two murders is far more likely to receive the death penalty than if he were on trial for only one.

The trial court prejudicially abused its discretion when it denied appellant's severance motions. The trial court's ruling, resulted in such a significant unfairness so as to deprive the defendant of a fair trial and due process of law. The highly emotionally charged Pepper Steak case adversely and improperly influenced the jury in deciding the Byrd case. Appellant was given the death penalty in the Byrd case which, absent the joinder of the two cases, he would not have received in that case. And, had the cases been tried separately, appellant would have been less likely to have received the death penalty in the Pepper Steak case because he was not the person who actually killed Mr. Malouf. As a matter of law, appellant suffered severe prejudice as a result of the denial of his severance motion.

Although the trial court told the jury that the Byrd case was a separate and distinct

offense and must be determined "separately and independently" (12RT 277), this instruction did little if anything to alleviate the great prejudice inherent in having the same jury decide both cases. As stated in *Jackson v. Denno* (1964) 378 U.S. 368, 388, fn.15, 84 S.Ct. 1774, 1787, fn.15, "'The naive assumption that prejudicial effects can be overcome by instructions to the jury, ...all practicing lawyers know to be unmitigated fiction.'" Further, if the instruction were sufficient, there would never be any need for separate trials.

5. Conclusion

Regarding the same jury hearing two separate cases, a "prejudicial constitutional violation" occurs where the defendant's trial has been "'...render[ed]...fundamentally unfair and hence violative of due process'... The prejudice is shown if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict." (*Sandoval v. Calderon* (9th Cir.2001) 241 F.3d 765, 771.) Here, the trial court's denial of appellant's severance motion was prejudicial and violated his rights to due process, a fair trial, a jury trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Reversal of count 1 and the penalty determination as to both murders is required.

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B. APPELLANT'S CONSTITUTIONAL RIGHTS WERE PREJUDICIALLY VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION FOR A LINEUP WHEREIN THE PARTICIPANTS WOULD WEAR SKI MASKS, WHICH IS WHAT THE PEPPER STEAK RESTAURANT SUSPECT WAS WEARING; THEREFORE, COUNTS TWO, THREE, FOUR, AND FIVE MUST BE REVERSED.

1. Introduction

In the Pepper Steak Restaurant incident, the suspect who was in the restaurant area was wearing a ski mask which obscured much of his facial features. Thus, to ensure fundamental fairness and an accurate, reliable identification, appellant moved for a live lineup at which the individuals would wear ski masks to partially obscure their faces. (1CT 232-249.) The prosecution filed a response. (1CT 269-271.) After a hearing, the trial court denied the motion. (1CT 298-299; 3RT 546-500.) However, this ruling was wrong and severely prejudicial to appellant. As a result, his rights to due process, a fair trial, a jury trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, sections 7, 15, 16, 17, and 18 were violated. Reversal of counts 2, 3, 4, and 5 is required.

2. Standard of review

A decision denying a motion for a live lineup (here, one with the participants wearing ski masks) is reviewed for an abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 236, 66 Cal.Rptr.2d 123, 178-179.)

3. The trial court prejudicially erred by denying appellant's motion for an accurate, fair lineup.

Due process encompasses the basic right to "a fair trial in a fair tribunal." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905, 117 S.Ct. 1793, 1797; accord, *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266, 137 Cal.Rptr.476, 483 ["A fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law."]) Indeed, fair play is the essence of due process. (*Galvan v. Press* (1954) 347 U.S. 522, 530, 74 S.Ct. 733, 742.)

In *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, 114 Cal.Rptr.121, 126, this Court held that "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." The right to a lineup arises "when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (Ibid; accord, *People v. Williams, supra,* 16 Cal.4th at 235, 66 Cal.Rptr.2d at 178; *Sims v. Sullivan* (2nd Cir.1989) 867 F.2d 142, 145 ["the failure to grant a lineup may constitute a denial of fundamental fairness where the in-court identification is so unreliable that '"a very substantial likelihood of irreparable misidentification"' exists."]) "[R]eliability is the linchpin" regarding identification procedures. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114, 97 S.Ct. 2243, 2253.) Thus, in *Swicegood v. Alabama* (5th Cir.1978) 577 F.2d 1322, where the suspects were wearing ski masks, an initial lineup was conducted having the potential

suspects wearing ski masks. (577 F.2d at 1326.) No one identified the defendant. At a second lineup, the participants' masks were removed. An identification of the defendant was made. Taking off the masks, as well as the disparity in the appearance of the participants, rendered the lineup suggestive, and violative of due process. In *United States v. Hinton* (D.C. Cir.1980) 631 F.2d 769, the suspects wore ski masks; thus, the defendant "appeared in a lineup along with seven other black males, all of whom wore ski masks." (631 F.2d at 774.)

Here, to ensure the reliability of the witnesses' identifications, and the fairness of their subsequent testimony, a lineup should have been conducted having the participants wearing ski masks. Such a procedure would have duplicated the incident and would have provided a fair identification process. No one would have been prejudiced.

The denial of appellant's motion for a ski mask lineup was prejudicial. Rogers testified that appellant was not present at the Pepper Steak Restaurant; thus, the identity of the robbery suspect was plainly in dispute. (10RT 2267-2268.) The suspect in the restaurant area wore a ski mask which masked his face; the witnesses did not get an unobstructed view. Although a live lineup had been held on April 30, 1996, the potential suspects were not wearing ski masks covering their faces. Thus, the April 1996 lineup was not an accurate or fair depiction of the actual incident. The witnesses had had no contact with appellant prior to the incident, which was a traumatic and stressful event, and which, as Dr. Shomer testified, increased the chance of inaccurate identification. If the

witnesses at a live lineup could not identify appellant while wearing a ski mask, that inability would readily call into question the accuracy and reliability of their other identifications of appellant. Being unsure of the accuracy and reliability of the witnesses' identification, the jury would have had a reasonable doubt of appellant's guilt. Thus, to ensure that the witnesses' identifications were reliable, and to ensure that appellant was accorded his right to due process and a fair trial, the trial court should have granted appellant's motion for a ski mask lineup.

4. Conclusion

"It is indisputable...that when the People seek to deprive an accused of his liberty based on identification evidence such can only be done by procedures which accord to him due process of law." (*Evans v. Superior Court, supra,* 11 Cal.3d at 621, 114 Cal.Rptr. at 124.) The procedure adopted by the trial court, i.e., limiting appellant to a lineup which did not accurately duplicate the conditions at the scene, prejudicially violated his constitutional rights. Reversal is required.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S *MARSDEN* MOTION FOR NEW COUNSEL. AS A RESULT, APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND COUNSEL UNDER THE SIXTH AMENDMENT WAS VIOLATED; REVERSAL IS REQUIRED.

1. Introduction

Appellant was dissatisfied with the representation he was receiving from his appointed defense counsel, Mr. Nacsin. Therefore, in February 2000, ten months prior to

the start of trial, appellant sought appointment of new trial counsel. (3RT 516-527, 529-540, 672-682.) The trial court denied appellant's request for new counsel without prejudice . (3RT 678.) However, this ruling constituted an abuse of discretion which denied appellant his rights to due process, a fair trial, to counsel of his choice, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. Reversal is therefore required.

2. Standard of Review

The denial of a motion for substitution of appointed counsel is reviewed for abuse of discretion. (*People v. Hart* (1999) 20 Cal. 4th 546, 603, 85 Cal. Rptr. 2d 132, 166-167; *People v. Marsden* (1970) 2 Cal. 3d 118, 12, 84 Cal. Rptr. 156, 159 ["...the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney...is within the discretion of the trial court..."]) If an abuse of discretion is established, reversal is required per se; prejudice need not be shown. (*Perry v. Leeke* (1989) 488 U.S. 272, 280, 109 S. Ct. 594, 600 ["[C]onstructive denial of the assistance of counsel...'...is not subject to...prejudice analysis..."]) Here, it is clear that the trial court abused its discretion. Therefore, reversal is required.

3. Appellant was unconstitutionally denied his right to effective assistance of counsel and counsel of his choice.

It is beyond dispute that, "[T]he right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights."

(*People v. Ortiz* (1990) 51 Cal. 3d 975, 982, 275 Cal. Rptr. 191, 196; accord, *Kimmelman v. Morrison* (1986) 477 U.S. 365, 374, 377, 106 S. Ct. 2574, 2582, 2584 ["The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process...***... [T]he right to counsel is the right to effective assistance of counsel."])

This fundamental right to counsel requires that new counsel be appointed to represent an indigent defendant when present counsel is providing ineffective assistance *or* where the relationship between the defendant and his or her attorney has devolved into an irreconcilable conflict. As stated in *People v. Hart, supra,* 20 Cal. 4th at 603, 85 Cal. Rptr. 2d at 167:

> "The governing legal principles are well settled. When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [S]ubstitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel.'" (Citations and internal quotation marks omitted.)

(Accord, *People v. Marsden, supra*, 2 Cal. 3d at 124-125, 84 Cal. Rptr. at 160; *Stenson v. Lambert* (9th Cir.2007) 504 F.3d 873, 886 ["...forcing a defendant to go to trial with an

attorney with whom he has an irreconcilable conflict amounts to constructive denial of the Sixth Amendment right to counsel. [Citation.] An irreconcilable conflict in violation of the Sixth Amendment occurs...where there is a complete breakdown in communication between the attorney and client, and the breakdown prevents effective assistance of counsel."]; *United States v. Swinney* (8th Cir.1992) 970 F.2d 494, 499 ["Justifiable dissatisfaction sufficient to merit substitution of counsel includes a conflict of interest, an irreconconcilable conflict, or a complete breakdown in communication between the attorney and the defendant."]) "[T]o compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." (*Brown v. Craven* (9th Cir.1970) 424 F.2d 1166, 1170.

Appellant stated, and counsel agreed, that counsel had refused to provide him with any discovery. (3RT 517, 520, 530, 534.) (3RT 534-535.) Although the discovery was eventually provided upon the trial court's order (3RT 535-536), counsel's failure to promptly provide appellant with the evidence against him was emblematic of the continuing problems and disagreements between the two.

Appellant stated that defense counsel was merely "keeping the defendant under the impression that the defense attorney is working in the interest of the client." (3RT 520, 532-533.) Counsel was not properly investigating the case (3RT 532, 673-675) and did not provide appellant with "work product." (3RT 537-539.)

As an example of deficiency of counsel, appellant asserted that he did not intelligently waive time because "I've been totally incompetent in not understanding any of the court proceedings, because all of the defense attorneys...has refused to...advise me of my rights." (3RT 522, 531.)

"[L]oss of trust is certainly a factor in assessing good cause" for appointment of new counsel. (*McKee v. Harris* (2nd Cir.1981) 649 F.2d 927, 932.) Appellant repeatedly reiterated that he had "absolutely no trust or faith in attorney Chuck Nacsin." "I got to be able to trust him for us to have that attorney/client relationship. And I don't trust him because...I don't know what he's doing." (3RT 523, 676.) Because of this distrust, appellant did not provide counsel with the names and addresses of defense witnesses. (3RT 524-525, 533-534.

Appellant informed the trial court that defense counsel "only visits with the defendant once every two or three months, and the attorney's secretary refuses to accept the defendant's collect calls, so the defendant can leave no messages." (3RT 523.)

According to appellant, Mr. Nacsin "refuses to interview any witnesses requested by the defendant" and thus "was attempting to take the defendant to trial with a tainted, inadequate, sabotaged investigation..." (3RT 523-524.) Counsel had refused to file a *Pitchess* motion regarding Detectives Fukson and Voss and for a change of venue and to recuse the trial court and the prosecutor. (3RT 525-526, 530-531.)

Counsel stated that he had discussed case investigation with appellant "many

times" and was "pursuing everything I can pursue in this case." (3RT 674.) But, as appellant stated:

> "And maybe he is. Maybe he is, all right; but I, I, I don't see it. And we have a hard time understanding each other. I can not -- I don't -- I don't know what he's doing, you know what I mean. I don't know what he's doing. I mean, when we're not discussing the case we get along just fine, you know what I'm saying. But when we discuss the case we collide. And I just don't have any understanding of what he's doing or anything like that.
>
> And I ask him for certain parts of the discovery and I don't receive them.
>
> And it makes me worry.
>
> You know, it makes me worry." (3RT 674.)

Defense counsel agreed with the trial court that he was properly investigating the case and would pursue all avenues of cross-examination. (3RT 676-677.)

The trial court's denial of appellant's *Marsden* motion constituted an abuse of discretion. From appellant's extended discussion of the myriad problems, and from counsel's remarks, it is clear the attorney-client relationship had irretrievably broken down; they simply could no longer work together effectively. Appellant did not trust counsel and believed that counsel had not represented him properly. Obviously, a strained, difficult relationship precludes effective assistance of counsel. As a result, this unproductive relationship violated appellant's constitutional right to counsel under the Sixth Amendment. His right to effective counsel was substantially impaired. Thus, the

motion for new, appointed counsel should have been granted. (*People v. Crandell* (1988) 46 Cal. 3d 833, 854, 251 Cal. Rptr. 227, 235 [new counsel should be appointed where "...defendant and counsel have become embroiled in such an irreconcilable conflict that no effective representation is likely to result."])

Appellant's prior attorneys, Grover Porter and David Call, had been replaced. Generally, when a defendant makes several *Marsden* motions, a court may infer "...that appellant's motion[s] [were] necessarily untimely or that it would have disrupted the orderly process of justice." (*People v. Lara* (2001) 86 Cal.App.4th 139, 13, 103 Cal.Rptr.2d 201, 219.) Here, however, the trial court never made any such finding, thus dispelling the possible inference the motion was made for improper reasons. Nor did the trial court rule the motion was untimely.

4. Conclusion

The trial court abused its discretion in denying appellant's timely *Marsden* motion made many months prior to the start of trial. As a result, appellant was denied his rights to due process, to a fair trial, to effective assistance of counsel, to counsel of his choice, to present a defense, to a reliable determination of guilt and penalty, and to fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution, article 1, section 15. Reversal is therefore required.

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D. THIS COURT SHOULD INDEPENDENTLY REVIEW THE REPORTER'S TRANSCRIPTS OF THE IN CAMERA PROCEEDINGS TO DETERMINE WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S *BRADY/PITCHESS* MOTION.

In conjunction with appellant's *Brady/Pitchess* motion and the oppositions (CT 250-265, 272-291; 2CT 308-312, 313-325, 326-329; 3RT 550-651), the trial court held an in camera hearing, from which appellant was excluded. (3RT 600-623, 628-638, 641-649.) The trial court denied the disclosure request as to Officers Morenberg, Owens, and Schiller (3RT 650), but granted it as to "the incident between Mr. Myles and a couple of the deputies at the jail." (3RT 650.)

Neither the transcript of the *Brady/Pitchess* in camera hearing nor the documents reviewed by the trial court was provided to appellant's counsel on appeal, and, because appellant was excluded from the in camera hearing, the transcript and documents are not available to appellate counsel. Thus, appellate counsel is not in a position to make any argument on appellant's behalf regarding the propriety of the trial court's ruling. Nevertheless, regarding in camera hearings, the remedy of appellate review is available. (*People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021, fn.4, 252 Cal.Rptr.779, 785, fn.4.)

A defendant in a criminal case has the due process right to the discovery of evidence that may "be used to counter the government's case or to bolster a defense." (*United States v. Stevens* (2nd Cir.1993) 985 F.2d 1175, 1180.) The due process clauses of

the Fifth and Fourteenth Amendments to the Constitution, as interpreted by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, and its progeny require the prosecution to learn of and disclose to the defense any exculpatory or impeachment evidence favorable to the accused that is in the prosecution's possession. The prosecution must disclose evidence "so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced." (*United States v. Nobles* (1975) 422 U.S. 225, 231, 95 S.Ct. 2160, 2166.) In addition to the disclosure of complaints against officers, the in camera hearing ensures that any *Brady* material in police officer files will be disclosed to the defendant.

To ensure that appellant's due process rights were not violated by the trial court's ruling, appellant requests that this Court independently review the transcript of the in camera hearing and the documents reviewed by the trial court[9] to determine whether the trial court erred. Such a procedure has been followed on numerous occasions in similar situations. (See, e.g., *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874, 95 Cal.Rptr.2d 686, 690 ["in order to protect petitioner's right to appellate review, '[t]he trial court can and should exercise its inherent power to order that the proceedings be recorded and transcribed and that the transcript be sealed.'"]; *People v. Woolman* (1974) 40

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[9] Appellant's motion to correct and augment the record on appeal included a request to have the documents that were reviewed in camera by the trial court included in the record on appeal. (CT Sup.A 362-363.) The trial court denied the request, and said the findings made on the record at the in camera hearing were sufficient. (RT 10/12/07, 3.) Thus, the trial court contemplated that its findings would be reviewed by this Court.

Cal.App.3d 652, 654, 115 Cal.Rptr.324, 326 ["we have examined the file tendered to the trial court at the in camera hearing..."]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1077, 236 Cal.Rptr.740, 741 ["In connection with the appeal this court has reviewed a transcript of that *in camera* hearing.)"]; *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1488-1489, 12 Cal.Rptr.2d 234, 236-237 ["Defendant asks this court to independently review the transcript of the in camera hearing to determine whether the trial court erred...***The transcript of the in camera hearing reveals..."])

Pursuant to the above authorities, and to ensure that appellant's constitutional rights were not violated, appellant requests that this Court review the in camera hearing transcript and documents considered by the trial court.

E. THE TRIAL COURT, AS A MATTER OF LAW, COMMITTED ERROR OF CONSTITUTIONAL PROPORTION WHEN IT PREJUDICIALLY INSTRUCTED THE PROSPECTIVE JURORS IN VOIR DIRE NOT TO BE INFLUENCED BY ANY SYMPATHY FOR APPELLANT; AS A RESULT, REVERSAL IS NECESSARY.

1. Introduction

It is axiomatic, that under the United States Constitution, Eighth Amendment, "[t]here is...a strong policy in favor of accurate determination of the appropriate penalty in a capital case..." (*Boyde v. California* (1990) 494 U.S. 370, 381, 110 S.Ct. 1190, 1198.) "[S]tates must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case.'" (*Graham*

v. Collins (1993) 506 U.S. 461, 468, 113 S.Ct. 892, 898.) Failure to abide by this fundamental principle is a violation of a defendant's rights to a fair trial, due process, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In the instant case, appellant's rights were violated and the jury deprived of the required sentencing discretion when, during voir dire, the trial court instructed the prospective jurors to "set aside any of those feelings of sympathy or empathy or compassion on either side" "during the course of this trial through the various phases." (5RT 888.)[10] This instruction was erroneous as a matter of law and mandates reversal of the death sentence.

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[10] The trial court told the jury: "It's a normal human reaction or a human emotion, you're going to be here during the course of this trial *through the various phases, we get to all of those phases*, for several weeks. Mr. Rogers, you'll be seeing Mr. Rogers, Mr. Myles, every day. There may be friends or family of theirs present from time to time.

Likewise, there may be friends or family of the deceased individuals or other people involved in the case in the courtroom from time to time, and a normal human reaction would be to have some feelings of sympathy or empathy with any or all of those people.

And what we're going to be asking you to do as jurors is to set aside any of those feelings of sympathy or empathy or compassion on either side and make an objective decision based solely on the facts and the law that I give to you.

Do all of you feel that you're the type of person who can do that, who could set aside any sympathy and emotions and make an objective decision based on the facts?" (5RT 888; italics added.)

2. Standard of review

As a result of the trial court's erroneous "no sympathy" instruction, the jury, while it was hearing the evidence and observing the witnesses, was misinformed as to the full extent of its discretion to consider any and all mitigating evidence. Reversal is required where, as here, it is "...reasonably likely [citation] that the jurors were misled about the scope of their discretion in determining penalty."]) *People v. Mayfield* (1993) 5 Cal.4th 142, 181, 19 Cal.Rptr.2d 836, 851.) As a matter of law, the erroneous "no sympathy" instruction certainly misled the jury.

3. The issue has not been waived.

The issue of the erroneous "no sympathy" instruction has not been waived. (See Penal Code section 1259 ["The appellate court may also review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; *People v. Hannon* (1977) 19 Cal.3d 588, 600, 138 Cal.Rptr.885, 892 ["Lack of objection...did not...waive defendant's right to appellate review of the propriety of the court's jury instruction..."]; *People v. Hempstead* (1983) 148 Cal.App.3d 949, 956, 196 Cal.Rptr.412, 416 ["...in a criminal case an appellate court may review the giving of an instruction despite the absence of an objection below if the substantial rights of the defendant were affected."]; *United States v. Olano, supra,* 507 U.S. at 736, 113 S.Ct. at 1779.) Here, as a matter of law, appellant's substantial rights were affected, the fundamental fairness of the penalty phase was

seriously compromised, and a miscarriage of justice has occurred. This Court, thus, may review the error.

4. The no "sympathy" instruction was erroneous and misled the jury to appellant's great prejudice.

It is well-settled that, as a matter of constitutional law, the jury in a death penalty case may "properly 'consider' sympathy for defendant" (*People v. Robertson* (1989) 48 Cal.3d 18, 52, 255 Cal.Rptr.631, 650, and that "[t]he Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy." (*Deuscher v. Whitley* (9th Cir.1989) 884 F.2d 1152, 1161.) As explained in *People v. Edwards* (1991) 54 Cal.3d 787, 834, 1 Cal.Rptr.2d 696, 726:

> ...at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience.

Similarly, in *People v. Wright* (1990) 52 Cal.3d 367, 442, 276 Cal.Rptr. 731, 781, the court noted:

> ...a jury's exercise of sentencing discretion in a capital case may be influenced by a sympathetic response to mitigating evidence... The jury is permitted to consider mitigating evidence relating to the defendant's character and background precisely because that evidence may arouse "sympathy" or

"compassion" for the defendant..."'[11]

To ensure that the defendant's constitutional rights to due process and against cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments are not violated, the jury must be free to consider and weigh whatever sympathy and pity the evidence may engender. Instructions must "...allow consideration of sympathy for defendant." (*People v. Mickey* (1991) 54 Cal.3d 612, 695, 286 Cal.Rptr.801, 846; accord *People v. Hardy* (1992) 2 Cal.4th 86, 203, 5 Cal.Rptr.2d 796, 867.) An instruction which tells the jury to set aside sympathy violates the Constitution because it completely does away with a critical, often dispositive, factor for the jury's consideration. Such an instruction is erroneous as a matter of law:

> The Legislature has entrusted to the absolute discretion of the jury the awesome decision between life imprisonment and the death penalty... In this case, the trial court erroneously instructed that the jury cannot be influenced by "pity for the defendant" or "sympathy" for him... [T]his instruction improperly eliminates factors that a jury may consider in fixing the punishment. *People v. Polk* (1965) 63 Cal.2d 443,

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[11] Accord, *Saffle v. Parks* (1990) 494 U.S. 484, 493, 110 S.Ct. 1257, 1263 ("The state must not cut off full and fair consideration of mitigating evidence."); *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330, 105 S.Ct. 2633, 2640 ("...a defendant has a constitutional right to the consideration of such factors, i.e., frailties of humankind."); *People v. Stansbury* (1993) 4 Cal.4th 1017, 1066, 17 Cal.Rptr.2d 174, 204 ("...sympathy for the defendant may be considered in selecting the penalty."); *People v. Williams* (1988) 44 Cal.3d 883, 955, 245 Cal.Rptr.336, 385; (At the penalty phase, "...sympathy for a defendant may be considered."); *People v. Hardy* (1992) 2 Cal.4th 86, 201, 5 Cal.Rptr.2d 796, 866 ("Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all the various factors he is permitted to consider, including [section 190.3] factor 'k' as we have interpreted it...")

451, 47 Cal.Rptr.1, 6.

(Accord, *Payne v. Tennessee* (1991) 501 U.S. 808, 822, 111 S.Ct. 2597, 2606 ["'We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death."]; *People v. Leach* (1985) 41 Cal.3d 92, 111, 221 Cal.Rptr.826, 837 ["...it was error to instruct that the jury was not to consider sympathy in reaching its penalty verdict... The jury should not be foreclosed from considerations of sympathy and compassion when there is any evidence in mitigation."])

The "Use Note" to CALJIC 1.00, the "no sympathy" instruction, states "CALJIC 1.00 should not be used in the penalty phase of a capital case as it admonishes the jury not to be influenced by pity for defendant." Although the instruction in this case was given during jury selection, the same concerns are present because the judge said that it applied "during the course of the trial through the various phases" and for "all those phases." The trial court instructed the jury that it must "set aside any of those feelings of sympathy or empathy or compassion" for "either side." (5RT 888.) This necessarily included appellant.

Further, the trial court told the jury that the "no sympathy" admonishment was applicable "during the course of this trial through the various phases we get to all of those phases." The instruction was not limited to only the guilt phase. As the Court in *California v. Brown, supra,* 479 U.S. 538, 107 S.Ct. 837 recognized, the timing of the

anti-sympathy instruction is crucial. There, the Court found no constitutional violation where the instruction was given *after* presentation of the mitigating evidence. Here, however, the "no sympathy" instruction came *before* any testimony. The jury heard appellant's favorable and sympathetic penalty phase witnesses only after it was told *not* to have any sympathy for the parties. The instruction was prejudicial because it erroneously emphasized that the guilt and penalty phases were governed by basically similar principles.

It is well-settled that the jury is deemed to have followed the instruction given. (*People v. Turner* (1994) 8 Cal.4th 137, 209, 32 Cal.Rptr.2d 762, 804 ["We presume that the jury followed the court's instructions."]) Thus, throughout the presentation of the guilt and penalty phases, the jury necessarily was rejecting any and all evidence likely to arouse sympathy, pity, or compassion for appellant. Such evidence readily could have justified a sentence less than death. Indeed, the instruction *required* that the jurors suppress and disregard any such sympathetic emotion or reaction that might affect the verdict. However, the trial court's "no sympathy" instruction effectively mandated that the jury disregard this critical mitigating evidence which appellant was constitutionally entitled to present and have considered by the jury. The instruction thus violated appellant's rights to a fair trial, to present a defense, to a reliable determination of penalty, to due process and to fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See, *Lockett v. Ohio, supra,* 438 U.S. at 603-605, 98 S.Ct. at 2964; *Woodson v. North*

Carolina (1976) 428 U. S. 280, 304, 96 S.Ct. 2978, 2991 [Jury may consider "...the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."])

The instruction after the presentation of evidence at the penalty phase, that the jury "...shall consider, take into account and be guided by..." inter alia, "...any sympathetic or other aspect of the defendant's character or record..." and to disregard all "statements that may have been made during jury selection" (3CT 659, 682-683; 14RT 3160, 3170-3171, 3174) did nothing to effectively correct or countermand the earlier "no sympathy" instruction. The instruction that the jury could properly consider "any sympathetic... aspect" should have been given *before* the penalty phase commenced. (13RT 2875-2880.) Nor did any instruction expressly state that the "no sympathy" instruction was wrong. After being instructed that it was *not* to be influenced by any sympathy for appellant and thereafter sitting through exceedingly unpleasant testimony and viewing numerous exhibits, it is unreasonable to conclude that the jurors could or would disregard the "no sympathy" instruction and give the required consideration to appellant's mitigating evidence. Thus, as a matter of law, there is a reasonable likelihood that the jury was misled as to the correct scope of its sentencing discretion as well as regarding its duty to take all mitigating evidence into consideration.

In *California v. Brown, supra,* 479 U.S. 538, 107 S.Ct. 837, the Court held that an instruction which informed the jury not to be "swayed by mere sentiment, conjecture,

sympathy, passion, prejudice, public opinion or public feeling" (emphasis added) was not constitutionally infirm because a jury "...would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence..." (479 U.S. at 542, 107 S. Ct. at 840.) But, as *People v. Keenan* (1988) 46 Cal.3d 478, 514, 250 Cal.Rptr.550, 573 makes clear, only the "mere sympathy" instruction is not unconstitutional per se. Here, in stark contrast to *Brown, supra,* the "set aside sympathy" instruction directed the jury not to be influenced by *any* sympathy at all. The distinction is dispositive of the issue in this case and inures to appellant's benefit. Here, unlike *Brown,* the instruction did not merely prohibit the jury "from basing their sentencing decisions on factors not presented at trial, and irrelevant to the issues at trial..." (479 U.S. at 543, 107 S.Ct. at 840.) Rather, the instruction in the instant case was unequivocal and incapable of varying interpretation; the jury was specifically directed not to consider any sympathy whatsoever. This was not a case of simply failing to counter-mand a "no sympathy" instruction given as part of the guilt phase. (See, e.g., *Williams v. Vasquez* (E.C. Cal.1993) 817 F.Supp. 1443, 1492.) Here, the entire case was prefaced with and infected by the "no sympathy" instruction.

The *Brown* rule should not be expanded or extended to the instant case. To do so would be unfair and unjust to appellant and would deny him his constitutional right to have the jury decide all factual issues. "'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused.'" *Hawkins v. Superior*

Court (1978) 22 Cal.3d 584, 593, n.7, 150 Cal.Rptr.435, 441, n.7.

5. Conclusion

As demonstrated, the "no sympathy" instruction given in this case during voir dire before the jury heard any evidence was wrong as a matter of law and begat a very reasonable likelihood that the jury was misled regarding the scope of its sentencing discretion. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, 112 S.Ct. 475, 482.) Appellant's rights to a fair trial, to a reliable determination of penalty, to due process and to fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California analogues were violated. Appellant was severely prejudiced. Reversal is required.

VI. ARGUMENT: GUILT PHASE ISSUES

A. THE INTRODUCTION OF EVIDENCE THAT PROSECUTION WITNESS KAREN KING RECEIVED A THREATENING PHONE CALL WHICH MAY HAVE MADE HER AFRAID TO TESTIFY, WHEN THE PROSECUTION HAD NO EVIDENCE APPELLANT WAS CONNECTED WITH THAT THREAT, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS; REVERSAL IS REQUIRED.

1. Introduction

Karen King was a prosecution witness in the Pepper Steak Restaurant case. During her testimony, the prosecutor questioned her about receiving a telephone call "from someone" and whether she was afraid to testify. (8RT 1718-1719.) The inference the prosecutor wanted the jury to draw was that appellant and/or Rogers or someone at

their direction had made the call and that the call was threatening. But, as the prosecutor knew, there was no evidence of any such conduct by the defendants.

Because of the prejudicial nature of the testimony, appellant moved for a mistrial. The motion was denied and the trial court gave a cautionary instruction. (8RT 1719-1727.)

However, the cautionary instruction did not alleviate the great prejudice inherent in the prosecutor's questions and King's answers. As a result, appellant's rights to due process, a fair trial, cross-examine witnesses, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were violated. Reversal is required.

2. Summary of relevant facts

The prosecutor called Karen King, who lived in the same apartment complex as the defendants. She testified that she had seen appellant with a gun, and that appellant had borrowed her black car sometime after March of 1996. (8RT 1713-1718.) The prosecutor then asked her if she was "afraid to be here today" and she said she was not. (8RT 1718.) King said she did not want to testify and had expressed fears about testifying but was not afraid "anymore." (8RT 1719.) The prosecutor asked if she had received a phone call from someone which caused her concern. The trial court sustained the defense hearsay and discovery objections. (8RT 1718-1719.)

Outside the presence of the jury, the prosecutor said that the brother of King's

boyfriend, Daniel Jackson (8RT 1713), had called from out of state to tell King not to go to court. (8RT 1730.) The trial court sustained the objection again. Defense counsel moved for a mistrial on the grounds that his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments had been violated. (8RT 1721.) The trial court stated that there was "no prejudice" from the evidence, especially if the defense elicited from King the information that neither defendant made the phone call. (8RT 1721-1722.) The trial court also stated that, if requested, it would instruct the jury not to consider efforts to suppress evidence against the defendants unless the jury found that the defendant(s) had authorized such an effort. Counsel for appellant argued that the prejudicial effect could not be cured. (8RT 1719-1724.)

On cross-examination, King stated that neither appellant or the co-defendant had called her, that the caller did not indicate he was calling on behalf of the defendants, and that she was just told it would be best if she did not testify. (8Rt 1724-1725.) The trial court then instructed the jury that an attempt to dissuade a witness from testifying could not be considered as consciousness of guilt on a defendant's part unless there was evidence indicating the defendant had told someone to make such an effort, and that "at this point" there was no such evidence. However, the trial court refused to instruct the jury that the defendants neither instructed nor encouraged such a phone call. (8RT 1726-1727.)

3. Admission of the evidence of threats made to King without any showing of a connection between appellant and the person making the threats is a violation of the defendant's constitutional rights.

Evidence that King had been contacted and threatened was irrelevant as a result of the failure to connect appellant in any way to the telephone call. The evidence was prejudicial because, regardless of the purportedly cautionary instruction, it supported an inference of consciousness of guilt. Admission of the evidence violated appellant's constitutional rights.

Here, the prosecutor knew that neither appellant nor Rogers had made the threatening phone call to King. Also, the prosecutor had no evidence that the call was made at their behest. Nevertheless, he questioned King regarding the call, obviously hoping to have the jury infer or at least suspect that the defendants were responsible for the call and thus were conscious of their guilt. Further, the trial court's comment that "at this point" there was no evidence the defendants were responsible for the call (8RT 1726) left the door open for the jury to decide on its own whether other evidence allowed them to draw the sought-after inference.

In *People v. Hannon* (1977) 19 Cal.3d 588, 138 Cal.Rptr.885, evidence was admitted regarding the suppression or attempted suppression of evidence, yet there was no evidence that the defendant was involved in the suppression. The Court held that admission of the evidence was error:

"""Efforts to suppress testimony against himself

> indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. [Citation.] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. [Citation.] However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant."' As no evidence of authorization was presented...admission of the evidence was erroneous...
>
> ***
>
> [T]he admission of evidence purporting to show suppression or attempted suppression of evidence is erroneous absent the prerequisite of proof that the defendant was present at such an incident or proof of authorization of such illegal conduct." (19 Cal.3d at 599-600, 138 Cal.Rptr.at 891-892; citations omitted.)

In *Keyser v. State* (Ind. 1974) 160 Ind. App.566, 312 N.E.2d 922, a prosecution witness testified about receiving threats and bribes. Appellant objected on the basis that there was no evidence the threat had come from the defendant. The trial court sustained the objection, struck the testimony, and instructed the jury to disregard the evidence. The reviewing Court reversed, holding that this was insufficient to cure the prejudice:

> "The jury should have before it all facts and circumstances affecting the reliability of the witnesses it hears.
>
> However, the desirability of so informing the jury in a criminal case must be balanced against any prejudice to the defendant generated by such evidence. Since a criminal defendant is the primary individual who could benefit from the bribing or absence of a witness who might testify against him, the inference is strong that he has procured these acts when evidence of them is introduced at his trial. No evidence or testimony was presented, or attempted to be presented, to advise the jury of whether or not the defendant was involved in the attempt. No connection between the defendant and the

> attempted bribe and threat was remotely shown.
>
> We think that in this latter instance such evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant. For this reason, the testimony quoted above amounted to an 'evidential harpoon' thrust into the defendant herein.
>
> It is apparent that the attempted removal of the resulting prejudice through an instruction to the jury was inadequate to expiate the effect of the testimony..." (160 Ind. App. at 569, 312 N.E.2d at 924; citations omitted.)

Clark v. Duckworth (7th Cir.1990) 906 F.2d 1174 involved a similar situation. There, the Court held that the testimony of an accomplice that he would not testify because of threats he received may have led the jury to believe that the defendant was behind the threats, despite the fact that no evidence was presented to support that implication. The result was that the defendant was denied his "fourteenth amendment right to a fair trial free from prejudicial and irrelevant evidence" – despite the trial court's admonition to disregard that testimony. (Id. at 1177-1178; accord *Dudley v. Duckworth* (7th Cir.1988) 854 F.2d 967, 972 [erroneous "admission of...threat testimony...amounts to a violation of the petitioner's fourteenth amendment right" to "'fundamental fairness.'"] *Clark* held that because threats made to a prosecution witness tend to show guilty knowledge or admission of guilt on the part of the defendant, evidence of threats is admissible only upon a showing that the threats were made by or on the authority of the defendant. (Id. at 1178, fn.1.)

Under *Clark v. Duckworth*, the same result is mandated here. There was considerable evidence raising a doubt as to appellant's guilt in connection with the Pepper Steak incident. Rogers testified appellant was not present. Some of the eyewitnesses did not identify appellant as a perpetrator. The suspect in the restaurant area was wearing a mask, thus calling into question the reliability of the identifications which were made. Although the prosecution presented no evidence showing either Rogers' or appellant's connection to or knowledge of the phone call to prosecution witness King, the fact that the threatening call was made fostered the unjustified inference that appellant had authorized the call, and thus showed consciousness of guilt. Even though the defense elicited testimony from King that her caller did not state that he was calling on behalf of the defendants, the jury would surely have made that connection -- as the prosecutor desired -- because there was no other reason for the testimony to be introduced. The admission of this testimony thus prejudiced appellant. Appellant's mistrial motion should have been granted.

Although the trial court instructed the jury prior to closing arguments that it could not consider the threatening telephone call to King "as tending to show any consciousness of guilt on the defendant's part" (11RT 2381), the instruction did nothing to dispel the incriminatory inference sought by the prosecution. Here, where the prejudice is exceedingly great, respondent cannot "...insulate reversal by pointing to a limiting [or cautionary] instruction...." (*Werner v. Upjohn Co., Inc.* (4th Cir.1980) 628 F.2d 848, 854;

accord, *Francis v. Franklin* (1985) 471 U.S. 307, 324, n.9, 105 S.Ct. 1965, 1976, n.9 ["Cases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights."]; *Krulewitch v. United States* (1949) 336 U.S. 440, 453, 69 S.Ct. 716, 723 ["The naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction."]) And, as stated in *People v. Gibson* (1976) 56 Cal.App.3d 119, 130, 128 Cal.Rptr.302, 308:

> "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals.... We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner."

4. Conclusion

The prosecution cannot show that the error regarding the threatening phone call was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 18.) Reversal is therefore required.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN, OVER APPELLANT'S OBJECTION, IT ALLOWED DONNA MALOUF TO REMAIN IN THE COURTROOM DESPITE HER PREJUDICIAL CONDUCT WHICH IMPROPERLY BIASED THE JURY AGAINST APPELLANT AND VIOLATED HIS CONSTITUTIONAL RIGHTS; REVERSAL IS REQUIRED.

1. Introduction

During her testimony, Donna Malouf, the victim's wife, was permitted to have a

support person sit with her. (7RT 1346.) After her testimony, over appellant's objection and motion for mistrial (4RT 768-770; 7RT 1441-1445; 8RT 1561-1562), she was allowed to remain in the courtroom, in full view of the jury despite the fact that she was crying and being held by support people and was making improper gestures toward the jurors. Her emotionally charged conduct, which was certainly understandable, nevertheless was quite powerful and improperly engendered sympathy for her and unwarranted bias and prejudice against appellant. As a result, his rights to due process, a fair trial, an impartial jury, to confront the witnesses against him, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were prejudicially violated. Reversal is required.

2. Standard of review

Whether to exclude a witness from the courtroom is reviewed for an abuse of discretion. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 330, 190 Cal.Rptr.211, 287.) Such a standard is also applied to the denial of a motion for mistrial. (*People v. McCain* (1988) 46 Cal.3d 97, 113, 249 Cal.Rptr.630, 638.)

3. The facts

Before Donna Malouf testified, appellant objected to her remaining in the courtroom after the conclusion of her testimony. The trial court overruled the objection:

> "THE COURT: Did either counsel wish to be heard on the issue of allowing Mrs. Malouf to remain in the courtroom

after she has completed her testimony?

MR. NACSIN [Defense counsel]: I have some problems with that, your Honor, because she's also going to be a witness in the penalty phase. And having her sit through the remainder of the trial, I think affects the penalty phase, quite honestly, when -- if we end up there. And what the jurors' perspective are of her. And she's sitting here through all this in the courtroom, and she's going to be a witness.

THE COURT: But that's true in every case, a potential death penalty case where there's friends or family of the deceased who may be testifying in the penalty phase as to victim-impact evidence, generally they are present during the guilt phase.

MR. NACSIN: Except that in those situations, that, that victim impact isn't an actual witness to the crime also, and was a victim in the crime itself.

THE COURT: Well, that perhaps adds to the probative value of the victim-impact evidence, I suppose.

But I -- the purpose of excluding witnesses during the trial is so witnesses will not hear the testimony of other witnesses, and then conform their testimony to be either consistent or inconsistent with other witnesses.

So certainly to the extent that during the guilt phase other percipient witnesses are going to be testifying to the events that occurred at the Pepper Steak restaurant, I would concur with defense counsel that it would be appropriate to exclude Mrs. Malouf, certainly prior to her testimony, to avoid any potentiality of her perhaps hearing what other people may say and then attempting to conform her testimony to any other witness's testimony.

But once she has testified fully and been cross-examined fully as to all matters, the rationale for exclusion in my mind no longer exists. So I'll treat that as an objection to

her being allowed to remain. Overrule that objection, exercise my discretion to allow her to remain in the courtroom as the surviving spouse of Mr. Malouf during the balance of the trial, after she's completed all of her testimony in the guilt phase." (4RT 768-770.)

When Donna Malouf testified, the trial court permitted a support person to "sit[ ] up there" with her. (7RT 1346.)

After her testimony, Donna Malouf remained in the courtroom, seated in the first row. She was nodding her head in agreement with the testimony of a critical prosecution witness. Out of the jury's presence, counsel objected and requested that Malouf be excluded from the courtroom. The request was denied:

"MR. NACSIN: The witness, Donna Malouf-Lawrence, is in the courtroom. I know the court ruled earlier, even though she wasn't excused, she could be in the courtroom. She's in the first row in the middle section. And I'm not saying she's doing it intentionally, but she's sitting there nodding her head in agreement with Mr. Lewis's answers. Those are the kind of things, whether she's doing them intentionally or unintentionally, are the problems with her being in here or before the jury. I don't know if any jurors do or don't see her, but those are the kinds of things we were worried about.

THE COURT: Well, I did notice that she was in the courtroom, and the record should reflect we had briefly discussed this in chambers, that we had previously had a discussion on the record about this, and the court had indicated I would allow her to remain in the courtroom after she had testified.

I didn't notice her really nodding her head but --

MR. NACSIN: For the record, I did. And just so the

record is clear, I made an objection about this earlier and -- and I objected on the exclusionary rules and the United States Constitutional rules, the Fifth, Eighth and Fourteenth Amendments.

THE COURT: I think exclusion of witnesses during testimony is discretionary with the court. Since Ms. Malouf has already testified, I don't see any prejudice -- I think maybe she should be told, you know, not to do any gesturing or nodding her head in agreement or disagreement with any witnesses, try to be conscious of that.

MR. YOUNG [Prosecutor]: I agree with the court. That's why I instructed her not to do that prior to calling this witness.

THE COURT: Okay. Okay.

MR. NACSIN: All's can I say is, I watched her and she's doing it.

THE COURT: Okay. I'll -- I'll pay more attention to her and see if it continues or if it's a problem. If it is, maybe in the future we'll suggest that maybe she sit at the back of the courtroom where she'll be less noticeable.

MR. NACSIN: Just for the record, I wanted to raise it now before it became a problem later.

THE COURT: I'll take that as an objection to her being present. That objection is overruled for all the reasons stated previously when we had discussed that decision.

MR. NACSIN: Thank you." (7RT 1441-1443.)

Later, defense counsel noticed that Donna Malouf, again sitting in the front row, was crying and was "being held by her support people." On several occasions, counsel had seen a juror look over and stare at Malouf. Counsel renewed his motion to exclude

Malouf. The trial court, however, allowed Donna Malouf to remain in the courtroom:

> "THE COURT: ...Counsel indicated that you wanted to be heard on something on the record before bringing the jury in?
>
> MR. NACSIN: Yes, your Honor. I hate to belabor the point, but out of an abundance of caution and because of the nature of this particular case, because I'm sitting, looking directly at the jury and partially at the audience, this morning when Carrie Hernandez was testifying about Fred Malouf being shot, Donna Malouf -- I think "Lawrence" now -- was in the first row here, and she was crying, understandably so, and she was being held by her support people. But the juror in Seat No. 9 looked over at her three or four times and stared at her.
>
> I want the record to reflect that.
>
> THE COURT: I did -- again, I've been paying attention to Miss Malouf. She was present during the part of the testimony describing the actual shooting and the bringing of towels and so forth. She was upset, but she wasn't -- you know, I mean, she wasn't audibly making any disturbance or moving. I mean, if one were to look at her face, you could tell she was upset, as you say, understandably so. That's certainly no different than any other case where there's family members present who are going to have some type of an emotional reaction.
>
> And I think she has a right to be here.
>
> MR. LEVINE [Rogers' counsel]: But those family members haven't testified in the presence of the jury.
>
> THE COURT: Sometimes they have and sometimes they haven't.
>
> MR. NACSIN: I just feel, out of an abundance of caution, I have to put this on the record.

THE COURT: That's fine, and you've done so.

Anything else?

MR. NACSIN: Yes.

THE CLERK: Was that a motion or just a statement?

THE COURT: No.

MR. NACSIN: It's a statement for the ongoing motion that's been ruled on twice previously." (8RT 1561-1562.)

4. The trial court prejudicially erred and violated appellant's constitutional rights by failing to exclude Donna Malouf from the courtroom.

The Due Process Clause of the Sixth and Fourteenth Amendments guarantees the right of jury trial in state criminal prosecutions. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149, 88 S.Ct. 1444, 1447; *Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn.6, 96 S.Ct. 1017, 1020, fn.6.) This fundamental right includes the right to trial by an impartial jury. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 ["the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors."]; *Arreola v. Choudry* (7th Cir.2008) 533 F.3d 601, 605 ["The Fifth and Sixth Amendments guarantee due process of law and trial by an impartial jury"]; *People v. Wilson* (2008) 44 Cal.4th 758, 822, 80 Cal.Rptr.3d 211, 259 ["A criminal defendant has a constitutional right to an impartial jury..."]) "An impartial jury is one in which no member has been improperly influenced...and every member is capable and willing to decide the case solely on the evidence before it." (*People v. Harris* (2008) 43 Cal.4th 1269, 1303,

78 Cal.Rptr.3d 295, 326 (internal punctuation omitted.))

"The right to a fair trial includes the right to a trial free from audience demonstrations which may contaminate or prejudicially affect the jury." (*People v. McGuire* (Ariz.1987) 751 P.2d 1011, 1013.) A witness's emotionally charged conduct or improper conduct can be prejudicial to a defendant. The Court in *Wilson v. Sirmons* (10th Cir.2008) 536 F.3d 1064, 1114 recognized that a "...witness['s]...emotionally charged display...might be unduly prejudicial." (Accord, *United States v. Mitchell* (9th Cir.2007) 502 F.3d 931, 971 [A person's courtroom conduct may be "'so inherently prejudicial as to pose an unacceptable threat' to a defendant's right to a fair trial, 'an unacceptable risk is presented of impermissible factors coming into play.'"])

In *Rodriguez v. State* (Fla. App.1983) 433 So.2d 1273, the trial court denied the defendant's mistrial motion made on the ground that he was prejudiced as a result of "...repeated outbursts by the deceased's wife." (433 So.2d at 1274.) The reviewing court reversed, agreeing that the defendant had been denied a fair trial:

> "Turning to the final challenge we agree that Mrs. Izquierdo's emotional outbursts, while understandable, were extremely prejudicial and created an atmosphere in which appellant could not receive a fair trial. Mrs. Izquierdo shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility toward Rodriguez. Her conduct necessarily engendered sympathy for her plight, and antagonism for Rodriguez, depriving him of a fair trial." (433 So.2d at 1276.)

In *Price v. State* (Ga. App.1979) 254 S.E.2d 512, the manslaughter victim's

mother repeatedly exhibited emotional outbursts while in the courtroom, in full view of the jury. Eventually, she was barred from the courtroom. The defendant's motions for a mistrial were denied. The reviewing court reversed, finding that the mother's outbursts "'...surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to have a fair trial.'" (254 S.E.2d at 514.)

In *State v. Gevrez* (Ariz.1944) 148 P.2d 829, the nonwitness mother of the manslaughter victim made comments during trial, "wept bitterly" in the presence of the jury, and, at various times, was consoled by the bailiff. The Court reversed, finding that the defendant had been denied his rights to due process and a fair trial:

> "The best witness in a trial sometimes never takes the witness stand; the greatest influence often comes from the unsworn person who is allowed to parade before the jury. We cannot, however, find fault with the mother of the deceased, but we do say the laxness of the court in permitting her to remain so near the jury, and her deportment while there, were very prejudicial to the rights of appellant and should not have been allowed." (148 P.2d at 833.)

In *Glenn v. State* (Ga.1949) 52 S.E.2d 319, a death penalty case, the victim's wife, while sitting in the front row, wept openly "in an audible fashion" and was "snuffling and sobbing" during the prosecutor's closing argument. She "made her grief apparent to the jury." (52 S.E.2d at 321.) She was eventually escorted from the courtroom. The defendant's motion for a mistrial on the ground that the jury was prejudiced by the widow's emotional conduct was denied. Although there was sufficient evidence to support the verdict, the Georgia Supreme Court nevertheless reversed:

> "This fact would not render harmless the denial of a new trial to the defendant, if he was prejudiced by the conduct complained of, since such conduct may well have influenced the jury to inflict the death penalty....'There may be a state of facts where the evidence, under the law, would demand a conviction of the crime of murder; but under our law, where the punishment to be inflicted for murder is left in the discretion of the jury, under no circumstances can this court say that the evidence demanded a general verdict of guilty which must be followed by the infliction of the death penalty.'
>
> The conduct of the widow of the deceased in audibly and visibly weeping before the jury during the argument of the assistant solicitor was certainly calculated to influence them against granting mercy to the defendant, if they believed him guilty of the crime charged. Had the widow been removed immediately from the room, her display of emotion would probably not have required the grant of a mistrial." (52 S.E.2d at 321.)

"'[T]he presumption of prejudice from jury contact with inadmissible evidence is...strong[ ] in the context of a capital case." It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment."'" (*People v. Lucero* (1988) 44 Cal.3d 1006, 1023, 245 Cal.Rptr.185, 194.) Here, while Donna Malouf may not have shouted epithets, the facts that she had a support person during her testimony, nodded her head in agreement with other witnesses, and had emotional outbursts during trial, which were visible to and observed by the jurors, necessarily engendered great sympathy for her sad plight and a corresponding significant antagonism toward appellant. As the above-cited cases aptly demonstrate, the presence in front of the jury of an emotionally distraught, sobbing

widow prejudicially disturbs the jury's ability to properly deliberate and render an unbiased, fair judgment.

The trial court's rulings were prejudicial to appellant. First, the unjustified presence of a support person adversely "affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience for the witness." (*People v. Adams* (1993) 19 Cal.App.4th 412, 438, 23 Cal.Rptr.2d 512, 527.) "[T]he support person's presence at the witness stand actually affects Confrontation Clause guarantees." (Id., 19 Cal.App.4th at 439, 23 Cal.Rptr. at 528.) Thus, in both the guilt and penalty phases, the jury had a false or distorted view of Malouf's demeanor while testifying. Further, the mere presence of the support person tacitly, but improperly, vouched for the supposed truth of Malouf's testimony.

Second, Malouf's nodding in agreement with a prosecution witness and her sobbing in court while being comforted by support people was also prejudicial to appellant in both the guilt and penalty phases. From her actions, the jury would feel an inordinate amount of sympathy for Malouf, an amount that could not be controlled by any cautionary type instruction. Acting on this sympathy, the jury would readily give more credence to her testimony as to what occurred in the restaurant's kitchen and would be more inclined to find for guilt and death. Seeing the victim's widowed wife crying and being comforted stirs up powerful feelings of empathy, sympathy, and thus revenge. Acting on these feelings, and not necessarily the evidence, the jury readily could have

found that death was the appropriate penalty even though appellant did not shoot Mr. Malouf.

5. Conclusion

Vis-a-vis the jurors, the fact that Donna Malouf, the victim's grieving wife, was permitted to remain in the courtroom allowed """emotion [to] reign over reason""" and gave rise to a substantial likelihood "that irrational, purely subjective responses should carry the day." (*People v. Pinholster* (1992) 1 Cal.4th 865, 959, 4 Cal.Rptr.2d 765, 814.) As a result, appellant's constitutional rights to due process, a fair trial, an impartial jury, to confront the witnesses against him, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were prejudicially violated. Reversal is required.

C. THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINED THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 1073.) Thus, in accordance with CALJIC No. 2.90, the trial court instructed the jury at the two guilt phases and the penalty phase that appellant was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the burden of proving him guilty beyond a reasonable doubt. (2CT 422, 539; 3CT 699; 11RT 2389-

2390; 12RT 2761; 14RT 3176.) (See, *Taylor v. Kentucky* (1978) 436 U.S. 478, 98 S.Ct. 1930; *People v. Soldavini* (1941) 45 Cal.App.2d 460, 114 P.2d 415.) In addition, the jury was also instructed in the two guilt phases and the penalty phase on the meaning of reasonable doubt in two interrelated instructions which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence, and which addressed proof of specific intent and/or mental state. (2CXT 403, 438, 528; 3CT 695; 11RT 2380-2381; 12RT 2755-2756; 14RT 3163- 3164.) Except for the fact that they were directed at different evidentiary points, these instructions (CALJIC Nos. 2.01 and 8.83) informed the jury, in essentially identical terms, that if one interpretation of the evidence "appears to you to be *reasonable* and the other interpretation to be unreasonable, you must accept the *reasonable* interpretation and reject the unreasonable." (Emphasis added.)[12]

This repeated directive was contrary to the requirement that appellant may be convicted only if guilt is proved beyond a reasonable doubt. (*In re Winship, supra*, 397

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[12] The issue of the erroneous circumstantial evidence instructions has not been waived. (See Pen. C. Sec.1259 ["The appellate court may also review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; *People v. Hannon* (1977) 19 Cal.3d 588, 600, 138 Cal.Rptr.885, 892 ["Lack of objection...did not...waive defendant's right to appellate review of the propriety of the court's jury instruction..."]; *People v. Hempstead* (1983) 148 Cal.App.3d 949, 956, 196 Cal.Rptr.412, 416 ["...in a criminal case an appellate court may review the giving of an instruction despite the absence of an objection below if the substantial rights of the defendant are affected."]; *United States v. Olano* (1993) 507 U.S. 725, 736, 113 S.Ct. 1770, 1779.) Here, as a matter of law, appellant's substantial rights were prejudicially affected, and a miscarriage of justice has occurred. This Court, thus, may review the error.

U.S. 358, 90 S.Ct. 1068; *Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781.) As a result, appellant's federal and state rights to due process of law, to a jury trial, and to a reliable determination of guilt and penalty were violated. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 2229.)

The problem with the instructions lies in the fact that they *required* the jury to accept an interpretation of the evidence that was incriminatory but only "appear[ed]" to be reasonable. This instruction is constitutionally defective for at least two reasons. First, telling jurors that it "*must*" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt; it allows a finding of guilt based on a degree of proof below that required by the Due Process clause. (See, *Cage v. Louisiana* (1990) 498 U.S. 39, 111 S.Ct. 328 (per curiam).

Cage v. Louisiana, supra, emphasizes the requirement that jury instructions must not subtly compromise the fundamental concept of proof beyond a reasonable doubt. In *Cage*, the jury was instructed to find the defendant not guilty if it "entertain[ed] a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt..." (*Id.*, 488 U.S. at 40, 111 S. Ct. at 329.) The instructions went on to equate reasonable doubt with "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and stated that "[w]hat is required is not an absolute or mathematical certainty, but a moral certainty." (*Id.*; emphasis omitted.) The Supreme Court looked to

"how reasonable jurors could have understood the instruction," and concluded it was unconstitutional:

> "It is plain to us that the words 'substantial' and 'grave' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (*Id.*, 498 U.S. at 41, 111 S.Ct. at 329-330 (footnote omitted).)

If, as the Supreme Court held in *Cage*, due process of law is violated by an instruction informing the jury that only a "substantial doubt" or "grave uncertainty" will amount to a reasonable doubt, then it violates due process to effectively instruct a jury that no reasonable doubt exists where a guilty interpretation of the evidence merely "appears to be reasonable."

The instructions given in appellant's case were also unconstitutional for a second reason. Here, the instructions *required* the jury to draw an incriminatory inference when such an inference merely appeared to be reasonable. The jurors were told that they "must" accept such an interpretation. Thus, the instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable," thereby violating appellant's right to a jury trial. (*Carella v. California* (1989) 491 U.S. 263, 109 S.Ct. 2419; *Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S.Ct. 2450.)

It is no answer to appellant's argument to point out that the instructions demanded that the jury accept a guilty interpretation of the evidence only where such an interpretation "appears to be reasonable" and where an innocent interpretation "appears" to be unreasonable. A defendant is not required to put forward any theory of innocence in order to be entitled to an acquittal. A juror may well conclude from the prosecution's evidence that only incriminatory inferences "appear" to be reasonable and yet also conclude that a conviction is unwarranted because the apparently incriminating inferences are not convincing enough to amount to proof beyond a reasonable doubt.

Justice Mosk has observed that the reasonable doubt standard is designed to embody "the *intensity* of the juror's belief in guilt." (*People v. Brigham* (1979) 25 Cal.3d 283, 300, 157 Cal.Rptr.905, 916 (conc. opn.), original emphasis.) The instructions in the present case did away with the need for such intensity. Indeed, while a conviction in a capital case calls for particularly strong confidence as to the defendant's guilt and the propriety of the death penalty (*Beck v. Alabama, supra*, 447 U.S. at 638, 100 S.Ct. at 2390), the "appears to be reasonable" standard used at appellant's trial authorized a conviction on less proof than is called for in civil cases, i.e., preponderance of the evidence.

It is likewise no answer to appellant's argument that the concept of reasonable doubt was also explained in CALJIC 2.90 because the instruction there defines reasonable doubt in arcane and confusing terms that are unlikely to be informative to any average

juror. (See, *People v. Brigham, supra*, 25 Cal.3d at 292-303, 157 Cal.Rptr. at 911-921 (conc. opn. of Mosk, J.).) Faced with such a vague definition, a juror would naturally look to the far simpler, clearer, and more accessible language of the "appears to be reasonable" instructions. Jurors' reliance on this simpler language was especially likely in the present case because that language was repeated in essentially the same form on two separate occasions during the guilt phases and the jury had the instructions with them during the penalty phase. (14RT 3159.)[13]

The erroneous reasonable doubt/circumstantial evidence instructions require reversal of appellant's conviction. Of course, the error is reversible without any inquiry into the trial evidence, both because it involved the basic standard of proof to be applied at the trial, and thus undermines the accuracy of the verdicts in the case, and because the error operated as an improper mandatory, conclusive presumption. (See *Carella v. California, supra,* 491 U.S. at 267-273, 109 S.Ct. at 2421-2424 (conc. opn. of Scalia, J.); *Rogers v. Richmond* (1961) 365 U.S. 534, 546-547; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; *People v. Frank* (1964) 225 Cal.App.2d 339, 342.)

Even if this Court were disinclined to go so far as to declare the error reversible

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[13] Even if one were to assume that the jurors relied on CALJIC No. 2.90 for an understanding of reasonable doubt and also that they would have derived an appropriate understanding of the concept from it, the most that could be concluded is that the instruction conflicted with the language appellant challenges in the circumstantial evidence instructions. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322, 105 S.Ct. 1965, 1975.)

per se in this case, reversal is required nevertheless because the error here cannot be deemed to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824.) The improper instructions were orally delivered in the guilt phases and considered by the jury in both phases. Moreover, appellant's case was precisely the kind of case that would be most adversely affected by the improprieties in the instruction. There were more than enough serious weaknesses and gaps in the prosecution's case to cause a reasonable juror to harbor a reasonable doubt about appellant's guilt and the appropriateness of death as the proper penalty; if the trial court had not instructed the jurors that they "must" accept "apparently reasonable" interpretations of the evidence that pointed toward guilt, that reasonable doubt would have resulted in appellant's acquittal or a life without possibility of parole decision. [14]

The errors in the instructions' explanation of reasonable doubt/circumstantial evidence violated appellant's constitutional rights; thus, reversal of the judgment is required.

D. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR OF CONSTITUTIONAL MAGNITUDE BY FAILING TO INSTRUCT THE JURY SUA SPONTE WITH CALJIC NOS. 4.21, 4.21.1, AND 4.21.2 REGARDING VOLUNTARY INTOXICATION.

1. Introduction

In count 2, appellant was charged with murder, on an aiding and abetting theory.

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[14] Although this argument was rejected in *People v. Wilson* (1992) 3 Cal.4th 926, 942-943, 13 Cal.Rptr.2d 259, 268-269, appellant respectfully submits that the issue was wrongly decided and should be reconsidered.

In counts 3 and 4, he was charged with robbery. (1CT 56-58.) Robbing and aiding and abetting a murder are specific intent crimes. Evidence of voluntary intoxication may negate specific intent. During the guilt phase, Lateshia Winkler testified that appellant "was high" when he returned to her apartment on the evening of April 20, 1996. (9RT 1792.) He was "shermed out," which means high on PCP. He was stumbling around in a PCP stuper. (9RT 1804, 1811, 1825, 1855.) It is common knowledge that ingestion of drugs affects different people different ways. Given this evidence and general knowledge, the trial court was required to instruct the jury sua sponte with CALJIC Nos. 4.21, 4.21.1, and 4.21.2 regarding the effect of voluntary intoxication on specific intent. However, it did not do so; thus, the jury never properly considered how appellant's ingestion of PCP could have affected -- and perhaps negated -- the specific intent necessary for murder and robbery. As a result of the court's failure to instruct the jury regarding voluntary intoxication, appellant's rights to due process, a fair trial, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, article 1, sections 7, 15, 16 and 17 were prejudicially violated. Reversal is required.

2. Due process and fundamental fairness required that the trial court sua sponte instruct the jury regarding voluntary intoxication.

The United States Constitution, pursuant to the Fifth and Fourteenth Amendments,

guarantees a criminal defendant due process of law. Regarding due process in general, the Court in *Chambers v. State of Florida* (1940) 309 U.S. 227, 236-237, 60 S.Ct. 472, 477 stated:

> "[A]s assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement...that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

Due process is not rigid and unbending but "...is a flexible concept that varies with the particular situation." (*Zinermon v. Burch* (1990) 494 U.S. 113, 127, 110 S.Ct. 975, 985; accord, *Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 ["...due process is flexible and calls for such procedural protections as the particular situation demands... Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"]) Here, appellant has been condemned to suffer the ultimate grievous loss -- forfeiture of his life. Under the facts of this case, the demands of due process mandated the trial court to instruct the jury sua sponte. Its failure to do so violated appellant's constitutional rights and prejudiced the defense.

Penal Code section 22, subdivision (b) states, "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." A defendant is

entitled to an instruction based on section 22 "when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's actual formation of specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677, 66 Cal.Rptr.2d 573, 598; accord, *People v. Aguirre* (1995) 31 Cal.App.4th 391, 37 Cal.Rptr.2d 48; *People v. Siegel* (1934) 2 Cal.App.2d 620, 622, 38 P.2d 450.)

Penal Code section 22 is applicable where the defendant may be liable as a aider and abettor. As stated in *People v. Mendoza* (1998) 18 Cal.4th 1114, 1133, 77 Cal.Rptr.2d 428, 439-440:

> "Section 22 has always permitted evidence of the effect of intoxication as to any specific intent, including the intent of an aider and abettor.
>
> ...Defendants may present evidence of intoxication solely on the question whether they are liable for criminal acts as aider and abettors. ...Intoxication evidence is admissible...to help decide whether the defendant is legally liable for a criminal act..."

(Accord, *People v. Matin* (2000) 78 Cal.App.4th 1107, 1114, 93 Cal.Rptr.2d 433, 437 ["the intent requirement for aiding and abetting liability is a 'required specific intent' for which evidence of voluntary intoxication is admissible under section 22."])

"Robbery requires the specific intent to deprive the victim of his or her property permanently." (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007, 55 Cal.Rptr.2d 217, 219.) Both robbery and felony murder based on robbery require that the intent to rob arise before force or fear is applied. (*People v. Lewis* (2008) 43 Cal.4th 415, 464, 75

Cal.Rptr.3d 588, 630.) Here, there was undisputed evidence that appellant was under the influence of PCP on the evening of April 20, 1996. The Pepper Steak incident occurred around 8:00 p.m. Rogers testified he (Rogers) had been drinking and doing drugs before the offenses were committed. (10 RT 2226.) Rogers was with appellant before the incident occurred; thus, it is readily inferred that appellant also used drugs and/or alcohol. Appellant was high -- "shermed out" -- when he returned to Winkler's apartment at around 10:00 p.m. (9RT 1792.) There was substantial evidence of drug use and the jury readily could have inferred that appellant had been under the influence when the incident occurred. It is common knowledge -- as Penal Code section 22 recognizes -- that consumption of drugs can negate the specific intent necessary for murder and robbery. Although appellant's defense was that someone else committed the offenses, this defense was rejected by the jury. Thus, the jury was left with evidence of a murder and robbery committed by appellant, who the jury knew had ingested intoxicating drugs and was in a PCP stupor. If an intoxication instruction had been given, the jury readily could have found from the evidence of drug ingestion that appellant lacked the required specific intent. But, without an intoxication instruction, the jury never would have "'understood deliberation and premeditation to be "mental states" for which it should consider the evidence of intoxication.'" (*People v. Hughes* (2002) 27 Cal.4th 287, 342, 116 Cal.Rptr.2d 401, 443.)

From the evidence, and the jurors' common knowledge and experience (*People v.*

Pride (1992) 3 Cal.4th 195, 268, 10 Cal.2d 636, 681 ["lay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process."]), they could have found that appellant was intoxicated at the time of the Pepper Steak incident. If the voluntary intoxication instruction had been given, the jury readily could have found that appellant lacked the required specific intent.

Appellant acknowledges that *People v. Saille* (1991) 54 Cal.3d 1103, 1117-1120, 2 Cal.Rptr.2d 364, 372-375 held there was no sua sponte duty to instruct regarding intoxication. However, "[t]he trial court has a duty to help the jury understand the legal principles the jury is asked to apply." (*People v. Giardino* (2001) 82 Cal.App.4th 454, 465, 98 Cal.Rptr.2d 315, 323; accord, *People v. Beardslee* (1991) 53 Cal.3d 68, 97, 279 Cal.Rptr.276, 291.) A trial court has a "duty to ensure a fair and impartial trial to all parties to a criminal action" (*United States v. Ford* (6th Cir.1987) 830 F.2d 596, 603; accord, *Selson v. Kaiser* (10th Cir.1996) 81 F.3d 1492, 1497 ["We have stressed that the trial judge 'has an "'independent duty to ensure that criminal defendants receive a trial that is fair...'"'"]). Given this overriding obligation to ensure a fair trial, the trial court in the instant case was obligated to instruct sua sponte with CALJIC No. 4.21, 4.21.1, and 4.21.2

3. Conclusion

Appellant was severely prejudiced by the failure of the trial court to sua sponte instruct the jury regarding intoxication. This failure resulted in a violation of appellant's

rights to due process, a fair trial, a reliable determination of guilt and sentence, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts. This Court cannot say beyond a reasonable doubt that, if the instruction had been given, a result more favorable to appellant would not have occurred. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824.) Therefore, reversal is required.

VII. ARGUMENTS: PENALTY PHASE AND SENTENCING ISSUES

A. APPELLANT'S CONSTITUTIONAL RIGHTS WERE PREJUDICIALLY VIOLATED BECAUSE THE VICTIM IMPACT EVIDENCE WAS NOT LIMITED TO THE FACTS OR CIRCUMSTANCES KNOWN TO APPELLANT WHEN HE ALLEGEDLY COMMITTED THE CRIME.[15]

In the words of one commentator:

> "Traditionally, the American criminal justice system has been guided by the principle that personal harm is properly avenged by the State, acting in the name of the individual harmed. Only by interposing the State between the victim and the accused, the thinking has been, can punishment be fairly measured and imposed, and the unseemly and socially destabilizing specter of privatized justice and revenge thereby avoided."

(Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 Ariz. L. Rev.143, 143 (1999) [footnotes omitted].) The admission of so-called "victim impact" evidence in some capital proceedings changes this

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[15] In *People v. Roldan* (2005) 35 Cal.4th 646, 732, 27 Cal.Rptr.3d 360, 429, this Court, without explanation, stated "[w]e disagree with this argument."

tradition.

The United States Supreme Court first addressed the use of evidence, in capital cases, of the impact of a murder on the victim's family in *Booth v. Maryland* (1987) 482 U.S. 496. In *Booth,* the Court addressed a Maryland statute that permitted the introduction of information relating to the (1) personal characteristics of the murder victim and the emotional impact of the killing on the victim's family and (2) family members' opinions and characterizations of the crime and the defendant. The Court characterized both types of evidence as irrelevant and rejected the assertion that such information was needed to allow jurors to assess the "gravity" of the offense. (482 U.S. at 504.) According to the *Booth* opinion, victim impact evidence improperly served to refocus the sentencing decision from the defendant and his criminal act to "the character and reputation of the victim and the effect on his family," despite the fact that the defendant was perhaps wholly unaware of the personal qualities and worth of the victim. (482 U.S. at 504.) The opinion explained:

> "One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors are generally aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant... The admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases."

(482 U.S. at 508-509.)

Four years later, after a change in personnel, the Court reversed *Booth* in *Payne v. Tennessee, supra,* 501 U.S. 808. In *Payne,* a mother and her 2-year-old daughter were killed with a butcher knife in the presence of the mother's 3-year-old son, who survived critical injuries suffered in the same attack. The prosecution presented the testimony of the boy's grandmother regarding how he missed his mother. (501 U.S. at 816.) The Court concluded "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." (501 U.S. at 827.)

In finding no Eighth Amendment bar to victim impact evidence, however, the *Payne* opinion did not mandate the introduction of such evidence, nor did it suggest that such evidence should be admitted in all capital cases. Justice O'Connor stated in her concurrence: "we do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (502 U.S. at 831.) To the extent that such evidence is not constitutionally prohibited, it is left to the statutory scheme of the individual states to determine whether and how to permit the introduction of evidence of this type. The general constitutional guidelines regarding capital sentencing remain unaffected: the need for "extraordinary measures" to ensure the reliability of decisions regarding the punishment imposed in a death penalty trial. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 conc. opn. of O'Connor, J.; see *Gardner v. Florida* (1977) 430 U.S. 280, 305.)

In other words, while *Payne v. Tennessee* holds that the Eighth Amendment does

not bar evidence of the victim's characteristics from the penalty phase per se, the matter is still controlled by statutory guidelines and the need to ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 423.)

Under the California statutory scheme, there is no "victim impact" sentencing factor. The aggravating evidence at penalty phase is limited to evidence relevant to the specific aggravating factors under Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 763, 771-776.) However, in *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, this Court held that *some* evidence of certain characteristics of the victim can be used as a proper consideration at penalty phase under section 190.3 factor (a) because they might relate to "circumstances of the crime." *Edwards* has come to stand for the proposition that "evidence of the harm caused by the defendant's actions is admissible at the penalty phase under section 190.3, factor (a), as one of the 'circumstances of the crime.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 992.)

This Court has not defined specifically the boundaries for the admission of victim impact evidence,[16] but there appears to be a need for some connection to the defendant's

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[16] The *Edwards* opinion noted: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* ..." (54 Cal.3d at 835-836.) Since *Edwards*, little further explication of the boundaries of the holding have been offered. In his dissent in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 492 fn. 2, Justice Mosk noted that the Court's *Edwards* language lacked specificity.

knowledge or perception. (See, e.g., *Edwards, supra* [Photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them]; *People v. Wash* (1993) 6 Cal.4th 215, 267 [Evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime.].) Justice Kennard has offered a sensible and logical guideline. In the concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 264, Justice Kennard discussed the proper scope of section 190, subdivision (a) in relation to victim traits:

> "As used in section 190.3, 'circumstances of the crime:' should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. This definition appears most consistent with the rule of construction that listed items should be given related meaning and with the United States Supreme Court's understanding of the term as reflected in its opinions."

(1 Cal.4th at 264.) Under this interpretation, characteristics of the victim unknown to the defendant should not be admitted as a penalty phase consideration.[17]

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[17] In considering the scope and logic of the California capital sentencing scheme, it should be noted that the California statutes allow a time and place for a victim's next of kin to express their feelings of loss during a criminal homicide proceeding. That time is not at the penalty-phase trial of a capital case. Rather, that time is when the sentence is formally imposed. Penal Code section 1191.1 mandates notice and an opportunity for the victim's next of kin to "express his, her or their views concerning the crime, the person responsible, and the need for restitution" when final judgment is pronounced. The victim's families were given this opportunity at the imposition of sentence. (See RT39, 7339-7345.)

Here, the victim impact evidence admitted was unrelated to appellant's knowledge, and unrelated to his moral culpability. There is no evidence that he was aware of any aspect of the victims' lives. He did not know Ricky Byrd's brother had been murdered. (13RT 3041-3042.)

The question before the jury at a sentencing phase involves an assessment of the moral culpability of a defendant. A series of United States Supreme Court opinions have instructed that the question whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879; see also *Eddings v. Oklahoma, supra,* 455 U.S. 104, 112; *Enmund v. Florida* (1982) 458 U.S. 782, 801.) Unless the evidence introduced in aggravation has some bearing on the defendant's personal responsibility and moral guilt, its admission creates the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process.

Justice Kennard's approach to victim impact evidence, discussed in her opinion in *Fierro,* seeks to avoid these problems. This type of evidence should only be allowed if it relates to "circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (1 Cal.4th at 264.)

Recognizing that this type of victim impact evidence would have an unwarranted

prejudicial effect, appellant asked that the jury be instructed:

> "In assessing to what extent, if any, you should consider any victim impact evidence in your deliberations you may not consider any victim impact evidence unless it was foreseeably related to the personal characteristics of the victim that were known to the defendant at the time of the crime." (3CT 647; 14RT 3147.)

The trial court refused to give the instruction. (14RT 3147-3148.) Based on the instant argument, this ruling was wrong and severely prejudicial.

Here, the relationships of the victims with their families were not known to the defendant. Nor did the defendant know anything about the victims. The victim impact evidence admitted here was beyond the knowledge of the defendant and unrelated to his moral culpability. To the extent a defendant can be *assumed* to know that a victim has family members who will be grieving survivors, the evidence should not be admissible because it can also be assumed that *the jury* is also so aware. Consequently, the evidence was outside the proper scope of the aggravating evidence. Appellant's rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and their California counterparts were violated. Reversal is required.

B. THE UPPER TERM SENTENCE ON THE FIREARM USE ENHANCEMENT FOR COUNTS ONE AND THREE IS UNCONSTITUTIONAL.

1. Introduction

In *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832, 62 Cal.Rptr. 3d 588, 592-

593, the Court stated:

> "In *Cunningham* [*v. California* (2007) 549 U.S. 276, 127 S.Ct. 856] the United States Supreme Court...held that California's determinate sentencing law (DSL) violates a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution by assigning to the trial judge, rather than to the jury, the authority to find the facts that render a defendant eligible for an upper term sentence. We conclude that defendant's Sixth Amendment right to a jury trial was violated and, although harmless error analysis applies to such violations, the error in the present case was not harmless beyond a reasonable doubt and the case must be remanded for resentencing."

For the reasons stated below, the same result should obtain in the present case regarding the 10-year upper term gun use enhancement on count 1.[18]

2. The sentencing facts

The Penal Code section 12022.5, subdivision (a) gun enhancement provides for a sentence of "3, 4, or 10 years." On Count 1, the trial court imposed the aggravated 10-year term "because of the use of two firearms and multiple shots and lack of any provocation." (14RT 3254.)

3. The matter should be remanded

In *People v. Sandoval, supra,* this Court, citing *Cunningham,* stated, "'[u]nder the

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[18] The abstract of judgment (3CT 763-765) shows a consecutive 10-year upper term gun use enhancement as to count 3. However, the sentence on count 3 was ordered stayed. (14RT 3245.) If this Court disagrees that *Cunningham* error occurred, this error in the abstract should be corrected. The trial court stated that the gun use enhancement only on count 1 "is not stayed." (14RT 3254.)

Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.'" (41 Cal.4th at 835, 62 Cal.Rptr.3d at 595.) Regarding *Blakely/Cunningham* error, a reviewing Court "must determine whether, if the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*Sandoval, supra,* 41 Cal.4th at 838, 62 Cal.Rptr.3d at 598.) The aggravating circumstances to which the *Sandoval* Court was referring are "the aggravating circumstances found by the trial court." (Id.) Remand for resentencing is required unless "a reviewing court [can] conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*Sandoval, supra,* 41 Cal.4th at 840, 62 Cal.Rptr.3d at 599.)

Regarding harmless error analysis in a case such as the instant one, the *Sandoval* Court stated:

> "In a case such as the present one, the reviewing court cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury. Although the aggravating circumstances found by the trial court were based upon the evidence presented at trial, they were not part of the charge and were not directly at issue in the trial. Aggravating circumstances are based upon facts that are not elements of the crime. (Cal. Rules of Court, rule 4.420(d).) Defendant thus did not necessarily have reason – or the opportunity – during trial to challenge the evidence supporting these aggravating circumstances unless such a challenge also would

have tended to undermine proof of an element of an alleged offense.

Furthermore, although defendant did have an incentive and opportunity at the sentencing hearing to contest any aggravating circumstances mentioned in the probation report or in the prosecutor's statement in aggravation, that incentive and opportunity were not necessarily the same as they would have been had the aggravating circumstances been tried to a jury. First, the standard of proof at the sentencing hearing was lower; the trial court was required to make a finding of one or more aggravating circumstances only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).) Second, because the trial court had broad discretion in imposing sentence, a finding by the court concerning whether or not any particular aggravating circumstance existed reasonably might have been viewed by defense counsel as less significant than the court's overall assessment of defendant's history and conduct. Counsel's strategy might have been different had the aggravating circumstances been tried under a beyond-a-reasonable-doubt standard of proof to a trier of fact that was responsible only for determining whether such circumstances were proved (and not for making the ultimate sentencing decision). Accordingly, a reviewing court cannot always be confident that the factual record would have been the same had aggravating circumstances been charged and tried to the jury.

Additionally, to the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. ... Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. ... In addition, the trial court may consider aggravating circumstances not set forth in rules or statutes. Such aggravating circumstances need only be 'reasonably related to the decision being made.' (*Id.*, rule 4.408(a).) Aggravating

> circumstances considered by the trial court that are not set out in the rules are not subject to clear standards, and often entail a subjective assessment of the circumstances rather than a straightforward finding of facts." (*Sandoval, supra,* 41 Cal.4th at 839-840, 62 Cal.Rptr.3d at 599-601.)

The trial court relied on "two firearms and multiple shots and lack of any provocation" as reasons for imposition of the upper term on the gun enhancement as to count 1. But, the truth of these factors was never submitted to the jury. These factors were "not fully litigated at trial." Had these issues been fully litigated, the jury may not have been in agreement with the trial court.

This Court may be tempted to uphold the upper term gun enhancement because appellant has prior convictions. (4CT 1024-1032.) However, the trial court did not rely on this fact. Further, simply because a prior conviction or some other properly determined factor may render defendant "eligible" for an upper term sentence does not mean such a term would have been imposed. A trial court has discretion to impose a sentence and must be given the opportunity to structure overall sentences in compliance with *Cunningham* at contested resentencing hearings. A reviewing court should be loath to preclude the exercise of the sentencing discretion that is intrinsically within the province of the trial court. Thus, where *Blakely/Cunningham* error has occurred, the case should be remanded for resentencing. Affirmance simply because a defendant may have been "eligible" for the upper term denies him the right to a proper exercise of the trial court's discretion and thus violates his constitutional right to due process under the Fifth

and Fourteenth Amendments. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 100 S.Ct. 2227.)

Here, none of the factors that the trial court relied on to impose an upper term sentence were or reasonably would have been covered by a jury finding, nor do they fall within the "prior conviction" exception. Thus, as in *Sandoval,* the *Blakely/Cunningham* error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.) "Accordingly, the imposition of the upper term sentence on [the firearm use enhancements] must be reversed and the case remanded to the trial court for resentencing in a manner consistent with the Sixth Amendment as interpreted in *Cunningham.*" (*Sandoval, supra,* 41 Cal.4th at 843, 62 Cal.Rptr.3d at 602.)

4. Procedure on remand for resentencing

In an effort to conform to *Cunningham*'s Sixth Amendment principles, the Legislature recently amended Penal Code section 1170. Subdivision (b) provides the procedure for sentencing a defendant to one of the three specified terms:

> "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. ... The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended."

Section 1170, subdivision (c) provides that, "The court shall state the reasons for its

sentence choice on the record at the time of sentencing." (Here, as noted, the trial court failed to state any reason for imposition of the upper term. (3RT 1811.))

In *Sandoval*, this Court held that where *Blakely/Cunningham* error has occurred, "...it is appropriate for resentencing in such cases to proceed under the procedure... adopted...by the Legislature." (*Sandoval, supra,* 41 Cal.4th 846, 62 Cal.Rptr.3d 604.) The Court noted that:

> "The trial court will be required to specify reasons for its sentencing decision, but will not be required to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances. ...***... [A]ffording the trial court discretion to select among the three available terms, without requiring a finding of aggravating and mitigating circumstances [will] change the sentencing system in a manner that would eliminate the constitutional defect identified in *Cunningham*..., but that as a practical matter would not substantially alter the DSL as initially adopted by the Legislature." (*Sandoval, supra,* 41 Cal.4th at 846-847, 850, 62 Cal.Rptr.3d at 605, 608)

However, *Sandoval*'s "discretionary" remedy fails to cure the constitutional defects found in *Cunningham* and the reformed sentencing regimen still infringes a defendant's rights to a jury trial and proof beyond a reasonable doubt. To avoid further *Cunningham* error on remand, a trial court should be required to impose the middle term as a result of its constitutional error.

5. Conclusion

For the reasons stated above, reversal is required.

VIII. ARGUMENT: OTHER ISSUES

A. PENAL CODE SECTIONS 190.3 AND 190.2 VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE CALIFORNIA CONSTITUTION.[19]

1. United States Supreme Court cases preclude vagueness in capital sentencing statutes and hold that aggravating factors must meet Eighth and Fourteenth Amendment vagueness requirements.

As the Supreme Court has held, the constitutional infirmity arising from use of a vague aggravating factor in a penalty phase weighing scheme, or with employing a vague capital sentencing system, is that such vagueness:

> "...creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance ...[and] creates the possibility not only of randomness but also of bias in favor of the death penalty..." (*Stringer v. Black* (1992) 503 U.S. 222, 235-236, 112 S.Ct. 1130, 1139.)

(Accord, *Tuilaepa v. California* (1994) 512 U.S. 967, 974, 114 S.Ct. 2630, 2636 ["a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentences process..."])

In order to minimize this risk of arbitrary and capricious application of the death penalty, the Supreme Court has long held that a state's aggravating factors must "channel

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19 Appellant recognizes that this Court has rejected this argument on other occasions. See, e.g., *People v. Osband* (1996) 13 Cal. 4th 622, 702, 55 Cal.Rptr.2d 26, 78. However, he requests this Court to reconsider these issues.

the sentencer's discretion..." by "...clear and objective standards ..." that provide "specific and detailed guidance...," so as to "make rationally reviewable the process for imposing a sentence of death." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 773, 110 S.Ct. 3092, quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 428, 100 S.Ct. 1759, 1765.) This channeling requirement applies regardless of whether the jury or the trial court determines the penalty because both are governed by the same statutes.

Thus, a capital sentencing scheme may not allot the sentencer complete discretion in deciding whether a defendant should be sentenced to death based merely on the facts of a particular case. (*Furman v. Georgia* (1972) 408 U.S. 238, 239-240, 255-257, 309-310, 314, 92 S.Ct. 2726, 2727, 2735, 2762, 2764.) The trier of fact must be "given guidance about the crime...that the State, representing organized society, deems particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 196, emphasis supplied [plur. opn., Stewart, Powell and Stevens, JJ.].) *Furman* and *Gregg* require that "the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case..." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S. Ct. 1756; emphasis supplied.)

As noted in *Lewis v. Jeffers, supra*, 497 U.S. at 774, 110 S.Ct. at 3099 quoting *Gregg v. Georgia, supra,* 428 U.S. at 189 (internal quotation marks omitted):

> "...[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life

> should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

It follows that a sentencing statute which, as here, merely directs the sentencer to look at vague categories, without attempting any further limitation or guidance, is unconstitutionally vague. (See, e.g., *Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 1859; *Godfrey v. Georgia, supra*, 446 U.S. at 429-433, 100 S.Ct. at 1765-1767.)

The United States Supreme Court recently applied such an analysis to the penalty phase aggravating factors in a capital case. In *Stringer v. Black, supra*, 503 U.S. 222, 112 S.Ct. 1130, the United States Supreme Court held that, in "weighing states" like California, the Eighth Amendment's prohibition against unconstitutionally vague aggravating factors is applicable not only to aggravating factors designed to narrow the class of death eligible defendants, but also to aggravating factors that are weighed by the jury in making its penalty decision:

> "[I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion...
>
> ...Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a

> sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (*Stringer v. Black, supra*, 503 U.S. at 235, 112 S. Ct. at 1139; emphasis added.)

Similarly, under the Eighth Amendment, "...a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." (*Richmond v. Lewis* (1992) 506 U.S. 40, 46, 113 S.Ct. 528, 534.)

Even though the United States Supreme Court has upheld factors (a), (b), and (i) of section 190.3 (*Tuilaepa v. California, supra*, 512 U.S. 967, 114 S.Ct. 2630), the crucial issue is the interaction between *all* factors during the deliberations of the triers of fact. While each discrete factor, standing alone, may appear constitutional, the combined effect of all factors renders the scheme unconstitutional. As stated by Justice Blackmun in his dissent in *Tuilaepa*:

> "[T]he Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes constitutional muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it." (512 U.S. at 995, 114 S.Ct. at 2647.)[20]

Further, *Tuilaepa*'s holding that factors (a), (b), and (i) were proper because they are not

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[20] *Tuilaepa* did not decide whether section 190.3 as a whole violates the Eighth Amendment. Nor did it consider factors (c), (d), (e), (f), (g), (h), (j) or (k). Thus, it is inapposite regarding these issues. (*San Diego Gas & Elect. Co. v. Superior Court*, (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 754 ["Cases are not authority, of course, for issues not raised and resolved."])

"propositional" (512 U.S. at 974-975, 114 S.Ct. 2636), even if arguably correct, is *not* applicable to the remaining factors, all of which (except possibly factor (k)) call for a "propositional" answer, e.g., a "yes" or "no" answer to the statutory question "Whether or not..." the factor is present. Depending on the answer, the factor is either aggravating or mitigating. Thus, under *Tuilaepa*, all factors except (a), (b) and (i) are "propositional," and thus violative of the Eighth Amendment.

Appellant submits that the Eighth Amendment's vagueness limitations and the other constitutional guarantees described above apply to the entirety of section 190.3. Section 190.3 leaves the jury unguided in its penalty deliberations, in violation of appellant's rights to due process, a fair trial, a reliable determination of penalty and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, the denial of appellant's state-created rights constitutes a denial of due process under the federal constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229.) Thus, reversal is required.

2. Factor (a) of Penal Code section 190.3, which directed the jury to separately weigh the "circumstances of the crime" as a factor in aggravation, violated the Eighth and Fourteenth Amendments.[21]

Penal Code section 190.3, subdivision (a) states that the sentencer may consider as a factor:

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[21] Appellant acknowledges that this court has previously rejected similar contentions (see, e.g., *People v. Wader* (1993) 5 Cal.4th 610, 663-64, 20 Cal.Rptr.2d 788, 818-819) but respectfully requests that the issue be reconsidered.

> "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1."

Factor (a), the aggravating factor that allowed the jury to impose death based on the "circumstances of the crime," made the penalty-determination process here look dangerously similar to the standardless scheme invalidated in *Furman v. Georgia, supra,* 408 U.S. 238, 96 S.Ct. 2726. Factor (a) failed to identify any aspect of the underlying offense which might aggravate punishment. This factor did nothing to limit the discretion of the jury; instead, it inherently invited the jury to *personally* determine why *it* was most offended by the crime, and to use that perception as a basis for imposing the death penalty, without reference to any objective standard.

Here, the general proscription against use of vague categories in rendering a death judgment, without limitation or guidance, as articulated in *Maynard v.Cartwright, supra,* as well as the specific proscription against use of vague penalty phase aggravating factors in a penalty phase weighing process, as stated in *Stringer v. Black, supra,* were both contravened by factor (a), which is standardless, subjective as to the sentencer, arbitrary, and weighted heavily toward death.[22] A sentencer may not impose a death sentence

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[22] The same arguments also apply to factor (a)'s "existence of any special circumstances found to be true" language, which failed to distinguish this case from any other capital prosecution. First, the use of such a factor is inherently death-biased because one or more special circumstances is present in every penalty phase proceeding. Second, the sentencer was given no guidance or standards by which to evaluate the special circumstances as aggravating factors in this case, i.e., the jury was asked to evaluate the special

merely by looking at the circumstances of the crime with no guiding principles whatsoever. Yet factor (a) implicitly allows such standardless, unguided discretion.

This portion of section 190.3 also violated the Eighth Amendment's reliability requirements,[23] state and federal constitutional guarantees of due process, the requirement that a sentencer be given clear and objective standards so that it may have proper guidance in its capital sentencing determination, the requirement that the sentencer not engage in arbitrary or capricious decision-making, the requirement that said process be designed so as to be rationally reviewable, and the prohibitions against cruel and/or unusual punishments under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In *Tuilaepa v. California, supra*, 512 U.S. at 975, 114 S. Ct. at 2637, the Court found that factor (a) was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence." Relying on *Tuilaepa*, this Court has ruled that factors (a), (b) and (i) are constitutional. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 187-190, 51

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circumstances in a standardless vacuum.

[23] Factor (a) is also unconstitutionally vague under the less rigorous due process clause standards, which require that state statutes give clear notice of the conduct prohibited so that the parties can prepare to meet the charge. (See, e.g., *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 543, 59 S. Ct. 618.) When a state statute contains terms not "susceptible of objective measurement," with no reference to a "specific or definite act," it is unconstitutionally vague under the due process clause. (See, e.g., *Cramp v. Board of Public Instruction* (1961) 368 U.S. 278, 286, 82 S. Ct. 275.) Here, the phrase "circumstances of the crime" gives no notice as to what "specific or definite acts" to rebut in order to forestall a death sentence. Indeed, the phrase is so broad and incapable of definition that it is impossible to rebut this aggravating factor.

Cal.Rptr.2d 770, 831-833.) Appellant submits these cases are wrongly decided, result in fundamental, unconstitutional unfairness and, thus, should not be followed by this Court. (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, n.7, 150 Cal.Rptr.435, 441, n.7 ["'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused.'"]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672, 679, 312 P.2d 680, 685 ["...decisions should not be followed to the extent that error may be perpetuated and that wrong may result."])

Further, as Justice Blackmun stated in his dissent in *Tuilaepa*, the use of "...the 'circumstances of the crime' [factor (a)] as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide...[is] something this Court condemned in *Godfrey v. Georgia*..." (512 U.S. at 988, 114 S.Ct. at 2643.) Further, because factor (a) "...lacks clarity and objectivity, it poses an unacceptable risk that a sentencer will succumb either to overt or subtle racial impulses or appeals ...The California sentencing scheme does little to minimize this risk." (512 U.S. at 992, 114 S. Ct. at 2645.) Clearly, factor (a) encompasses *every* fact which could possibly exist in *any* homicide; thus, it is vague and overly broad.

A vague factor such as factor (a) fails to "...provide[] a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not..." and fails to "...differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death

penalty may not be imposed." *(State v. Middlebrooks* (Tenn. 1992) 840 S.W. 2d 317, 343.) Thus, it is not "a proper narrowing device." (*Id.*) (Accord, *Richmond v. Lewis, supra,* 506 U.S. at 46, 113 S.Ct. at 534 ["...a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty.]; (*Wade v. Calderon* (9th Cir.1994) 29 F.3d 1312.)

Factor (a) does nothing to limit or guide the sentencer's discretion, creates a category so constitutionally vague as to be meaningless, is death-biased and encourages arbitrary, capricious, unreliable and unreviewable decision making, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-237; *Zant v. Stephens* (1983) 462 U.S. 862, 865, 103 S.Ct. 2733, 2736.)

3. A unitary list of aggravating and mitigating factors which does not specify which factors were aggravating and which were mitigating, which does not limit aggravation to the factors specified, and which fails to properly define aggravation and mitigation, violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

a. Section 190.3's unitary list violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

Penal Code section 190.3 fails to tell the sentencer which factors are aggravating or mitigating, and fails to give any definition or explanation of aggravation which might have served as a narrowing principle in the application of the factors. These errors resulted in unconstitutionally arbitrary and inconsistent sentencing, in several distinct

respects.

Permitting the sentencer to use mitigating evidence in aggravation impermissibly allows the imposition of the death sentence in an arbitrary[24] and unprincipled manner, violating the Eighth and Fourteenth Amendments. (See *Gregg v. Georgia, supra*, 428 U.S. at 192; *Zant v. Stephens supra*, 462 U.S. at 865.) In addition to this constitutional deficiency, the use of a unitary list also improperly allowed the sentencer to consider the *absence* of statutory mitigating factors as aggravating factors.

The unitary list codified in Penal Code section 190.3 is unconstitutionally vague and therefore gives the sentencer no guidance whatsoever in determining sentence. It permitted and encouraged the prosecutor to manipulate and exploit the putatively mitigating factors to suit his own ends as exemplified by his arguments characterizing mitigating evidence -- appellant's young age -- as aggravating evidence. (RT 6237-6238, 6239-6240, 6246.) It thus reduced the penalty decision process to a standardless, confused, subjective, arbitrary and unreviewable determination in violation of appellant's rights to fair trial, impartial sentencer, reliable determination of penalty, due process and fundamental fairness under the United States Constitution's Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v.*

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[24] With no guidance afforded to the sentencer as to how the state deems mental disturbance, victim participation, rage, etc. to be "particularly relevant to the sentencing decision" (*Gregg v. Georgia, supra*, 428 U.S. at 196), identically situated defendants will be sentenced differently depending purely upon the subjective predilections of the sentencer involved.

Georgia, supra, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

b. Section 190.3 allowed the jury to engage in an undefined, open-ended consideration of nonstatutory aggravating factors.

Section 190.3 is unconstitutionally vague because it fails to limit the sentencer to consideration of specified factors in aggravation. Additionally, it fails to guide the sentencer and permits the prosecutor to argue non-statutory matters as evidence in aggravation.[25] (See, e.g., RT 6299, where the prosecutor argued that appellant should die because "[h]e is still part of society"; this is not a factor listed in section 190.3.) Section 190.3 therefore allows the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

The failure of California's capital sentencing statute to properly guide the sentencer with respect to how it is to consider the various factors is vividly illustrated by factor (i) relating to the matter of defendant's age. Appellant was 24 years old at the time of the

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[25] Reviewing courts often find it useful to refer to history and to the current practices of other states in determining whether a state has framed its statutes consistent with the requirements of due process. (*Schad v. Arizona, supra,* 501 U.S. at 631-633, 111 S.Ct. at 2497.)

incident. The United States Supreme Court has held, per the Eighth and Fourteenth Amendments, that "one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age..." (*Stanford v. Kentucky* (1989) 492 U.S. 361, 375, n.5, 109 S.Ct. 2969, 2978, n.5.) Thus, even the highest court in the land regards "age" as a *factor in mitigation.* Yet in cases where the defendant is not exceptionally youthful, the factor will be used -- as here -- in aggravation under an "he's old enough to know better" theory.

This Court, by contrast, has held that age is a metonym for any age-related matter and may be used either in aggravation or mitigation, because age alone is not a factor over which a defendant may exercise control (*People v. Lucky* (1985) 45 Cal.3d 259, 302).[26] It recently reiterated the proposition that:

> "...the standard instructions [are] adequate despite their failure to identify the aggravating or mitigating character of the various sentencing factors, because such matters "should be self-evident to any reasonable person within the context of each particular case." (*People v. Medina* (1990) 51 Cal.3d 870, 909, quoting *People v. Jackson* (1980) 28 Cal.3d 264,

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[26] This court has held that age can mitigate or aggravate in the same case, depending on the sentencer's personal perspective. (*People v. Edwards, supra*, 54 Cal.3d at 839.) In some cases, the sentencer might find the defendant's youth indicative of his lack of judgment, and therefore consider it in mitigation. Other sentencers might consider it aggravating, standing alone, or in view of the expense for imprisoning a young person for a life without parole term. Appellant respectfully requests this court reconsider *Edwards* and *Lucky*, because this level of ambiguity demonstrates factor (i) is unconstitutionally vague and arbitrary, under the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p.192; *Zant v. Stephens, supra*, 462 U.S. at p.865; *Stringer v. Black, supra*, 503 U.S. at 234-236.)

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Surely the reasoning in *Medina* raises both substantive and procedural due process concerns. Not only does it condone the standardless procedure characterized by ambiguous, undefined terms that, in the Court's view, "should be self-evident... within the context of each case," but it allows a state's most severe sanction to be meted out in an arbitrary, capricious fashion by a sentencer lacking adequate guidance regarding the proper considerations that should be made in determining sentence.

The failure to limit consideration of age to mitigation only invites the sentencer to impose death based on a constitutionally vague factor in a constitutionally arbitrary, unreviewable manner and skews the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Stringer v. Black supra*, 503 U.S. 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

c. Section 190.3, subdivision (d) does not define mental illness as a mitigating factor and its "extreme" modifier is unconstitutional. The vagueness of section 190.3 violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Section 190.3 provides that only an "extreme mental or emotional disturbance," per factor (d), or capacity questions involving impairment due to mental disease, defect or intoxication, per factor (h), can be taken into account by the sentencer. As presented, these factors could be considered either aggravating or mitigating. Factor (k) provides

that "any other" extenuating circumstance can also be considered. The combination of these factors has three constitutional deficiencies.

First, this Court has previously defined factor (d) as a purely mitigating factor. (*People v. Davenport* (1985) 41 Cal.3d 247, 277-278, 221 Cal.Rptr.794, 813.)[27] The threshold problem is that absent an explicit limitation of factor (d) to mitigation, a sentencer is likely to consider it in aggravation. Mental or emotional instability -- which it appears appellant was certainly suffering from -- is not a factor which the sentencer will automatically or intuitively understand as mitigating in nature; a sentencer is more likely to conclude that it is indicative of defendant's future dangerousness and is therefore aggravating.[28] This aspect, standing alone, violates the Eighth Amendment.

The language of factors (d) and (h) injected unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. (*Stringer v. Black, supra*, 503 U.S. 234-236.) Such terminology creates an unacceptable risk that there will be no principled distinction between those cases in which the death penalty is imposed and those in which

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[27] This characterization no doubt arose due to the "belief, long held by this society, that defendants who commit criminal acts that are attributable to...emotional and mental problems, may be less culpable than defendants who have no such excuse." (*California v. Brown* (1987) 479 U.S. 538, 545 [O'Connor, J., conc.].)

[28] For an example of such attitudes by a judge, see *Miller v. State* (Fla.1979) 373 So.2d 882, 883-885 (Trial judge sentenced defendant to death based on defendant's incurable mental illness rendering defendant a future danger, even after recognizing such disturbances are mitigating); as to public attitudes, see Note, (1979) 12 John Marshall J. Prac. & Proc. 351, 365.

it is not. (*Maynard v. Cartwright, supra*, 486 U.S. at pp.361-362.) A sentence based on such vague considerations is unreviewable, and thus unconstitutional, in violation of the Eighth and Fourteenth Amendments. (*Godfrey v. Georgia, supra*, 446 U.S. at p.428.)

The second problem, assuming the jury understood factor (d) to be mitigating, is its specification that only "extreme" mental illness may be considered. This language has all the constitutional infirmities discussed above,[29] plus others all its own.

A sentencing entity may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. (*Mills v. Maryland* (1988) 486 U.S. 367, 374, 108 S.Ct. 1860; *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954 [plur. opn., Burger, C.J.].) The "extreme" adjective preceding "mental or emotional disturbance" creates a barrier to the sentencer's full consideration and assignment of mitigating weight to Appellant's evidence, in violation of these authorities.

This court recognized this limitation in *People v. Ghent* (1987) 43 Cal.3d 739,

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[29] Aggravating factors that include constitutionally vague terms like "extreme" must also meet constitutional vagueness standards. "Extreme" does not provide sufficient guidance to avoid arbitrary and capricious sentencing, provides no principled basis for distinguishing between a death sentence and life without parole, and is death-biased; sentences based on such terms are also unreviewable, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Stringer v. Black, supra*, 503 U.S. 234-236; *Maynard v. Cartwright, supra,* 486 U.S. at 361-362; *Godfrey v. Georgia, supra,* 446 U.S. at 428; see, e.g., *State v. David* (La. 1985) 468 So. 2d 1126, 1129-1130 [holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct]; *Arnold v. State* (1976) 224 S.E. 2d 386, 391-392 [holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions].)

p.776, 239 Cal.Rptr.82, 106, but held that this constitutional defect was cured by factor (k). (See *People v. Kelly* (1990) 51 Cal. 3d 931, 968-969.) However, a reasonable sentencer could have understood these factors to unconstitutionally limit one another, i.e., that the factor (k) language referred only to any evidence "other" than those areas explicitly discussed earlier in the same instruction, i.e., mental or emotional disturbances. (See *Francis v. Franklin* (1985) 471 U.S. 307, 315-316, 105 S.Ct. 1965.)[30] This undue limitation of the sentencer's ability to consider all relevant mitigating evidence resulted in the imposition of death in violation of the Eighth and Fourteenth Amendments. (*Lockett v. Ohio, supra*, 438 U.S. at 604.)[31]

The third problem with factor (d) is that the use of the word "extreme" as a modifier invites the sentencer to engage in the sort of subjective, vague, arbitrary, unreviewable determination that has consistently been found constitutionally unacceptable, viz., subjective determinations of what level of mental illness is adequate for consideration. (E.g., *Maynard v. Cartwright, supra*, 486 U.S. at 363-364

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[30] Such an interpretation is required by standard rules of statutory construction, e.g., the provisions that: specific rules take precedence over general rules, both as a matter of legal interpretation and common understanding (*Rose v. California* (1942) 19 Cal.2d 713, 723-724; *People v. Breyer* (1934) 139 Cal.App.547, 550) and *expressio unius est exclusio alterius,* the "[e]xpression of one thing is the exclusion of another." (*Black's Law Dictionary* (West Rev. 4th Ed. 1968) p.692; *In Re Lance W.* (1985) 37 Cal.3d 873, 888.)

[31] Alternatively, at a minimum, there is a legitimate basis for finding ambiguity concerning the factors actually considered by the sentencer. (*California v. Brown, supra*, 479 U.S. at 546 [O'Connor, J., conc.].)

["especially"];[32] *Shell v. Mississippi* (1990) 498 U.S. 1, 4, 111 S.Ct. 313 ["especially"]; *Moore v. Clarke* (8th Cir.1990) 904 F.2d 1226, 1232-1233 ["exceptional"], *cert. den.*, (1992) 504 U.S. 930, 112 S.Ct. 1995.)[33] This effectively ensures that the sentencer, regardless of the mitigating nature of the evidence, will devalue or reject altogether any mitigating mental illness that does not meet their subjective definition of "extreme." Also, what may be "extreme" to one sentencer may be only mild to another, thus further illustrating the vague and arbitrary nature of factor (d).

Factors (d) and (h), individually and considered together, are prejudicially violative of appellant's rights to fair trial, to a reliable determination of sentence, to due process, and to fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.)

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[32] Notably, the unconstitutionally vague "especially" is a synonym for "extremely" (Random House Thesaurus, College Edition (1984) p. 257), the adverbial form of "extreme." (Webster's New World Dictionary, Second College Edition (Simon & Schuster 1980), p. 498.)

[33] This constitutional flaw is also found in factor (g)'s "... *extreme* duress or...*substantial* domination..." (Emphasis supplied.) The use of such modifiers in various instructions is unconstitutional, because it conveys to a reasonable sentencer that only the most extreme examples of various potential mitigating factors are to be considered in mitigation.

d. The factors listed in section 190.3 are unconstitutionally vague, arbitrary and result in unreliable sentences, in violation of the Eighth and Fourteenth Amendments.

In addition to the factors discussed above, all the remaining factors in section 190.3 fail to pass constitutional scrutiny, both facially and as applied, when measured against the Eighth and Fourteenth Amendments' prohibitions against vagueness and arbitrariness. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236). This is particularly true in view of the heightened level of due process and reliability required in capital cases pursuant to the Eighth and Fourteenth Amendments. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama, supra,* 447 U.S. at 637-638 and n.13.)

Both on its face and in the context of appellant's case, section 190.3's factors provided the jury the same unguided, limitless, unreviewable discretion which is constitutionally inadequate. (*Furman v. Georgia, supra*, 408 U.S. at 295 ["...wholly unguided by standards governing that (death) decision..."] (Brennan, J., conc.); ["...capriciously selected random handful upon whom the sentence of death has in fact been imposed."] (Stewart, J., conc.) *Id.*, at 309-310.)

This conclusion is reinforced by *Stringer v. Black, supra*, 503 at U.S. 234-236, where the United States Supreme Court held that, in a weighing state (such as California), which requires the sentencer to weigh aggravation against mitigation, vague aggravating factors create a risk of randomness in sentencing decision-making and create a bias in

favor of death. (Accord, *Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2635 ["The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision."]) The factors listed in section 190.3 fail to guide or limit the sentencer's discretion, create a pro-death bias, create the impermissible risk that vaguely-defined factors would result in the arbitrary selection of appellant for execution, and afford no meaningful basis on which this Court may review the sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Section 190.3's failure to provide proper guidance also violates appellant's rights under state law, thereby implicating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S. Ct. at 2229.)

e. Section 190.3's failure to require that individual aggravating factors be proven beyond a reasonable doubt, that any determination that aggravation outweighed mitigation be proven beyond a reasonable doubt, and that death be proven the appropriate penalty beyond a reasonable doubt, violated the Eighth and Fourteenth Amendments.

The failure to require proof of aggravating circumstances beyond a reasonable doubt violates a defendant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428; *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531.) A defendant's state-created rights are also violated, thus violating his federal right to due process. (*Hicks v. Oklahoma, supra*,

447 U.S. at 346, 100 S.Ct. at 222.) This failure leaves the sentencer with no abstract yardstick by which to measure aggravation or mitigation, and no scale on which to weigh and balance the two. The standards provided by section 190.3 are so vague as to be nearly meaningless, as evidenced by the fact that both the prosecution largely and the defense almost entirely bypassed any discussion of those standards in closing argument.[34]

The closing argument of the prosecutor was focused not so much on whether individual factors in aggravation had been shown, or what weight was to be attributed to those factors, individually or cumulatively, but on a standardless determination that appellant deserved death because horrible crimes had been committed. This lack of guided discretion is analogous to one of the constitutional errors condemned in *Beck v. Alabama, supra,* (1980) 447 U.S. 625, 643 n.19, 100 S. Ct. 2382, 2392, n.19.[35] The jury

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[34] In *State v. Wood* (Utah 1982) 648 P.2d 71, the Utah Supreme Court reviewed a capital conviction where the trial court had found that a single aggravating factor outweighed three mitigating factors. The Utah Supreme Court held that proof beyond a reasonable doubt was required, and set forth the following standard for future capital case juries: "After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and *you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.*" (*Id.*, at p. 83; emphasis supplied.)

The Utah Supreme Court explained that this standard means that the sentencer must "...have no reasonable doubt as to...the conclusion that the death penalty is justified and appropriate after considering all the circumstances." (*Id.*, at p. 84.)

[35] In *Beck*, the Alabama capital statutes provided for the jury to hear guilt phase evidence and render a verdict "...either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him..." (*Beck v. Alabama, supra,*

here had no adequate guidelines or standards by which to measure or weigh the evidence presented by either side. Thus, each side was faced with an amorphous, subjective, individual decision-making process that failed to comport with constitutional demands.[36]

Section 190.3's factors and the related CALJIC instructions were unconstitutionally vague, failed to direct or limit the jury's discretion, encouraged the jury to act in a constitutionally arbitrary, capricious, unreviewable manner and skewed the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra*, 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865; see, *State v. Wood, supra,* (Utah 1982) 648 P. 2d 71, 83.)[37]

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447 U.S. at 629.) Therefore, although that Alabama procedure is different than California's, the unconstitutional dilemma posed to the *Beck* jury and the constitutional problem for the trial court here were similar: "...the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to *whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision...*" (*Id.*, 447 U.S. at 640, emphasis supplied.)

[36] Even assuming, *arguendo*, that the beyond a reasonable doubt standard was not required to establish the existence of any aggravating circumstance relied upon to impose a death sentence, or that death was the appropriate sentence, or that the aggravating circumstances outweighed mitigating circumstances, section 190.3 nevertheless violates the Fifth, Sixth, Eighth and Fourteenth Amendments by failing to specify any burden of proof or burden of persuasion at all.

[37] Appellant is aware that this court has rejected similar contentions (*People v. Rodriguez,* (1986) 42 Cal. 3d 730, 777-779; *People v. Allen* (1986) 42 Cal. 3d 1222, 1285), but respectfully requests that the issue be reconsidered.

Criminal cases merit the highest standard of proof known to the law, i.e., proof beyond a reasonable doubt:

> "...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. The stringency of the beyond a reasonable doubt standard bespeaks the weight and gravity of the...interest affected,..., society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impose almost the entire risk of error upon itself. ...In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755-756, 102 S.Ct. 1388], quoting *Addington v. Texas* (1979) 441 U.S. 418, 423, 415, 99 S.Ct. 1804; internal quotation marks and brackets omitted.)

The imposition of a death sentence represents the ultimate imposition on individual liberty. Therefore, the Fourteenth Amendment's general concepts of due process and equal protection, and the Eighth and Fourteenth Amendment's heightened level of due process and reliability in capital cases (*Ford v. Wainwright, supra,* 477 U.S. at 414, 106 S. Ct. at 2595; *Beck v. Alabama, supra*, 447 U.S. at 637-638 and n.13), as well as the California Constitution, mandate the use of the beyond a reasonable doubt standard in all decisions by capital case sentencers. A similar conclusion obtains under the California Constitution as well.

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f. The failure to require that the jury base any death sentence on written findings regarding individual aggravating factors violated the Fifth, Sixth, Eighth and Fourteenth Amendments.[38]

The California death penalty statute does not require the sentencer to base its decision on any written findings. As a result, appellant's constitutional rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the failure to require that the jury present written findings on its decision regarding the applicable aggravating factors relied on in determining the appropriate sentence. This failure also violates appellant's rights under state law, thereby violating his federal right to due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at 346, 100 S. Ct. at 2229.)

Section 190.3 fails to direct or limit the sentencer's discretion, encourages it to act in a constitutionally arbitrary, capricious, unreviewable manner and skews the sentencing process in favor of execution, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia, supra*, 446 U.S. at 428-429; *Stringer v. Black, supra,* 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.) This is particularly so as to Appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, reliability in the determination that death is

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[38] Appellant is aware that this court has previously rejected similar contentions (e.g., *People v. Allen, supra*, 42 Cal.3d at 1285), but respectfully requests that the issue be reconsidered.

appropriate, and meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at 543; *Gregg v. Georgia, supra*, 418 U.S. at 195.)

The jury was not required to expressly find which factors in aggravation had been proven or why the aggravating factors allegedly outweighed the mitigating factors. In the absence of guided discretion, it could have made its decision to impose death using any of the improper considerations described above or any number of other factors unrelated to section 190.3. Absent a requirement of written findings, the propriety of the judgment here cannot be reviewed in a constitutional manner. Lack of such a requirement creates a constitutionally impermissible risk that the sentencer will rely on factors constituting improper aggravation, or discount proper mitigation, thereby resulting in an unreliable sentence. Written findings would obviate this prejudicial problem.

g. The provisions of California's death penalty statute fail to provide for comparative appellate review to prevent arbitrary, discriminatory or disproportionate imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Some states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. Georgia, for example, requires that the state Supreme Court determine whether "...the sentence of death is excessive or disproportionate to the penalty imposed in similar cases." (Ga. Stat. Ann. section 27-2537(c).) This provision was approved by the United States Supreme Court, which reasoned that it guards "...further against a situation comparable to that presented in *Furman v. Georgia, supra*]..." (*Gregg*

v. Georgia, supra, 428 U.S. at 198.) Toward the same end, Florida has judicially "...adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259, 96 S.Ct. 2960.)

Section 190.3 does not require that either the jury, trial court, or this Court undertake inter-case proportionality review -- a comparison between this and other capital cases regarding the relative proportionality of sentence imposed. (See *People v. Fierro* (1991) 1 Cal. 4th 173, 253.) The California sentencing scheme therefore fails to guard "...against [the] situation comparable to that...in *Furman*..." (*Gregg v. Georgia, supra*, 428 U.S. at 198) i.e., unbridled discretion, arbitrariness, and caprice.

Furman raised the question of whether, within a category of crimes for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. The California capital case review system contains the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at 192, citing *Furman v. Georgia, supra*, 408 U.W. at 313 (White, J., conc.).)

The California capital punishment scheme also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution. (*Gregg v. Georgia, supra*, 428 U.S. at 192; *Godfrey v. Georgia supra*, 446 U.S. at 428-429; *Stringer v. Black, supra,* 503 U.S. at 234-236; *Zant v. Stephens, supra*, 462 U.S. at 865.

Additionally, the Eighth and Fourteenth Amendments require a heightened level of due process and reliability in capital cases. (*Ford v. Wainwright, supra*, 477 U.S. at 414; *Beck v. Alabama, supra*, 447 U.S. at 637-638 and n.13.) Finally, the California scheme violates appellant's right to equal protection, under the Fourteenth Amendment, because such review is afforded non-condemned inmates, per section 1170, subdivision (f).[39]

Even assuming, *arguendo*, that appellant has no constitutional right to inter-case review, appellant is entitled to equal treatment vis-a-vis other similarly situated inmates convicted of crimes occurring at the same time as those of which he has been convicted, i.e., the benefit of a determination of whether his "...sentence is disparate in comparison with the sentences in similar cases." (*Ibid.*)

h. California's failure to provide penalty phase safeguards violates the Eighth and Fourteenth Amendments.[40]

The United States Supreme Court has repeatedly recognized that the death penalty is qualitatively different in nature from any other punishment. Therefore, capital case sentencing systems may not create a substantial risk that a death judgment and execution will be inflicted in an arbitrary and capricious manner. (*Gregg v. Georgia, supra*, 428

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[39] Appellant is aware that this court has previously rejected similar contentions (*People v. Marshall* (1990) 50 Cal.3d 907, 945, 269 Cal.Rptr.269, 289; *People v. Allen, supra*, 42 Cal.3d at 1285, 232 Cal.Rptr. at 889), but respectfully requests that the issue be reconsidered.

[40] Appellant recognizes that this court has rejected similar arguments previously (e.g., *People v. Sully* (1991) 53 Cal.3d 1995, 1251-1252), but respectfully asks that it reconsider the points at issue, both facially and as applied in this case.

U.S. at 189; *Godfrey v. Georgia, supra*, 446 U.S. at 431.) *Furman* and *Gregg* require that "...the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case..." justify the sentence. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 1774.) Accordingly, penalty phase aggravating factors in "weighing states," such as California, may not be unconstitutionally vague. (*Stringer v. Black, supra,* 503 U.S. at 234-236.)

The safeguards such as written findings as to the aggravating factors found by the sentencer, proof beyond a reasonable doubt of the aggravating factors, unanimity on the aggravating factors (when there is a jury), a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt, a finding that death is the appropriate punishment beyond a reasonable doubt, a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision, and definition of which specified relevant factors are aggravating and which are mitigating, greatly lessen the chance of an arbitrary or capricious death judgment. These safeguards reflect attempts to eliminate the use of unconstitutionally vague penalty phase factors, eliminate death-biased proceedings, eliminate arbitrary and capricious death judgments and executions, and to make death judgments meaningfully reviewable on appeal. California's system singularly fails to employ any of these safeguards, or to employ alternative but comparable measures. Therefore, California's capital case system is unconstitutional on its face and, as applied, in violation of appellant's rights to a fair trial, a reliable determination of sentence, due

process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments.

i. The California statutory scheme fails to perform the constitutionally required function of narrowing the population of death-eligible defendants, in violation of the Eighth and Fourteenth Amendments.

i. Introduction

To avoid constitutionally arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions:

> "...must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra*, 462 U.S. at 877.)

(Accord, *Tuilaepa v. California, supra*, 512 U.S. at 972, 114 S.Ct. at 2635 ["...the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder."]) California's capital statute fails to comport with these requirements.

ii. Section 190.2's numerous special circumstances are so broad as to include nearly every first degree murder and therefore fail to perform the constitutionality required narrowing function, in violation of the Eighth and Fourteenth Amendments.

The special circumstances included in section 190.2 are not only numerous but also so broad in definition as to encompass nearly every first degree murder. Section

190.2's all-embracing special circumstances were therefore created with an intent directly contrary to the "...constitutionally necessary function at the stage of legislative definition: [that] they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at 878.) In *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465, 24 Cal.Rptr.2d 808, 812, this Court addressed the "narrowing" aspect of capital sentencing in general:

> "'Narrowing' pertains to a state's 'legislative definition' of the circumstances that place a defendant within the class of persons eligible for the death penalty. To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite 'narrowing' function must 'circumscribe the class of persons eligible for the death penalty.' Additionally, it must afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not. A legislative definition lacking 'some narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment." (Citations omitted.)

(Accord, *Godfrey v. Georgia, supra,* (1980) 446 U.S. 420, 428, 433, 100 S. Ct. 1759, 1764, 1767.)

In *Godfrey v. Georgia, supra*, the United States Supreme Court reviewed a Georgia capital murder statute which sanctioned the death penalty for a murder found to have been "...outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (*Godfrey v. Georgia, supra*, 446 U.S. at 422.) Despite Georgia's argument that it had applied a "narrowing

construction" to that statute (*Id.*, at 429-430), the plurality opinion held:

> "In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" (*Id.*, at 428-429.)

Section 190.2 seemingly circumvents the *Godfrey* problem because it does not contain one special circumstance embracing "almost every murder," like the Georgia statute; nevertheless, section 190.2 has many individual special circumstances, which together embrace almost every murder. Such a scheme is contrary to the pertinent principle of *Godfrey* and the Eighth Amendment:

> "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.'" (*Furman v. Georgia, supra*, 408 U.S. at 313 [conc. opn., White, J.]; accord, *Godfrey v. Georgia, supra*, 446 U.S. at 427 [plur. opn.]; (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

Viewed in its proper light, section 190.2 conflicts with this Eighth Amendment principle by purposefully encompassing almost every murderer. Moreover, multiple murder, the special circumstance found in this case, is, unfortunately, a common or "routine" form of murder occurring in California, yet has been defined as a potential capital crime, along with other much less common forms of murder.

In *People v. Morales* (1989) 48 Cal. 3d 527, 557-558, this Court noted that even the rare lying-in-wait special circumstance might be susceptible to an Eighth Amendment failure to narrow challenge if lying-in-wait were defined simply as a concealment of the perpetrator's purpose. In affirming Morales' conviction, this Court fashioned a three part definition for the lying-in-wait special circumstance which it held "...presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." (*Ibid.*) Justice Mosk dissented, finding the court's definition to be "so broad as to embrace virtually all intentional killings...," and opining that it "...does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not." (*Id.*, at 575.)

Justice Mosk's latter criticism is also applicable to the multiple murder circumstance here, and the comprehensive listing contained in section 190.2 generally. Under *Godfrey*, it is constitutionally impermissible for a statute making a defendant death-eligible to have so broad and indiscriminate a sweep, selecting as it does on the basis of the common aspects attending many murders. Serious as these factors are, they are not those which society views as inherently being among the most "...grievous... affronts to humanity...," as required by the Eighth Amendment. (*Zant v. Stephens, supra*, 642 U.S. at 877, n.15, citing *Gregg v. Georgia, supra*, 418 U.S. at 184.) Moreover, a statute which specifically contemplates encompassing every murderer fails to account for different degrees of culpability involved in different types of murder, increasing the

likelihood that juries will arbitrarily sentence defendants to death without proper regard for the defendant or the act, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

iii. Section 190.2, subdivisions (a), (3), the special circumstance of multiple murder, fails to perform the constitutionally required narrowing function, by making a common form of felony murder death-eligible, in violation of the Eighth and Fourteenth Amendments.[41]

California's statutory scheme violates the Eighth and Fourteenth Amendments, in that it attaches overly-broad eligibility for the death penalty to multiple murder offenses, and fails to..."genuinely narrow the class of persons eligible for the death penalty and...reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra*, 462 U.S. at 878.)[42]

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[41] Appellant recognizes that this court rejected a similar argument in *People v. Marshall, supra*, 50 Cal.3d at 945-946. Appellant respectfully asks that this court reconsider the argument.

[42] Additionally, because the substantive felony murder offenses (section 189) the multiple murder special circumstance (section 190.2) and the circumstances of the offense (section 190.3, subd. (a)) used in the actual decision to impose death, are all duplicative, a death judgment which, as here, is based on such factors also violates the Fifth Amendment's prohibition against double jeopardy, applicable to the states through the Fourteenth Amendment (see *Benton v. Maryland* (1969) 395 U.S. 784, 793-794, 89 S.Ct. 2056), as well as article I, section 15 of the California Constitution. (*Contra, People v. Gates* (1987) 43 Cal. 3d 1168, 1188-1190.) Indeed, this "triple use" of facts in a capital case felony murder also violates the Eighth Amendment's prohibition against cruel and unusual punishments, the Fourteenth Amendment's due process clause, and the enhanced capital case due process protections of both. (*Contra, People v. Marshall, supra,* 50 Cal. 3d at 945-946, citing *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241-246, 108 S. Ct. 546, 552-

Additionally, California's statutory scheme is particularly death-biased in felony murder cases because after a first degree murder conviction and special circumstance finding based on multiple murder, the sentencer is required to double-count or weigh the same felony murder "crime circumstances" (Pen. C. sec. 190.3, subd. (a)) and the same multiple murder special circumstance as factors in aggravation (see, Pen. C. sec. 190.3, subd. (a)) contrary to the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra,* 503 U. S. at 234-236.)

Narrowing criteria must apply to multiple murder offenses as well as to other death-eligible statutory provisions, and death eligibility must be limited to the most reprehensible murderers. The criteria applied to multiple murder in California fail to provide this narrowing function; instead, they sweep in a broad, arbitrary fashion. This is demonstrated by the anomalous fact that, while any multiple-murderer may be executed, the same is not true of all "traditional" -- and often far more reprehensible -- first degree murderers, a result which is "highly incongruous." (*State v. Cherry* (N.C.1979) 257 S.E. 2d 551, 567.) California's multiple murder special circumstance therefore fails to provide the constitutionally required meaningful or rational basis for distinguishing capital from non-capital murder. (*Zant v. Stephens, supra*, 462 U.S. at 878 and n.15; *Furman v. Georgia, supra,* 408 U.S. at 248, n.11 [Douglas, J., conc.], 294 [Brennan, J., conc.], 309-310 [Stewart, J., Conc.], 313 [White, J. conc.].)

555.)

iv. Section 190.3, subdivision (a)'s specification of special circumstances as factors in aggravation grants the penalty phase sentencer unbridled discretion, weighted in favor of death, in violation of the Eighth and Fourteenth Amendments.

In addition to the above-described constitutional deficiencies, the statutory provision that a multiple murder special circumstance finding may be used at the penalty phase as a factor in aggravation is another Eighth and Fourteenth Amendment[43] violation.

In California, the sentencer weighs in aggravation of sentence any special circumstance which was found true at the guilt phase. (Section 190.3, subd. (a).) A defendant convicted of two murders in one proceeding is therefore automatically subject to a multiple murder special circumstance (section 190.2, subd. (a)(3)) and a penalty phase murder aggravating factor (section 190.3, subd. (a)) by the simple nature of the charges.

By contrast, a defendant accused of a single premeditated killing is not automatically subjected to a statutorily mandated special circumstance. Even though a single pre-meditated murder involving deliberation, malice, and an intent to kill may be far more serious than a multiple murder,[44] premeditated murder alone does not automatically give rise to both a special circumstance and an aggravating factor. This

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[43] As described, post, the Fourteenth Amendment violation offends both the due process clause and the equal protection clause.

[61] A defendant's intent and therefore moral guilt, *Enmund v. Florida* (1982) 458,? 485 U.S. 782, 800, 102 S.Ct. 3368, 3378), are critical to a determination of death penalty suitability. (*Id.*, at pp.800-801.)

disparity between a heinous premeditated murder of a single individual and multiple murder is both "highly incongruous" (*State v. Cherry, supra,* 257 S.Ed.2d at p.567; see *State v. Middlebrooks*, 840 S.W. 2d at 345), and a violation of the due process clauses of the Fifth and Fourteenth Amendments, as well as the Fourteenth Amendment's equal protection clause.

California attempts to comply with the Eighth Amendment's narrowing requirement by means of guilt phase findings of special circumstances accompanying guilt phase findings of first-degree murder. (Sec. 190.2, subd.(a).) Where the homicide is multiple murder, however, the narrowing fails to pass constitutional muster because no narrowing takes place: the special circumstances found under section 190.2, subd.(a)(3) duplicates the elements of the crimes themselves. (*Furman v. Georgia, supra*, 408 U.S. at 313 [White, J., conc.,]; accord, *Godfrey v. Georgia, supra,* 446 U.S. at 427 [plur. opn.].) The error is then exacerbated by having the sentencer consider the special circumstance finding as a penalty phase aggravating factor (sec. 190.3, subd.(a)), creating a death-biased process that violates the Eighth and Fourteenth Amendments. (*Stringer v. Black, supra*, 503 U.S. at 234-236; *Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2635.)

v. Sections 190-190.5 afford the prosecutor complete discretion to determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments.

Sections 190-190.5 afford the individual prosecutor complete discretion to

determine whether a penalty hearing will be held, in violation of the Eighth and Fourteenth Amendments. In *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, Justice Broussard dissented on this ground, noting that it creates a substantial risk of county-by-county arbitrariness. There are no statewide standards to guide the prosecutor's discretion.

Under the California statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar, if not identical, charges in different counties will not. These arbitrary outcomes occur either at the charging stage, prior to trial by plea to a non-capital charge, after the guilt phase, and during or after the penalty phase. This disparate range of options, coupled with the absence of any standards to guide the prosecutor's discretion, permits reliance on constitutionally irrelevant and impermissible considerations, including, *inter alia*, race, sexual orientation, personal dislike of the defendant, and/or economic status. Additionally, the prosecutor is free to seek death in virtually every first degree murder case on either a lying-in-wait theory (*People v. Morales, supra*, 48 Cal.3d 527) or a felony murder theory.

The statutory scheme therefore allows arbitrary and wanton prosecutorial discretion throughout the capital case process, in charging, prosecuting, submitting the case to the jury and opposing the automatic motion to modify the sentence. This compounds the effects of the vagueness and arbitrariness in the statutory scheme,

described *ante*. Much like the arbitrary and wanton jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 96 S.Ct. 2978 this unlimited discretion is contrary to the principled decision-making required by *Furman v. Georgia, supra*, 408 U.S. 238.

In appellant's case, the prosecutor decided to charge multiple murder, giving rise to the duplicative multiple-murder special circumstance and aggravator that ultimately resulted in a death sentence. In his penalty phase argument regarding the circumstances of the crime as a factor warranting the death penalty, the prosecutor exploited the unconstitutionally vague statutory factors by arguing the special circumstances themselves justified death. The jury therefore arrived at its death judgment by a tainted process involving unguided consideration of improper factors improperly argued by the prosecutor. Therefore, under the Eighth and Fourteenth Amendments, and the principles articulated in *Furman*, *Tuilaepa*, and *Stringer*, reversal of the death judgment here is mandated.

j. <u>These errors prejudiced appellant and mandate reversal</u>.

Section 190.3 violated the Fifth, Sixth, Eighth and Fourteenth Amendments, as described above. It also violated appellant's analogous state-created rights, thereby violating his right to due process. (*Hicks v. Oklahoma, supra*, 497 U.S. at 346, 100 S.Ct. at 2229.) These errors are each prejudicial and mandate reversal individually and cumulatively.

As to all the unconstitutionally vague provisions of section 190.3, reversal is automatic, because the use of a vague aggravating factor in the weighing process created randomness and a bias in favor of execution. (*Tuilaepa v. California, supra*, 512 U.S. at 973, 114 S.Ct. at 2675; *Stringer v. Black, supra*, 503 U.S. at 234-236.)

As to all other errors, *ante*, reversal is mandated, as respondent cannot demonstrate that they individually or collectively had no effect on the penalty verdict in this exceedingly close case. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, 107 S.Ct. 1821.)

B. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

1. Introduction

Appellant was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). While appellant's rights under state and federal constitutions have been violated, these violations are also violations of international law.

2. Background

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank

with federal statutes.[45] Customary international law is equated with federal common law.[46] International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700, 44 L.Ed. 320, 20 S.Ct. 290.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118, 2 L.Ed.208.) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33, 71 L.Ed.2d 715, 102 S.Ct. 1510.) The United States Constitution also authorizes Congress to "define and punish...offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243, 252, 80 L.Ed.2d 273, 104 S.Ct.

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[45] Article VI, sec. 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[46] Restatement Third of the Foreign Relations Law of the United States (1987), p.145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

1776.[47]

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[48] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[49]

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[47] See also *Oyama v. California* (1948) 332 U.S. 633, 92 L.Ec.249, 68 S.Ct. 269, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Laws] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* At 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, 570 invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat.1031, 1046.)" (*Id.* at 604.)

[48] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[49] Buergenthal, International Human Rights (1988) p.3.

This expression was further in 1920 by the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[50] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[51]

It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[52]

3. Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human

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[50] *Id.*, pp. 7-9.

[51] Restatement Third of the Foreign Relations law of the United States (1987) Not to Part VII, vol. 2 at 1058.

[52] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

rights provisions are seen in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[53] By adhering to its multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the United Nations drafted and adopted both the Universal Declaration of Human Rights[54] and the Convention on the Prevention and Punishment of the Crime of Genocide.[55] The Universal Declaration is part of the International Bill of Human

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[53] Article 1 (3) of the UN Charter, June 26, 1945, 59 Stat.1031, T.S. 993, entered into force October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world."
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> Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).

[54] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res.217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[55] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, *supra,* p.48.

Rights,[56] which also includes the International Covenant on Civil and Political Rights,[57] the Optional Protocol to the ICCPR,[58] the International Covenant on Economic, Social and Cultural Rights,[59] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the

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[56] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills." (1991) 40 Emory L.J. 731.

[57] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976 (hereinafter ICCPR).

[58] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[59] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

individual without distinction as to race, nationality, creed or sex."[60] In 1948, the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[61]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[62] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to

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[60] OAS Charter, 119 U.N.T.S.3, entered into force December 13, 1951, amended 721 U.N.T.S. 324, entered into force February 27, 1970.

[61] Buergenthal, International Human Rights, *supra,* pp.127-131.

[62] Buergenthal, International Human Rights, *supra.*

Appellant notes that this appeal is a stet in exhausting his administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

reinforce the normative effect of the American Declaration.[63]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the United Nations Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[64] Though the 1950s was a period of isolationist, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[65]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; Ex-President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[66] and the

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[63] Buergenthal, International Human Rights, *supra.*

[64] Sohn and Buergenthal, International Protection of Human Rights (1973) pp.506-9.

[65] Buergenthal, International Human Rights, *supra,* p.230.

[66] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. _____ U.N.T.S.

International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment[67] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[68]

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[69] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[70] Though the United States courts have not strictly applied

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____ (1994).

More than 100 countries are parties to the Race Convention.

[67] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res.39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong., 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. ____ U.N.T.S. ____ (1994).

[68] Buergenthal, International Human Rights, *supra,* p.4.

[69] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p.579.

[70] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), entered into force January 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet

Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[71]

4. Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[72] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the

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been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc.L., 92d Cong., 1sat Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[71] See for example *Inupiat Community of the Arctic Slope v. United States* (9th Cir.1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); *Crow v. Gullet* (8th Cir.1983) 706 F.2d 774 (citing the International Covenant on Civil and Political Rights); *Filartiga v. Pena-Irala* (2nd Cir.1980) 630 F.2d 876 (citing the International Covenant on Civil and Political Rights).

See also Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 Geo.Wash.J.Int'l.L & Econ.71. Ms. Charme argues that Article 18 codified the existing interim (pre-treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. Thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[72] Restatement Third of the Foreign Relations Law of the United States, sec.102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[73]

Customary international law is "part of our law." (*The Paquete Habana, supra,* at 700.) According to 22 U.S.C. sec.2304 (a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.[74] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[75] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga v. Pena-Irala* (2d Cir.1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary

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[73] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills," (1991) 40 Emory L.J. 731 at 737.

[74] 22 U.S.C. sec.2304 (a)(1).

[75] Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts & Docs. 46. This statute is generally considered to be an authoritative list of the sources of international law.

international law as evidenced and defined by the Universal Declaration of Human Rights...." (*Id.*) at 882. The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[76] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[77]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on human rights. Thought Ex-President Bush vetoed this legislation,[78] in May 1993 Ex-President Clinton tied renewal of China's most favored

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[76] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser.L/VII.50, doc.6 (1980).

[77] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser.L/V/II.52, doc.17, para.48 (1987).

[78] See Michael Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times, September 29, 1992, at Al.

nation status to progress on specific human rights issues in compliance with the Universal Declaration.[79]

The International Convention on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound."[80]

5. Due process violations

The factual and legal issues presented in the brief demonstrate that appellant was

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[79] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's "MFN" status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14 Nw. J. Int'l L.&Bus.66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use "MFN" status to influence China's compliance with recognized international human rights. See Kent, China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994 (1995) 17 H.R. Quarterly, 1.

[80] Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures (1993) 42 DePaul L. Rev.1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

denied his rights to due process and a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[81] ("ICCPR") as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[82] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[83] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[84]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-

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[81] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[82] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d Sess.

[83] Vienna Convention, *supra,* 1155 U.N.T.S. 331, entered into force January 27, 1980.

[84] Restatement Third of the Foreign Relations Law of the United States, (1987) sec.313.cmt.b. With respect to reservations, the Restatement lists "the requirement...that a reservation must be compatible with the object and purpose of the agreement."

executing or have been implemented by legislation.[85] The United States declared that the articles of the ICCPR are not self-executing.[86] In 1992, the Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.[87]

But under the Constitution, a treaty stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Asakura v. Seattle* (1924) 265 U.S. 332, 341, 68 L.Ed. 1041, 44 S.CT. 515.)[88] Moreover, treaties designed to protect individual rights should be

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[85] Newman and Weissbrodt, International Human Rights: Law, Policy and Process, (1990) p.257. See also *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[86] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d Sess.

[87] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep.No.23, 102d Cong., 2d sess. at 19.

[88] Some legal scholars argue that the distinction between self-executing and non-self-executing treaties is patently inconsistent with express language in Article 6, sec.2 of the United States Constitution and that all treaties shall be the supreme law of the land.

construed as self-executing. (*United States v. Noriega* (1992) 808 F.Supp.791.) In *Noriega,* the court noted, "It is inconsistent with both the language of the [Geneve III] treaty and with our professed support of its purpose to find that the rights established herein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs -- not to create some morphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.... Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life... [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[89] Likewise, these protections are found in the American Declaration:

See generally Jordan L. Paust, Self-Executing Treaties (1988) 82 Am. J. Int'l L.760.

[89] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[90]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[91] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.[92]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[93] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any

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[90] American Declaration of the Rights and Duties of Man, *supra.*

[91] Report of the Human Rights Committee, p.72, 49 UN GAOR Supp. (No.40) p.72, UN Doc. A/49/40 (1994).

[92] *Id.*

[93] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.

of the nonderogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[94] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[95]

6. Conclusion

The due process violations that appellant suffered throughout his trial and sentencing phases are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to bind nations to an international

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[94] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer. Ct.H.R., ser. A: Judgments and Opinions, No.3 (1983) reprinted in 23 I.L.M.320, 341 (1984).

[95] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex.Int'l L.J.69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jusisdiction." Advisory Opinion No.OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982) reprinted in 22 I.L.M.37, 47 (1983). These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

commitment to further protections of human rights. The United States must honor its role in the international community be recognizing the human rights standards in our own country to which we hold other countries accountable. As a result of the violations of international law which occurred in this case, reversal is required.

C. THE CUMULATIVE PREJUDICIAL EFFECT OF ALL THE ERRORS IN THE INSTANT CASE VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, AN IMPARTIAL JURY, A RELIABLE DETERMINATION OF GUILT AND PENALTY, AND FUNDAMENTAL FAIRNESS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS WELL AS THE CALIFORNIA CONSTITUTION.

As shown in the preceding sections of this brief, numerous extremely prejudicial errors were committed in the instant case. Even if, *arguendo,* none alone may justify reversal, when considered cumulatively, or in any combination, these errors denied appellant his constitutional rights to a fair trial, confrontation of witnesses, an impartial jury, due process, to present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and the analogous provisions of the California Constitution. Reversal of the verdicts of guilty as well as penalty of death are therefore required.

In *People v. Hill* (1998) 17 Cal.4th 800, 844-847, 72 Cal.Rptr.2d 656, 681, 682, this Court discussed why the cumulative effect of all the trial errors prejudiced the defendant, violated his constitutional rights, and required reversal:

> "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of

reversible and prejudicial error. ...

> Defendant's trial, as seen, was far from perfect. In the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. ...
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> Although we might conclude any single instance of misconduct was harmless standing alone, we cannot ignore the overall prejudice to defendant's fair trial rights...[I]t became increasingly difficult for the jury to remain impartial. 'It has been truly said: "You can't unring the bell."' (*People v. Wein* (1958) 50 Cal.2d 383, 423 (dis. opn. of Carter, J.) Here, the jury heard not just a bell, but a constant clang of erroneous law and fact.
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> The sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly troubling. Considered together, we conclude they created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors. Considering the cumulative impact of [the prosecutor's] misconduct, at both the guilt and penalty phases of the trial, together with...the other errors throughout the trial, ...we...conclude defendant was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial. Defendant is thus entitled to a reversal of the judgment and a retrial free of these defects."

(Accord, *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469 ["The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."]; *United States v. Necolchea* (9th Cir.1993) 986 F.2d 1273, 1282-1283, citing *Rivera, supra*; *Walker v. Engle* (6th

Cir.1983) 703 F.2d 1959, 963 ["Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."]; *United States v. Hernandez* (6th Cir.2000) 227 F.3d 686, 697 [same, citing *Walker, supra.*)

Here, the trial court improperly denied appellant's severance motion and motion for a ski mask lineup. *Marsden* error occurred. Prejudicial evidence was admitted. The trial court prejudicially erred by allowing Donna Malouf to remain in the courtroom. The trial court committed instructional error. Other prejudicial errors occurred.

As explained in *Hill, supra,* the "aggregate prejudicial effect of [these] errors was greater than the sum of the prejudice of each error standing alone." (7 Cal.4th at 845, 72 Cal.Rptr.2d at 681.) Thus, appellant was denied his constitutional rights to a fair trial, due process, effective assistance of counsel, to present a defense, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution, art. 1, secs.15, 16, 17. This Court cannot say that beyond a reasonable doubt, that a result more favorable to appellant would not have occurred in the absence of the errors. (*Chapman v. California, supra,* 386 U.S. 18, 87 S.Ct. 824; *United States v. Rivera, supra,* 900 F.2d at 1470, n.6 ["If any of the errors being aggregated are constitutional in nature, ...Chapman should be used..."]) Therefore, reversal of the guilt and penalty judgments is required.

IX. CONCLUSION

For the reasons stated above, reversal is required.

Dated: December 19, 2008

Respectfully submitted
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CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Opening Brief contains 50,280 words.

I declare under penalty of perjury that the above is true and correct.

Dated: December 19, 2008

John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

I am a citizen of the United States and a resident of the County of Santa Clara; I am over the age of eighteen years and am not a party to the within action; my business address is 4083 Transport Street, Suite B, Palo Alto, California 94303.

On December 22, 2008, I served the within:

APPELLANT'S OPENING BRIEF

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Executed at Palo Alto, California on December 22, 2008.

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