SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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SUPREME COURT No. S104665 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTOPHER POORE

Defendant and Appellant.

Riverside County
Superior Court
No. INF 033308

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE RANDALL D. WHITE, JUDGE

R. Clayton Seaman, Jr.
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304
(928) 776-9168
Bar No. 126315

Counsel for Appellant
Christopher Poore

TABLE OF CONTENTS

Subject *Page*

TABLE OF CONTENTS. 2

TABLE OF AUTHORITIES.. 9

STATEMENT OF APPEALABILITY. 27

STATEMENT OF CASE. 27

STATEMENT OF FACTS. 31

GUILT PHASE. 31
Summary of the Facts. 31
The Homicide. 33
Melinda McGuire. 37
Autopsy Report. 38
The Investigation. 38
The Weapon. 41
Gang Testimony. 42
Incarceration Activities, Jail Incidents Prior To Trial. 42
Theft of Nitroglycerin Pills. 42
Possible Reasons for Theft.. 43
Possession of Contraband.. 44
Defense Evidence. 44
Rebuttal Evidence.. 55

PENALTY PHASE. 57
Aggravating Evidence.. 57
Summary. 57
Contraband. 59
November 15, 1995. 59
December 10, 1995.. 60
Inmate Altercations.. 60
May 29, 1993. 60

August 22, 1994. 62
May 21, 1995. 63
June 7, 1995. 64
July 4, 1995.. 65
July 7, 1995.. 66
August 16, 1995. 67
November 24, 1995. 67
December 19, 1995.. 68
November 4, 1996. 68
November 16, 1996. 69
February 16, 2000.. 69
Victim Impact Statements. 70

GUILT PHASE ISSUES. 75

I. THE TRIAL COURT ERRED BY PAINFULLY SHACKLING APPELLANT TO AN UNDERSIZED CHAIR DURING TRIAL AS A PROPHYLACTIC MEASURE INSTEAD OF A MEASURE OF LAST RESORT TO CONTROL DISRUPTIVE BEHAVIOR. 75

Introduction.. 75
Factual Background. 76
Errors in the Trial Court's Shackling Decisions. 97
Unjustified Restraint Violates Appellant's State and Federal Constitutional Rights. 99
Change in Jurisprudence. 104
Shackling Decision Made Before Any Evidentiary Support Showing Manifest Need. 107
Focus on Courtroom Behavior.. 110
None of the Evidence Demonstrated Manifest Need for Restraints.. 112
Less Restrictive Alternatives Were Available. 122
Prejudice. 126
Prejudice - Pain Caused by the Shackles. 129
Additional Prejudice - Impairment of the Right to Participate in the Trial 134
Additional Prejudice - Shackles Violated the Dignity and Decorum

of the Courtroom 141
Additional Prejudice - Shackling Affected Appellant’s Demeanor at Trial and Prevented Him from Fully Participating in His Defense. 142

II. DISMISSAL OF PROSPECTIVE JURORS WHO WOULD LISTEN TO THE EVIDENCE AND CONSIDER VOTING FOR EITHER DEATH OR LIFE IMPRISONMENT CANNOT BE EXCUSED ON GROUNDS THAT THEY COULD NOT BE ABSOLUTELY SURE THAT THEY COULD IMPOSE THE DEATH PENALTY. THEIR DISMISSAL WAS IMPROPER AND VIOLATIVE OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS THE CALIFORNIA CONSTITUTION. 145

Summary of Argument 145
Factual Background. 146
Witt-Witherspoon Standard as Interpreted by this Court.. 151
Gray, Witt, Adams & Witherspoon Were Violated by The Removal of Prospective Jurors Walker and Siebert Because they were Not Sure they Could Impose the Death Penalty Where The Instructions, as Explained by the Court, Did Not Require a Juror to Impose Death or Say That a Juror Should Do So... 153
Conclusion. 187

III. EXCLUSION OF PROSPECTIVE JURORS BECAUSE OF UNWILLINGNESS OR INABILITY TO IMPOSE A DEATH SENTENCE VIOLATES THE FEDERAL CONSTITUTION AS IT WAS UNDERSTOOD BY THE FRAMERS AND REQUIRES REVERSAL OF TIIE GUILT AND PENALTY JUDGMENTS IN THIS CASE.. 188

Introduction.. 188
The High Court's Death-qualification Cases Must Be Re-examined in Light of the Original Understanding of the Bill of Rights. . 188
Due Process of Law and the Right to an Impartial Jury as Seen by the Framers of the Bill of Rights Did Not Permit Judges to Exclude

Citizens Based on Scruples Against Capital Punishment. . . 193
Death Qualification Protocols Emerged Too Late and with Too Little Rationale, to Command Adherence Today. 199
Reversal is Required. 202

PENALTY PHASE ERROR. 203

IV. THE TRIAL COURT ERRED IN ALLOWING THE DEFENSE TO FOREGO THE PRESENTATION OF EVIDENCE IN PENALTY PHASE AFTER TRIAL DEFENSE COUNSEL INFORMED THE COURT THAT THERE WAS MITIGATING EVIDENCE AVAILABLE. 203

Summary of Argument. 203
Factual Background. 205
A Death Sentence Imposed in the Absence of Substantial Mitigating Evidence Is Constitutionally Unreliable. . 208
A Capital Defendant Cannot Unilaterally Waive His Eighth and Fourteenth Amendment Right to Have the Jury Consider Mitigating Evidence. 217
The Jury's Inability to Consider All Mitigating Evidence in Mr. Poore's Case Rendered Mr. Poore's Sentence Unreliable. 220
The Absence of Available Mitigating Evidence Is a Structural Error Entitling 222

V. THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT. 224

VI. CALIFORNIA'S FAILURE TO TIMELY PROVIDE CONDEMNED DEFENDANTS WITH HABEAS COUNSEL OFFENDS THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND CALI FORNIA CONSTITUTIONS AND REQUIRES REVERSAL OF APPELLANT'S CAPITAL CONVICTION AND SENTENCE. 240

VII. CALIFORNIA’S DEATH PENALTY STATUTE, AS

INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.. 242

A. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad*. 245

B. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.* 247

C. *California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*... 249

1. *Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.* 250

2. *In the Wake of Apprendi*, *Ring*, *Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt*. 253

3. *Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt*.. 259

4. *The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating*

Factors and That Death Is the Appropriate Penalty.. 261
a. *Factual Determinations*.. 261
b. *Imposition of Life or Death*. 262
5. *California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors*... 264
6. *California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty*. 267
7. *The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury*. 269
8. *The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury*. 270
9. *The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction*... 270
10. *The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants*. 273
11. *California's Use of the Death Penalty as a*

Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments to the United States Constitution. 276

VIII. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS. 278

CONCLUSION. 281

CERTIFICATE OF WORD COUNT. 281

TABLE OF AUTHORITIES

Authority *Page*

United States Supreme Court Cases

Abdul-Kabir v. Quarterman (2007) 550 U.S. 233. 212

Adams v. Texas (1980) 448 U.S. 38. . . . . 151, 162, 168, 183

Adams v. United States ex rel. McCann (1942) 317 U.S. 269. 138

Addington v. Texas (1979) 441 U.S. 418. . . . . 260, 262

Allen v. Ornoski (2006) 546 U.S. 1136 226

Alleyne v. United States (2013) 570 U.S. 99, 133 S.Ct. 2151. . . . . 189, 193

Apprendi v. New Jersey (2000) 530 U.S. 466.. . . . . 190, 202, 251, 269

Arizona v. Fulminante (1 991) 499 U.S. 279.. . . . . 126, 222

Atkins v. Virginia (2002) 536 U.S. 304.. 209, 212, 217, 277

Baze v. Rees (2008) 553 U.S. 35.. 229

Beck v. Alabama (1980) 447 U.S. 625. . . . . 208, 210, 219

Blakely v. Washington (2004) 542 U.S. 296.. . . . . 192, 201, 251, 269

Boulden v. Holman (1969) 394 U.S. 478. 183

Brady v. United States (1970) 397 U.S. 742.. 139

Brewer v. Quarterman (2007) 550 U.S. 286.. 221

Bush v. Gore (2000) 531 U.S. 98. 275

Caldwell v. Mississippi (1985) 472 U.S. 320. 212, 220, 280

California v. Brown (1987) 479 U.S. 538.. . . . . 221, 264

Callins v. Collins (1994) 510 U.S. 1141. . . . . 228, 239

Chapman v. California (1967) 386 U.S. 18. . . . . 75, 126, 279

Crawford v. Washington (2004) 541 U.S. 36 . . . . 189, 191

Cunningham v. California (2007) 549 U.S. 270 [166 L. Ed. 2d 856. . 250-259, 275

Darden v. Wainwright (1986) 477 U.S. 168. . . . . 166, 170-173, 176

Deck v. Missouri (2005) 544 U.S. 622 [125 S.Ct. 2009]. 110, 127, 141

Donnelly v. DeChristoforo (1974) 416 U.S. 637. 279

Dunn v. Blumstein (1972) 405 U.S. 330. 122

Eddings v. Oklahoma (1982) 455 U.S. 104. . . . . 210, 222, 224, 239, 273

Estelle v. Williams (1976) 425 U.S. 501. 99

Faretta v. California (1975) 422 U.S. 806. 215

Ford v. Wainwright (1986) 477 U.S. 399. 278

Gardner v. Florida (1977) 430 U.S. 349. . . . . 211, 213, 217, 262

Georgia v. Brailsford (1794) 3 U.S. 1. 199

Gideon v. Wainwright (1963) 372 U.S. 335. 126

Glossip v. Gross (2015) 576 U. S. __, 135 S.CT 2526 226

Gray v. Mississippi (1987) 481 U.S. 648. . . . . 146, 154, 187

Greene v. Georgia (1996) 519 U.S. 145. 165

Greer v. Miller (1987) 483 U.S. 756.. 279

Gregg v. Georgia (1976) 428 U.S. 153.. . . . . 211, 212, 230, 264

Hall v. Florida, United States Supreme Court Case No. 12-10882. 226

Harmelin v. Michigan (1991) 501 U.S. 957 266

Hicks v. Oklahoma (1980) 447 U.S. 343. . . . . 136, 272

Hilton v. Guyot (1895) 159 U.S. 113. 277

Hitchcock v. Dugger (1987) 481 U.S. 393. . . . . 222, 280

Hope v. Pelzer (2002) 536 U.S. 730. 132

Illinois v. Allen (1970) 397 U.S. 337. . . . . 100, 103, 111, 123, 125, 134, 137, 141

In re Winship (1970) 397 U.S. 358. 261

Indiana v. Edwards (2008) 554 U.S. 164 [128 S. Ct. 2379].. 215

Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110. 278

Johnson v. Bredesen (2009) 558 U.S. 1067 226

Johnson v. Mississippi (1988) 486 U.S. 578.. . . . . 211, 269

Johnson v. Zerbst (1938) 304 U.S. 458.. 138

Jones v. United States (1999) 526 U.S. 227. 189

Jurek v. Texas (1976) 428 U.S. 262. 212

Kansas v. Marsh (2006) 548 U.S. 163. . . . . 228, 242, 265, 267

Lackey v. Texas (1995) 514 U.S. 1045 226

Lenhard v. Wolff (1979) 444 U.S. 807. 217

Lockett v. Ohio (1978) 438 U.S. 586.. . . . . 209, 222, 270

Lockhart v. McCree (1986) 476 U.S. 162.. 152

Logan v. United States (1892) 144 U.S. 263. 200-202

Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367. 277

Martinez v. Court of Appeal of California, 4th Appellate Dist. (2000) 528 U.S. 152 215-216

Maynard v. Cartwright (1988) 486 U.S. 356. 249

McGautha v. California (1971) 402 U. S. 183.. 194

McKaskle v. Wiggins (1984) 465 U.S. 168.. 215

McKoy v. North Carolina (1990) 494 U.S. 433. 209

Memorial Hospital v. Maricopa County (1974) 415 U.S. 250. 122

Mills v. Maryland (1988) 486 U.S. 367. 209, 266, 270, 276

Minnick v. Mississippi (1990) 498 U.S. 146.. 139

Monge v. California (1998) 524 U.S. 721. . . . . 260, 264, 273

Morgan v. Illinois (1992) 504 U.S. 719. . . . . 149, 158, 184-187, 201

Murray v. Giarratano (1989) 492 U.S. 1. 242

Ohio v. Roberts (1980) 448 U.S. 56. 191

Penry v. Lynaugh (1989) 492 U.S. 302.. . . . . 209, 213, 222

Presnell v. Georgia (1978) 439 U.S. 14.. 262

Pulley v. Harris (1984) 465 U.S. 37. . . . . 243, 267

Reynolds V. United States (1879) 98 U.S. 145. 200

Riggins v. Nevada (1992) 504 U.S. 127 100

Ring v. Arizona (2002) 536 U.S. 584 . . . . 125, 189, 250, 253, 266, 269, 275

Roberts v. Louisiana (1976) 428 U.S. 325. . . . . 209, 210, 219

Rompilla v. Beard (2005) 545 U.S. 374. 220

Roper v. Simmons (2005) 543 U.S. 551. . . . . 210, 213

Satterwhite v. Texas (1988) 486 U.S. 249.. 223

Schneckloth v. Bustamante (1973) 412 U.S. 218. 138

Sell v. United States (2003) 539 U.S. 166.. 216

Shelton v. Tucker (1960) 364 U.S. 479. 122

Silber v. United States (1962) 370 U.S. 717. 218

Skinner v. Oklahoma (1942) 316 U.S. 535. 274

Skipper v. South Carolina (1986) 476 U.S. 1. 210, 222, 280

Speiser v. Randall (1958) 357 U.S. 513. 261

Stanford v. Kentucky (1989) 492 U.S. 361. 276

Stringer v. Black (1992) 503 U.S. 222. 272

Sumner v. Shuman (1987) 483 U.S. 66. 208

Thompson v. Oklahoma (1988) 487 U.S. 815.. 277

Townsend v. Sain (1963) 372 U.S. 293.. 265

Trevino v. Thaler (2013) 569 U.S. 413 [133 S. Ct. 1911]. 242

Trop v. Dulles (1958) 356 U.S. 86. 212

Tuilaepa v. California (1994) 512 U.S. 967. 247

Tumey v. Ohio (1927) 273 U.S. 510.. 127

United States v. Booker (2005) 543 U.S. 220. 253, 256, 270

United States v. Gagnon (1985) 470 U.S. 522.. 134

United States v. Gonzalez-Lopez (2006) 548 U.S. 140.. . . . . 126, 222

United States v. Jackson (1968) 390 U.S. 570. 139

Uttecht v. Brown (2007) 551 U.S. 1. . . . . 166, 174, 184

Vasquez v. Hillery (1986) 474 U.S. 254. 127

Wainwright v. Witt (1985) 469 U.S. 412.. . . 146, 151-154, 162, 167, 170, 173, 202

Waller v. Georgia (1984) 467 U.S. 39. . . . . 126, 135

Walton v. Arizona (1990) 497 U.S. 639. . . . . 125, 189, 251

Washington v. Glucksberg (1977) 521 U.S. 702. 217

Whitmore v. Arkansas (1990) 495 U.S. 149. 138

Wiggins v. Smith (2003) 539 U.S. 510. 220

Williams v. Taylor (2000) 529 U.S. 362. 220

Witherspoon v. Illinois (1968) 391 U.S. 510. . . 151, 154, 161, 182, 184, 201, 220

Woodson v. North Carolina (1976) 428 U.S. 280. . . . . 209, 218, 263, 270

Zant v. Stephens (1983) 462 U.S. 862.. . . . . 218, 270

Federal Court Cases

Badger v. Caldwell (9th Cir. 1978) 587 F.2d 968. . . . . 123, 134

Bryson v. Ward (10th Cir. 1999) 187 F.3d 1193. 222

Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 512. 272

Cooper v. Fitzharris (9th Cir. 1987) 586 F.2d 1325. 279

Darden v. Wainwright (M.D. Fla. 1981) 513 F. Supp. 947. . . . . 166, 170, 176

Duckett v. Godinez (9th Cir 1995) 67 F.3d 734. 123

Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295. 272

Fritz v. Spalding (9th Cir. 1982) 682 F.2d 782.. 214

Groseclose ex rel. Harries v. Dutton (M.D. Tenn. 1984) 594 F.Supp. 949. 139

Jackson v. Ylst (9th Cir. 1990) 921 F.2d 882. 215

Jeffers v. Lewis (9th Cir 1994) 38 F.3d 411. . . . . 231, 238

Jones v. Chappell (C.D. Cal 2014) 31 F.Supp.3d 1050. 224

Kennedy v. Cardwell (6th Cir. 1973) 487 F.2d 101. . . . . 101, 128

Loux v. United States (9th Cir.) 389 F.2d 911. 128

Myers v. Ylst (9th Cir. 1990) 897 F.2d 417.. . . . . 266, 276

People v. Mejia (2d. Cir. 2008) 545 F.3d 179. 120

Rhoden v. Rowland (9th Cir. 1998) 172 F.3d 633. 100

Savage v. Estelle (9th Cir. 1991) 924 F.2d 1459. 215

Smith v. Armantrout (8th Cir. 1987) 812 F.2d 1050.. 139

Spain v. Rushen (9th Cir. 1989) 883 F.2d 712 . . . . . . 100, 103, 105, 123, 128, 144

Stewart v. Corbin (9th Cir. 1988) 850 F.2d 492 . . . . 105, 110

Tyars v. Finner (9th Cir. 1983) 709 F.2d 1274.. 123

United States v. Brock (7th Cir. 1998) 159 F.3d 1077. 215

United States v. Burr (C.C.Va. 1807) 25 F. Cas. 49. 196

United States v. Cornell (C.C. D.R.I. 1820) 25 F. Cas. 650. . . . . 199, 201

United States v. Doe (9th Cir. 1998) 155 F.3d 1070. 138

United States v. Esquer (7th Cir. 1972) 459 F.2d 431. 123

United States v. Frazier-El (4th Cir. 2000) 204 F.3d 553. 214

United States v. Latham (1st Cir. 1989) 874 F.2d 852. 135

United States v. Samuel (4th Cir. 1970) 431 F.2d 610. . . . . 123, 128

United States v. Scott (9th Cir. 2006) 450 F.3d 863. 139

United States v. Theriault (1976) 531 F.2d 281. 123

United States v. Whitehorn (D.D.C. 1989) 710 F. Supp. 803.. 132

Wilson v. McCarthy (9th Cir. 1985) 770 F.2d 1482. 103

Woodard v. Perrin (1st Cir. 1982) 692 F.2d 220.. 123

State Court Cases

Commonwealth v. Lesher (Pa. 1828) 17 Sergo & Rawle 155. 199

Conservatorship of Roulet (1979) 23 Ca1.3d 219. 262

Hovey v. Superior Court (1980) 28 Ca1.3d 1. . . . . 180, 182

In re Marquez (1992) 1 Cal.4th 584. 280

In re Morgan (2010) 50 Cal.4th 932.. 234

In re Sturm (1974) 11 Cal.3d 258. 265

Johnson v. State (Nev., 2002) 59 P.3d 450. 254

People v. Adcox (1988) 47 Cal.3d 207. 247

People v. Anderson (2001) 25 Cal.4th 543. 256

People v. Bacigalupo (1993) 6 Cal.4th 457. 245

People v. Barnett (1998) 17 Ca1.4th 1044. 237

People v. Barton (1995) 12 Cal.4th 186. 204

People v. Bittaker (1989) 48 Cal.3d 1046.. 248

People v. Black (2005) 35 Cal.4th 1238. 255

People v. Bolden (2002) 29 Cal.4th 515. 156

People v. Boyd (1985) 38 Cal.3d 762. . . . . 160, 272

People v. Brown (1988) 46 Cal.3d 432.. . . . . 253, 280

People v. Brown (Brown I) (1985) 40 Cal.3d 512. 254

People v. Burnick (1975) 14 Ca1.3d 306. 262

People v. Butler (2009) 46 Cal.4th 847.. 136

People v. Cain (1995)10 Cal.4th 1. 163

People v. Calio (1986) 42 Cal.3d 639.. 109

People v. Capistrano (2014) 59 Cal.4th 830. . . . . 157, 165, 173, 176

People v. Carpenter (1997) 15 Cal.4th 312. 271

People v. Carter (2005) 36 Cal.4th 1114. 237

People v. Coleman (1988) 46 Cal.3d 749. . . . . 109, 152

People v. Combs (2004) 34 Cal.4th 821. 102

People v. Cooper (1991) 53 Cal.3d 771. 152

People v. Covarrubias (2016) 1 Cal.5th 838. 102

People v. Cox (1991) 53 Cal.3d 618. . . . . 78, 102

People v. Croswell (N.Y. Sup. 1804) 3 Johns. Cas. 337. 198

People v. Cummings (1993) 4 Cal.4th 1233. 126

People v. Cunningham (2001) 25 Cal.4th 926. . . . . 105, 119

People v. Demetroulias (2006) 39 Cal.4th 1.. . . . . 254, 266

People v. Dickey (2005) 35 Cal.4th 884. 255

People v. Dillon (1984) 34 Cal.3d 441. 246

People v. Duran (1976) 16 Cal.3d 282. . . . . 101, 104, 105, 110, 126, 141

People v. Dyer (1988) 45 Cal.3d 26. 247

People v. Edelbacher (1989) 47 Cal.3d 983. . . . . 245, 270

People v. Fairbank (1997) 16 Cal.4th 1223. . . . . 250, 253, 264

People v. Farnam (2002) 28 Cal.4th 107. . . . . 164, 252

People v. Fauber (1992) 2 Cal.4th 792.. 264

People v. Feagley (1975) 14 Cal.3d 338.. 262

People v. Fierro (1991) 1 Cal.4th 173. 268

People v. Ghent (1987) 43 Cal.3d 739. 151-152

People v. Gordon (1990) 50 Cal.3d 1223. 152

People v. Haley (2004) 34 Cal.4th 283.. 156

People v. Hamilton (1963) 60 Cal.2d 105. 280

People v. Hamilton (1989) 48 Cal.3d 1142. 270

People v. Hardy (1992) 2 Cal.4th 86. 247

People v. Harrington (1871) 42 Cal. 165. . . . . 100, 143

People v. Hawkins (1995) 10 Cal.4th 920. 103

People v. Hawthorne (1992) 4 Cal.4th 43. . . . . 253, 266

People v. Hayes (1990) 52 Cal.3d 577. 280

People v. Hernandez (2011) 51 Cal.4th 733.. 120

People v. Hernandez (2012) 53 Cal.4th 1095. 242

People v. Hill (1998) 17 Cal.4th 800. 279

People v. Hillhouse (2002) 27 Cal.4th 469.. 246

People v. Holloway (1990) 50 Cal.3d 1098. 146

People v. Holt (1984) 37 Cal.3d 436. 279

People v. Howard (1992) 1 Cal.4th 1132. 138

People v. Hoyt (1942) 20 Cal.2d 306. 182

People v. Huggins (2006) 38 Cal.4th 175.. 136

People v. Jenkins (2000) 22 Cal.4th 900. 126

People v. Kaurish (1990) 52 Cal.3d 697.. . . . . 152, 160

People v. Lee (2011) 51 Cal.4th 620.. 237

People v. Lomax (2010) 49 Cal.4th 530 114

People v. Mai (2013) 57 Cal.4th (986). 204

People v. Mar (2002) 28 Cal.4th 1201. . . . . 108, 123

People v. Marshall (1990) 50 Cal.3d 907.. 268

People v. Martin (1973) 9 Cal.3d 687.. 121

People v. Martinez (2009) 47 Cal.4th. 399. 158-160

People v. Mason (1991) 52 Ca1.3d 909. . . . . 152, 161-163

People v. McDowell (2012) 54 Cal.4th 395. 237

People v. Mickey (1991) 54 Cal.3d 612. 146

People v. Millwee (1998) 18 Ca1.4th 96.. 156

People v. Montiel (1993) 5 Cal.4th 877. 271

People v. Morrison (2004) 34 Cal.4th 698. 271

People v.Nicolaus (1991) 54 Cal.3d 551. 247

People v. Olivas (1976) 17 Cal.3d 236. . . . . 273, 274

People v. Pearson (2012) 53 Cal.4th 306. . . . . 155, 187

People v. Pride (1992) 3 Cal.4th 195. 114

People v. Prieto (2003) 30 Cal.4th 226.. . . . . 255, 257, 274

People v. Ramos (2004) 34 Cal.4th 494. 156

People v. Riser (1956) 47 Ca1.2d 566. 180

People v. Robinson (2005) 37 Cal.4th 592. 248

People v. Rodrigues (1994) 8 Ca1.4th 1060. 155-156

People v. Rogers (2006) 39 Cal.4th 826. 265

People v. Sanchez (2016) 63 Cal.4th 665. 120

People v. Scheid (1997) 16 Cal.4th 1. 125

People v. Schmeck (2005) 37 Ca1.4th 240. 242

People v. Seaton (2001) 26 Cal.4th 598. . . . . 11, 120

People v. St. Martin (1970) 1 Cal.3d 524. 204

People v. Stewart (2004) 33 Cal.4th 425. . . . . 153, 157

People v. Thomas (1977) 19 Ca1.3d 630. 262

People v. Thomas (2011) 52 Cal. 4th 336.. 156

People v. Walker (1988) 47 Cal.3d 605. 247

People v. Wallace (2008) 44 Cal.4th 1032. . . . . 104, 112

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SUPREME COURT No. S104665 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	)
	) Riverside County
v.	) Superior Court
	) No. INF 033308
	)
CHRISTOPHER POORE,	)
	)
	)
Defendant and Appellant.	)
	)
	)

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE RANDALL D. WHITE, JUDGE

STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, art. VI, section 11 and Penal Code section 1239, subdivision (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF CASE

By an Information filed on April 28, 2000, appellant Christopher Poore was charged with four counts. (1 C.T. 196-199.) Count 1 alleged

that on November 8, 1999, appellant Poore committed the premeditated murder (PC section 187) of Mark Kulikov. Count 2 alleged the residential robbery (PC section 211) of Mr. Kulikov. (1 CT 197-199.) Count 3 alleged that on or about November 8-9, 1999 appellant committed burglary of an inhabited dwelling (PC section 459) at 2280 Powell, Palm Springs, California. (1 CT 196-199.)

Counts 1 and 2 also alleged that the offenses were committed for financial gain (PC section 190.2(a)(1)), after lying in wait (190.2(a)(15)), and involved the personal use of a firearm (12022.5(a) and 1192.7(c)(8)), the personal discharge of a firearm causing injury/death (12022.53(d)/1192(c)(8)) as well as a gang enhancement (186.22(b)(1)). (1 CT 197-199.) Count III also alleged a gang enhancement (PC section 186.22(b)(a)). (1 CT 198-199.)

Count 4 alleged possession of a firearm by a felon (PC section 12021(a)(1)), and noting convictions of first degree burglary, grand theft (PC section 487) and a previous 12021(a) conviction. (1 CT 199.)

On May 1, 2000 appellant was arraigned on the Information, pleaded not guilty to each count and denied all the special circumstance allegations. Appellant requested trial by jury. (1 CT 202-203.)

On June 23, 2000 defense counsel filed a 1368 motion. Dr. Jones was appointed to evaluate appellant. (1 CT 217-219.) After an evaluation of appellant on July 1, 2000 Dr. Jones concluded appellant was of borderline intelligence and showed evidence of thought disorders, particularly paranoia and perhaps hallucinations, such as hearing his grandfather's directions. He found that although appellant was able to understand

proceedings to some degree, he was not able to cooperate with counsel, nor was he competent to represent himself. (1 CT 225-229.) After further investigation, however, the 1368 motion was withdrawn by counsel. (1 CT 217-219.)

On September 19, 2001 the defense filed a motion to sever counts 2 and 3. The defense motion for use of a neck brace to obscure appellant's tattoos was denied. (2 CT 509-514.)

The defense severance motion and motions to federalize objections and to exclude firearm/ammunition evidence were all denied on September 25, 2001. (2 CT 533-536.)

Following a defense Evidence Code section 402 motion the court ruled it would not allow any cross-examination of prosecution witnesses White or McGuire regarding drug usage on the day of the event. (30 CT 8787-8789.)

Counsel made opening statements on November 14-15, 2001 and testimony began on November 15, 2001. (30 CT 8798-8800, 8817-8820.)

On December 10, 2001, after the court received a jury note regarding juror no. 5 overhearing a witness outside the courtroom, the defense filed a motion for a mistrial. The motion was denied. (31 CT 8949-8952.)

Appellant admitted a prior (strike) offense on December 14, 2001. (31 CT 8963-8965.)

On December 20, 2001 the guilt phase and closing arguments concluded and the jury retired to deliberate. (31 CT 9006-9008.)

On January 2, 2002 the jury returned its verdicts, finding: appellant guilty of first degree murder as charged in counts 1-3 inclusive

and guilty as charged in count 4. (31 CT 9014-9017.)

The jury found true the firearm enhancements alleged under sections12022.53 and 12022.5; both enhancements in Count 1. (31 CT 9018-9019.)The jury found true the special circumstances of lying in wait (190.2(a)(15)) and financial gain (190.2(a)(1)) as charged in count 1. (31 CT 9021-9022.). It found the 186.22(b) gang enhancement **NOT** true. (31 CT 9020.)

The jury found true the 12022.53 and 12022.5 firearm enhancements alleged in count 2, but found the 186.22(b) gang enhancement to be **NOT** true. (31 CT 9023-9025.) The 186.22(b) gang enhancement charged in count 3 was also found to be **NOT** true. (31 CT 9026.)

On January 3, 2002, the court denied the defense *Faretta* motion and appellant expressed the desire that counsel make no penalty phase presentation or argument. (31 CT 9034-9035.)

On January 8, 2002, appellant filed a handwritten *Marsden* motion and a motion for mistrial due to ineffective assistance of counsel. (31 CT 9065.) That same day the *Marsden* motion was denied, the mistrial motion was denied and the prosecution gave its opening statement in the penalty phase. Defense reserved its opening statement and prosecution testimony began. (31 CT 9066-9068.)

On January 14, 2002 the prosecution rested, the defense waived argument, called no witnesses and rested. (31 CT 9080-9083.) On January 16, 2002, the jury returned the verdict of death. The prosecution presented argument and the defense waived. (31 CT 9087, 9091-9093.)

On February 19, 2002 the court sentenced appellant as follows:

Count 1	death	plus 10 years, stayed (12022.5) plus 25-life, stayed (12022.53
Count 2	Upper term of 6 years plus 10 years, consecutive (Penal Code section 12022.5) plus 25-life consecutive (12022.53)	
Count 3	Upper term of 6 years consecutive to Count 2 (designated principal count)	
Count 4	Upper term of 3 years consecutive to Count 2 667c prior 5 years	

The Restitution fine was $10,000 to be collected by the prison per Penal Code section 2085.5

All determinate sentences were stayed pending execution. (32 CT 9257-9258.)

This appeal is automatic.

STATEMENT OF FACTS

GUILT PHASE

Summary of the Facts

Because the facts of this case are both convoluted and witnesses often contradict each other, a brief summary of the prosecution and defense case is necessary.

The prosecution asserted that appellant was a member of the Aryan Brotherhood. As such he made a pledge to the leadership to "tax" a drug dealer and use the proceeds to help support members of the brotherhood who were still in prison. The decedent, Mr. Kulikov lived in a house near

appellant and appellant knew many of the persons who frequented the house. Although concededly there was a great deal of drug activity in the house, the prosecution successfully opposed a defense motion to present evidence showing that Mr. Kulikov was a drug dealer.

According to prosecution witnesses, appellant arrived at the house during the late morning of November 8, 1999. Appellant, a friend, James Wolden and Mr. Kulikov went into Mr Kulikov's bedroom to converse in private. Appellant purportedly asked for money or drugs. Mr Kulikov replied that he had neither, but appellant was welcome to take any of Mr. Kulikov's property and pawn it to obtain money. According to Mr. Wolden, appellant simply drew a pistol and shot Mr. Kulikov five times. Upon leaving the bedroom, appellant purportedly told Mr. Wolden that the shooting was required by the "fellas." Mr. Wolden understood that reference to mean the Aryan Brotherhood. Thereafter, several witnesses placed some of the decedent's property in appellant's Jeep and another witnesses' truck and delivered it to appellant's residence, where it was later located by police.

The defense presented evidence that appellant knew Mr. Kulikov and bought some stereo equipment from him. Appellant also knew several of the people who frequented Mr. Kulikov's house and knew that there was a lot of drug usage going on in the home.

Appellant testified that on the date of the shooting, he was house sitting for his friends, Cameron and Jo-lin Blodgett. He further testified that he never went to the Kulikov home. On that day, he loaned his Jeep to Mr. Wolden who was going to run several errands and then visit Mr. Kulikov.

Appellant cautioned Mr. Wolden that he had an older collectible pistol in the toolbox of the Jeep that he was going to give his step-father as a gift. Later that day, Mr. Wolden returned with the Jeep and some of the stereo equipment that appellant previously purchased from Mr. Kulikov. Other witnesses arrived soon after in a truck carrying the stereo equipment that would not fit in the Jeep and some other property that they asked appellant to store for them.

Although appellant denied being a member or associate of the Aryan Brotherhood, these witnesses knew he had been in prison. Thus, if one of them shot Mr. Kulikov over drug related issues or for some other reason, it would be easy to place the blame on appellant because his prison record made him less credible to the authorities.

Significantly, at the end of the guilt phase trial, the jury found all the gang related special circumstances to be "not true."

The Homicide

In November 1999 Mark Kulikov lived in a house at 2280 Powell Road. (16 RT 3479.) Brian White and a man called "Critter" lived there with Mr. Kulikov. (15 RT 3272-3278; 16 RT 3399-3403.) Debra Feller was at the house often; she was in and out. (15 RT 3270-3276, 3350; 16 RT 3399.) People would come and go. (15 RT 3281-3283, 3351-3352.) Mindy McGuire was also in and out, sometimes with appellant but mainly with whomever "had the bag." (16 RT 3399.)

On November 8, 1999, Ms. Feller was there as was another acquaintance of Mr. Kulikov's, Gary Richards. (15 RT 3281-3283, 3351-3352.)

In November Jamie Wolden[1] had known appellant for a couple of weeks. He knew appellant as Dusty or Chris. Both men had been in prison. (15 RT 3178-3180.) On November 8, 1999, appellant arrived at Wolden's apartment. (15 RT 3183, 3243-3244.) Wolden testified that he told appellant he was looking for Morris McCormies and appellant replied he had seen McCormies at Mark Kulikov's house. Appellant offered Wolden a ride and they proceeded to Mr. Kulikov's house in appellant's Jeep (exhibit 108, pgs 3260-3261; 15 RT 3183-3185; 3285-3290.) They arrived there about 11 a.m. (15 RT 3344.)

When they arrived, Ms. Feller opened the door. (15 RT 3185-3188, 3245.) Gary Richards was seated on the couch. Mr. Kulikov offered the men beers. (15 RT 3188-3193; 15 RT 3285-3290.) Appellant and Mr. Kulikov then walked down the hall towards a bedroom. (15 RT 3192-3193.)

As the two men walked towards the bedroom, appellant motioned for Mr. Wolden to follow. (15 RT 3193-3194, 3245-3248.) Mr. Wolden testified that when he entered the bedroom appellant was asking Mr. Kulikov about money. Mr. Kulikov informed appellant he had no money, but appellant could take whatever property Mr. Kulikov owned to pawn. (15 RT 3195-3199.)

At some point Ms. Feller was asked to join the trio in the bedroom and she, too, was asked if she had any money or drugs. After she replied

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[1] Wolden testified he was getting no benefits for his testimony but he was enrolled in the witness protection program and was receiving assistance from them. (15 RT 3182-3183.)

she had neither, she left the room and closed the door behind her. (15 RT 3290-3294, 3379-3381.) Mr. Wolden further testified that he observed appellant pull a revolver from his waistband and shoot Mr. Kulikov four or five times. Mr. Kulikov was seated in a chair and was unarmed. (15 RT 3200-3203.)

According to Ms. Feller appellant then began issuing orders. He went to the hallway and told her to pack up her stuff and leave. Initially she resisted, but she began to pack. She looked into Mr. Kulikov's room and observed he was sitting in a chair, deceased. She requested appellant cover him with a blanket and appellant did so. (15 RT 3296-3299.)

Mr. Wolden testified that as appellant walked by him, appellant stated he had been told to do this by "the fellas." Mr. Wolden understood that to be the Aryan Brotherhood. Appellant added that his "bros" get out on parole every day. Wolden told the jury that he understood that to be a threat to keep silent. (15 RT 3204-3206.) Mr. Wolden said he saw appellant reload the pistol in another bedroom. There was one unspent cartridge. The empties appellant put into his jacket pocket. (15 RT 3206-3208, 3247-3248.)

According to Wolden, appellant then ordered him to take Mr. Kulikov's stereo speakers, put them into appellant's Jeep and have Mr. Richards assist in taking them to appellant's apartment. Appellant gave Mr. Wolden the keys to the Jeep and Messrs. Wolden and Richards did so. As they put the speakers in appellant's apartment, Mr. Wolden saw appellant's girlfriend, Mindy McGuire. (15 RT 3208-3212; 15 RT 3300-3303.)

Ms. Feller testified that she watched as Wolden and Richards put the

stereo into the Jeep. (15 RT 3300-3303.) Later, about 4 p.m., Brian White arrived driving Mr. Kulikov's truck. Ms. Feller opened the door and told White to do whatever appellant asked. Appellant put two or three large boxes into the truck. (15 RT 3300-3303; 16 RT 3423-3424.) Ms. Feller testified that in the interim, she overheard a discussion in the bedroom wherein appellant told White that he had been sent by the Aryan Brotherhood because Mr. Kulikov was not doing enough for folks getting out of prison. (15 RT 3303-3307; 16 RT 3420-3421.)

Ms. Feller told the jury that she and Mr. White then packed some of their things and loaded them into Mr. Kulikov's truck, along with appellant's boxes. They then drove the truck to appellant's condominium. (15 RT 3308-3309, 3344-3345; 16 RT 3422-3423.) Prior to their departure Mr. Wolden returned to the house, gave appellant the keys to his Jeep and left. (15 RT 3214-3216; 15 RT 3310-3311.)

After they left appellant's condominium, Ms. Feller and Mr. White returned to Mr. Kulikov's house, packed the rest of their things and left the house. They drove around for a while and eventually went to Ms. Feller's house. (15 RT 3319-3321, 3346-3348; 16 RT 3427-3429.) They decided they should go to the police. (17 RT 3429-3440.) Ms. Feller spoke with her neighbor, a retired police officer, and he called the police from his home. (15 RT 3323, 3346-3348.)

Mr. Wolden testified that his last contact with appellant was on November 9, 1999. Ms. McGuire was with appellant at the time. Wolden said he did not call the police after the homicide because he feared for his

family.[2] (15 RT 3235-3236, 3254-3255.)

Melinda McGuire

Melinda McGuire testified that she stayed at appellant's house on weekends when she worked at a bar nearby. (16 RT 3518.) At the time she was doing "a lot" of meth. She had been using for twenty years or so. (16 RT 3515-3520.) She and appellant had a sexual relationship. (16 RT 3518.)

She told the jury that the last time she saw Mr. Kulikov was on Saturday, November 6, 1999, when she accompanied him to the casino where she worked. (16 RT 3542-3545.) The next day Ms. McGuire took her laundry to appellant's house and fell asleep. When she awakened appellant was there. At some point he left. (16 RT 3545-3547.) Later Mr. Wolden showed up driving appellant's Jeep with Gary Richards as a passenger. They dropped off something and left. (16 RT 3551-3554.) Sometime after 6 p.m. appellant arrived with White and Feller. White and Feller left about a half hour later in Mr. Kulikov's truck.[3] (16 RT 3555-3558.) Ms. Feller told Ms. McGuire that Mr. Kulikov was dead; Ms. McGuire did not believe this, but did not pursue it. (16 RT 3558-3559.) She testified that nevertheless, appellant confirmed the death while talking to

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[2] Wolden believed that three days after the homicide, the Palm Springs police came to his house. He accompanied them to the police station and was interviewed on tape. (15 RT 3237-3240.)

[3] Eventually Mr. Kulikov's truck was located near Twenty-nine Palms. Personal property scattered around and in the bed of the truck were identified as Mr. Kulikov's. (21 RT 4559-4563.)

her in the garage. (16 RT 3559-3563.) Eventually Ms. Feller told Ms. McGuire that appellant shot Mr. Kulikov. (16 RT 3563, 3566.)

Cherice Wiggins, sister of Melinda McGuire, testified she met appellant through her sister. On November 7, 1999, Ms. McGuire and appellant arrived at Ms. Wiggins' home and appellant expressed a desire to purchase a gun from Ms. Wiggins. She testified that appellant said he needed the gun to confront a man named Morris. (15 RT 3156-3161, 3170-3171; 16 RT 3525-3527, 3529-3531, 17 RT 3630.) Ms. Wiggins agreed to sell appellant a gun (exhibit 1, pg 3161) and bullets (exhibit 2, pg 3162-3164) for $200. (15 RT 3156-3161.)

Autopsy Report

Aruna Singhania did the autopsy on Mr. Kulikov on November 12, 1999. He noted eight gunshot wounds, three were in the face. (21 RT 4460-4469, exhibits 22-24.) There were two wounds in the chest, a wound to the right hand (counted as two wounds, entrance and exit), and an exit wound in the left side of the neck. (21 RT 4460-4469, Exhibits 25-27.) The cause of death was intrathoracic hemorrhage due to perforation of the heart and both lungs. Contusion and laceration of the brain also contributed to Mr. Kulikov's death. (21 RT 4471-4472.) The toxicology samples taken were consistent with Mr. Kulikov's recent ingestion of methamphetamine and cocaine. (21 RT 4481-4488.)

The Investigation

On November 9, 1999 at 1:15 p.m. Officer Thomas Beckert was dispatched to 2280 Powell Road, Mr. Kulikov's address. The caller was unknown, but the information was that there was a body at the residence.

Officer Beckert met officer Kelly Fieux at the house. When they received no response to their knock, they entered the house through an unlocked door. (16 RT 3479-3486.)

The entire house was in complete disarray. (16 RT 3486; 20 RT 4323-4324; 4406-4408.) The deceased, in the northeast bedroom, was in a chair with obvious facial gunshot wounds and a wound to one hand. (16 RT 3486-3495; 20 RT 4323-4326; 4408.) The officers notified their superiors and waited at the scene until Sergeant Fallon responded and took control of the scene.[4] (16 RT 3495-3497.)

Detective Brian Reyes and his partner, Detective Mark Harvey responded to Mr. Kulikov's residence. Officers Donovan and Judd were assigned to collect evidence. (20 RT 4317-4320; 20 RT 4404-4408; 21 RT 4492.) Detectives Castillo and Goya were also involved in the investigation.[5] (20 4317-4320; 21 RT 4527.)

While at the scene, Detective Reyes received a dispatch to meet Brian White and Debra Feller at a Circle K in Morongo Valley. (20 RT 4326-4330; 4408-4411.) Detective Reyes testified that both were scared and both were cooperative. After talking with them, separately, the detectives found their stories consistent and transported them to the Palm Springs police

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[4] Exhibits 8-20 are photographs taken at the crime scene. Exhibit 9 shows gunshot wounds to the face; exhibit 10 shows wounds to the chest. (16 RT 3502-3509.)

[5] Working with officer Castillo, forensic technician Marvin Spreyne went to the deceased's house and did a search for latent fingerprints. (21 RT 4542-4543.) The house was in a state of disarray. No useable prints were found anywhere in the house. (21 RT 4544.)

department for detailed interviews.[6] (20 RT 4326-4330, 4335-4338; 4410-4411.)

Detectives Reyes and Harvey then asked Ms. Feller to take them to appellant's address. They drove to 471 Village Square in a gated community in Palm Springs. There was no sign anyone was there. (20 RT 4338.) They continued to drive around looking for appellant's car and while doing so the detectives received a call telling them that Officer Castillo found a Jeep registered to appellant. At 3190 Via Escuela, the home of Cameron Blodgett[7], Ms. Feller identified the Jeep in the driveway as belonging to appellant. (20 RT 4338-4343.) Detective Donovan was part of a surveillance team left to watch the house on Via Escuela. (21 RT 4563-4571.)

Back at the police station, Detective Reyes asked Ms. Feller to call both residences, appellant's and Blodgett's on Via Escuela. At appellant's address a female answered. A male answered the call at the Via Escuela house. After the call placed to Via Escuela, the officers who were left at the address for surveillance purposes observed people leaving in the Jeep. They pursued and stopped the Jeep. (20 RT 4348-4349.) The occupants were Ms. McGuire and appellant. (20 RT 4349-4352.)

Ms. McGuire testified that after the call from Ms. Feller, appellant

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[6] Following his interview, White was booked for a parole violation. (20 RT 4338; 4412-4415.)

[7] Cameron Blodgett and his wife Jo-Lin were both defense witnesses, good friends of appellant. He had a key to their home and was house-sitting for them at the time of his arrest. (16 RT 3580-3584; 4945, 4953.)

and Ms. McGuire left quickly. Appellant was going to take McGuire home, but they were surrounded by the police and arrested. (16 RT 3585-3586.) Appellant did not have a gun when they were pulled over. They were pulled over as they left the driveway of Mr. Blodgett's house. (16 RT 3587-3589, 17 RT 3663-3665.) Ms. McGuire knew appellant had the gun earlier (17 RT 3651-3653) and later heard appellant say he buried it. (17 RT 3631-3633.)

On cross-examination, however, McGuire admitted that she just assumed that appellant buried the gun. (17 RT 3651-3653.) Later she testified that she told detectives that appellant told her he buried the gun. Thus, her assumption was the location where the gun was buried. (17 RT 3661.)

The Weapon

While initially at the Via Escuela address, Detective Donovan heard noises from the backyard area, including the sound of glass breaking. (21 RT 4563-4567.) Remembering the noises when he participated in the search at Via Escuela, he went to check that area. (21 RT 4571-4573.) The brick patio appeared to have some bricks missing and fresh-turned dirt. Detective Donovan checked the area and found a gun, a .32 Colt police positive (exhibit no. 1, pg 4586). It was loaded with six live rounds. (21 RT 4573-4578.) He also saw a broken coffee mug. (21 RT 4586; 4607-4608.)

During the search of appellant's residence, detectives secured exhibit no. 2, a black plastic gun case and a box of .32 cartridges, from a bedroom closet. (21 RT 4430-4434; 4580-4584.)

Exhibit no. 4 is a bag containing 5 spent rounds and one live round of

the same brand and type as those found in the gun detective Donovan recovered from the patio of the Via Escuela residence. (21 RT 4595-4596.) Officer Judd recovered the rounds in exhibit no. 4 from a dumpster near appellant's condo. (21 RT 4595-4596.)

Senior criminalist Richard Takenaga testified that he did ammunition and pistol comparisons for this case. (21 RT 4613, 4610-4625, 4646-4657.) He determined the five expended cartridges in evidence could have been fired from the gun in evidence only because they shared the same class characteristics. (21 RT 4664-4665.)

Gang Testimony

There was considerable testimony concerning appellant's purported membership in the Aryan Brotherhood prison gang and his activities within the group. Apparently the jury found that testimony to be incredible since it found all the gang enhancements to bed NOT true. Therefore, appellant omits any discussion of that evidence here.

Incarceration Activities, **Jail Incidents Prior To Trial**

Theft of Nitroglycerin Pills

Demytr Daughtery was a classification officer at Riverside County Sheriff's department from February though April 2000. (20 RT 4273-4274.) At that time, inmate Neal O'Neill and appellant shared a cell in the administrative segregation unit of the jail. (20 RT 4273-4277; 21 RT 4717.) Officer Daugherty testified that on or about March 23, 2000, O'Neill told him that he (O'Neill) was missing his nitroglycerin pills and that his cellmate took them. No one but O'Neill and appellant had access to the cell. (20 RT 4277-4283.)

Officer Jeffrey Reynolds testified that on March 25, 2000, the Riverside County Sheriff's department did a cell search and found a medication container in appellant's property box. (21 RT 4678-4683; 21 RT 4680-4681.) It appeared to be a nitroglycerine bottle with pills inside. (21 RT 4678-4683; 21 RT 4682, 4684-4685.) Officer Reynolds testified that appellant did not deny ownership of the bottle. Appellant said he found the pills and simply kept them. (21 RT 4686-4688.)

Registered nurse Judy Van Varick, worked at the Indio jail on that date. She testified that appellant had no prescription for nitroglycerin so she disposed of the pills. (21 RT 4690-4693.)

Possible Reasons for Theft

Neal O'Neill (19 RT 4154) was appellant's cellmate at the county jail on two occasions. (19 RT 4154-4160.) Steven Pearson was in the same pod. (19 RT 4160.) Appellant apparently discussed his case with O'Neill. (19 RT 4164-4167.) O'Neill testified that appellant told him that he shot the deceased three times in the back bedroom of the deceased's house. (19 RT 4167-4170.) Further, appellant said he hid the gun under a brick on a patio. (19 RT 4170-4172.) Appellant mentioned a couple of girls and two guys witnessed the homicide. (19 RT 4170-4172.) O'Neill further testified that appellant offered him a Jeep and a DeLorean to kill the witnesses. (19 RT 4170-4172.)

At the time of these discussions, O'Neill was taking nitroglycerine for his heart. He testified that appellant asked him to let him have the medication to kill someone via injection. When the medication came up missing, O'Neill decided to talk to his investigator. (19 RT 4176-4178.)

Later an investigator came and talked to O'Neill; they had already found the nitroglycerine pills in appellant's possession. (19 RT 4179-4182.)

Officer Gregory Bonaime, testified that he worked gang intelligence. (22 RT 4727.) He spoke to O'Neill around March 25, 2000 after Daughtery suggested he do so. (22 RT 4731-4732.) O'Neill believed Poore took his nitroglycerin tablets. (22 RT 4732.) Bonaime testified that O'Neill told him that appellant wanted the nitroglycerin and wanted to know what it would do to a person. Appellant purportedly told O'Neill that he had a syringe and he wanted to use the pills to give someone a lethal injection, a "hot shot." (22 RT 4733.)

Possession of Contraband

Officer David Werksman was assigned to the Robert Presley Detention Center, the jail at Riverside on March 27, 2000. (22 RT 4696-4697.) On that date he was asked to assist in a strip search of appellant. (22 RT 4698.) He testified that when no contraband was found, an x-ray was ordered. (22 RT 4699.) The x-ray revealed an object inside appellant. Given the option of having it removed or removing it himself, appellant opted to remove it himself. (22 RT 4700.) In Mr. Werksman's presence, appellant removed two bindles from his rectum. (22 RT 4701.) Exhibits 118 and 119 portray the items appellant removed: an improvised syringe, tobacco, three hand-rolled cigarettes and a red lighter. (22 RT 4701-4702.)

Defense Evidence

Johnny Lee, Jr. was appellant's parole officer from September 1999 until appellant's arrest in November of that year. (23 RT 4841-4842, 4854.) He testified that during the time appellant was under Mr. Lee's supervision,

he never tested positive for drugs. Further, appellant was working in construction for Jalbert Companies. (23 RT 4844) and living with his mother or at her fiance's place in Palm Springs (23 RT 4845.) Mr. Lee had no knowledge that appellant was actually living in a condominium on Village Square East in Palm Springs. Mr. Lee noted that appellant was in "high control" due in part to the nature of his convictions and his alleged gang affiliation. (23 RT 4853.)

Appellant's supervisor at the Jalbert Company was William Nichols. (23 RT 4921-4922.) Mr. Nichols testified that he recalled appellant working with him for about two and a half months starting around July or August 1999. (23 RT 4924.) However, when reviewing appellant's paycheck stubs, he discovered the last one issued was for August 22, 1999 to August 28, 1999 and one was dated May 16, 1999. (23 RT 4933-4934, 4938.) In any event, Nichols remembered Jalbert Construction going bankrupt at the end of the summer. (23 RT 4924.)

Cameron Blodgett testified that he and his wife, Jo-Lin, met appellant around March 1999 at the Village Pub where Jo-Lin was employed. (23 RT 4943-4944; 24 RT 5026.) They became friends and appellant went to the Blodgett house often. (23 RT 4945.) They became such good friends that Cameron and Jo-Lin had given appellant a key to their home. (23 RT 4953.) For a short time Cameron and appellant had joint ownership of a truck and appellant sometimes helped Blodgett with yard work around the house. (23 RT 4945-4946.)

Mr. Blodgett also testified that when he was interviewed by Detective Bowser, Mr. Blodgett thought he and appellant worked in

Blodgett's yard on Saturday, November 6, 1999. Afterwards they went to the pub and had a beer. (23 RT 4848, 4986.) On Sunday, November the 7th, appellant arrived at the Blodgett home around noon and stayed pretty much the whole day. Again, on Sunday, they worked in the yard and did some other work around the house. (23 RT 4948, 4986-4987; 24 RT 5037.) Mr. Blodgett did not remember whether or not appellant asked to borrow the truck. (23 RT 4949.)

Mr. Blodgett told the jury that appellant again came to the house on Monday, November 8th, between 11:30 a.m. and noon. (23 RT 4949; 24 RT 5027.) It was appellant's usual routine to arrive about that time and make coffee. (24 RT 5034.) Appellant left about 4:30 to 5:00 p.m. (23 RT 4951.) That night appellant and Mr. Blodgett met at the pub around 9 p.m. and watched the last quarter of the football game.[8] While they were at the pub, Mr. Blodgett won a bicycle. After the game, the two went back to Blodgett's house, hung out and had a few beers. While at the house appellant had a woman with him. Appellant, his girlfriend and Mr. Blodgett left the house about midnight and returned to the pub to wait for Jo-Lin to get off work at 2:30 a.m. . (23 RT 4951; 24 RT 5032, 5044.) Mr. Blodgett didn't remember seeing appellant's girlfriend after midnight and thought he either dropped her off en route to the pub or she left from the pub. (23 RT 4951-4952.)

Neither Mr. Blodgett nor Jo-Lin could tell the jury precisely where

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[8] Although when interviewed by Bowser and Reyes, apparently Blodgett told Reyes appellant was at Blodgett's house between 10:30 p.m. and midnight on the evening of the 8th, he told Bowser he met appellant at the pub at 9:15 that evening. (23 RT 4981-4984.)

appellant was from noon to 4:00 p.m. on Monday, November 8th. Appellant had the run of the house and could have come and gone several times. (23 RT 5010, 24 RT 5021; 5029, 5040-5042.) Mr. Blodgett owned two trucks in November 1999 - a Toyota and a 1936 Ford. Neither Mr. Blodgett nor Jo-Lin recalled loaning the Toyota to appellant on the evening of the 7th. (23 RT 5011; 24 RT 5030, 5047-5048.)

On Tuesday, November 9, Blodgett and Jo-Lin were getting ready to go to San Diego to babysit their granddaughter for a couple of days. They asked appellant to stay at the house; take care of their puppies and feed the cat. (23 RT 4952.) They dropped off a key at appellant's condominium, a gated community in Palm Springs, between 2:00 and 3:00 p.m. (23 RT 4953, 4972-4974; 24 RT 5031.) The key drop-off was necessary because that morning appellant called to let them know he had misplaced the key they had given him previously. (23 RT 4979-4980.)

Mindy McGuire answered the door and admitted the Blodgetts to appellant's condominium. (23 RT 4974.) It appeared to them that appellant had been going through some boxes; the living room was messy. (23 RT 4975.) There was a bunch of stuff covered with blankets in the garage. Among other things, Mr. Blodgett saw two speakers and a DeLorean[9]. (23 RT 4975.)

When the Blodgetts arrived home on Thursday afternoon their house

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[9] Defense witness Richard Grommon, appellant's mother's fiancé testified that the DeLorean belonged to him. (24 RT 5061.) Appellant lived in Grommon's condominium at 471 Village Square East sometime after his release from Pelican Bay in March 1999. (24 RT 5055-5056.) Appellant lived there rent free and Grommon paid all utility bills. Appellant's Jeep was purchased for him by his mother. (24 RT 5060.)

had been ransacked. Drawers and cabinets had been emptied and pillows were off the couch. The couple phoned appellant and left a message on his answering machine. Later they learned appellant had been arrested. (23 RT 4954.) In cleaning up, the Blodgetts found a search warrant underneath a pile of papers. (23 RT 4955; 24 RT 5033.) At some point they went into the back yard and found some patio bricks removed. (23 RT 4955.)

Mr. Blodgett testified that he believed that appellant never used drugs when he came to Blodgett's house. Part of the ground rules Blodgett had concerning guests to his home were no guns, no drugs. (23 RT 4959, 4987.) The woman appellant had with him on Monday, November 8,th however, had a reputation for being a methamphetamine user. At one point Mr. Blodgett talked with appellant about that. Appellant told Blodgett that Ms. McGuire was trying to clean up when she was seeing appellant. (23 RT 4961, 4991.) To Mr. Blodgett's knowledge, that was the only time this woman came to the house until the police informed him otherwise after he returned from San Diego. (23 RT 4961, 4993.)

Mr. Blodgett testified that he was interviewed by law enforcement on several occasions. (23 RT 4965-4967.) He did not remember appellant returning to prison after they met in March 1999 and did not remember a two or three month absence during the time he knew appellant. He did, however, know appellant was released from Pelican Bay the second time in September, 1999. (23 RT 4969.)

Robert Hamilton, III testified he met appellant in the fall of 1999. (24 RT 5143.) He also knew Mark Kulikov. He and appellant visited Mr. Kulikov at the same time when appellant expressed an interest in purchasing

some stereo equipment from Kulikov. (24 RT 5144.) Mr. Hamilton recognized the articles depicted in defense exhibits 41-45 and 51 as being parts of Mr. Kulikov's stereo system. (24 RT 5145-5148.) On cross examination Hamilton testified that when appellant offered to buy Mr. Kulilov's stereo equipment Mr. Kulikov said it was not for sale at that point. Nevertheless, appellant gave Kulikov $150 as a down payment for the equipment or a similar system. (24 RT 5144, 5152, 5154.) Sometime before the homicide, Mr. Hamilton saw Mr. Kulikov with several hundred dollars which Kulikov indicated came from the sale of the stereo equipment to appellant. (24 RT 5152-5153.) Mr. Kulikov came to Hamilton's home with the intent to purchase drugs. (24 RT 5155.)

Mr. Hamilton also testified that he and Jamie Wolden lived in the same apartment complex and Mr. Wolden told him that the police threatened to charge Wolden with murder if Wolden didn't say that appellant was the shooter. Wolden also told Hamilton that he had driven appellant's Jeep. (24 RT 5150, 5163.) On cross- examination, Hamilton testified that if Detective Bowser said when he talked to Hamilton a second time that Wolden told him appellant shot Kulikov, that was a misunderstanding. (24 RT 5168, 5178, 25 RT 5297.)

Appellant testified in his own defense. (25 RT 5298.) At the outset, he explained his history of imprisonment. He said he was convicted for the first time when he was sixteen years old. The crime was burglary for which he spent three years in the California Youth Authority. (25 RT 5299.) Subsequently appellant got involved in drugs. (25 RT 5300.) He was convicted of grand theft (25 RT 5300), being an ex-felon in possession of a

firearm, twice, (25 RT 5301, 5303) and also for violating parole. (25 RT 5309.) He was in and out of prison. (25 RT 5302-5303, 5309.) He began in a level one facility and due to involvement in various internal fights, eventually found himself in Pelican Bay at a level four facility. (25 RT 5305.) Appellant estimated he had been in ten to fifteen fights in prison during the entirety of his incarcerations. (25 RT 5313-5314, 5377.)

Appellant was familiar with gangs in prison. (25 RT 5305-5306.) He stated he was not a member or an associate of the Aryan Brotherhood even though he had been validated by prison authority as an associate. (25 RT 5306.)

When appellant was paroled from Pelican Bay around March 1999 he violated his parole at one point to assist a friend, Kathleen O'Donnell when she moved from one home to another. (25 RT 5308-5309.) He informed his parole officer beforehand and believed he had an okay but through some mis-communication between parole offices he was charged with violating parole, found guilty and was re-assigned to Chino for sixty days. (25 RT 5310-5311.)

Appellant was working for Jalbert Construction at the time of his parole violation. (25 RT 5312.) Upon his release he returned to Jalbert. (25 RT 5315.) He worked at Jalbert for about two months after his release, during August and September 1999. (25 RT 5316.)

Appellant initially lived with his mother in Rancho Mirage then moved to 471 Village Square East. (25 RT 5318-5319.) Appellant's rent and utilities were free, paid for by Richard Grommon, his mother's fiancé. Mr. Grommon and appellant's mother paid for basically everything

including his Jeep, auto insurance for it and appellant's cell phone bill. (25 RT 5319-5320, 5366.)

Appellant met Jo-Lin Ferdinand at the Village Pub just before he was sentenced to 60-days for a parole violation. Later Jo-Lin introduced appellant to Cameron Blodgett, her husband. (25 RT 5321-5322.) Appellant regularly went to the Blodgett household to make coffee for the couple. They became rather close very fast. Appellant did a lot of manual labor around the house because Blodgett could not, due to a disability. (25 RT 5322.)

Appellant met Mark Kulikov through Mindy McGuire. (25 RT 5323.) Appellant went to Mr. Kulikov's home several times beginning sometime in August 1999. He also met Debi Feller there; she was always there. (25 RT 5323.) He met Wolden through Tommy Hamilton. Even though appellant and Cindy McGuire had a sexual relationship, appellant would not classify this relationship as girlfriend/boyfriend. It was a daily thing for both of them. (25 RT 5324.)

Appellant denied shooting Mr. Kulikov. From the testimony, appellant knew that Mr. Kulikov was shot sometime on the 8th of November 1999 around 1:00 p.m. (25 RT 5325.) Appellant did not remember very well what he did on November 6th, Saturday, but he did remember Sunday, November 7th. (25 RT 5325.) On Sunday he got up about 8 or 9 a.m., had breakfast on the patio and received a call from Ms. McGuire to pick her up. (25 RT 5326.) However, she arrived at the condo before he was ready to leave. They went to Palm Desert between noon and 1 p.m. to pick up his new glasses. They returned to the condo and spent most of the day around

the pool. (25 RT 5326.) That evening appellant took Ms. McGuire to visit her mother in Sky Valley; it was her birthday. (25 RT 5326-5328.) It was cold so they stopped to borrow Mr. Blodgett's truck. (25 RT 5327.)

After visiting with McGuire's mother, appellant and McGuire visited Cherise Wiggins, McGuire's sister. While they were there, Ms. Wiggins mentioned a collector's item gun she wanted to sell. (25 RT 5327-5328.) Appellant thought it would be a good gift for his stepfather, Mr. Grommon. He didn't have the money to purchase the gun then because he had spent a bunch of money on stereo equipment earlier, but he told Wiggins he would get the money from his mother.[10] (25 RT 5328, 5358.) From Wiggins' house appellant and McGuire returned to the Blodgetts to exchange the truck for appellant's Jeep. (25 RT 5320.) They did not stay long and returned to appellant's condominium. (RT 5330.)

When he took the gun from Wiggins, appellant put it in the back of the truck. Before returning to the condo he put the gun in the toolbox in the back of his Jeep and locked the toolbox. (25 RT 5333.)

On Monday, the day of the homicide, appellant got up around 8 or 9 a.m., his usual time. Ms. McGuire was there. (25 RT 5330.) She was asleep when appellant had breakfast. After breakfast he showered and got ready to go to Cameron's and Jo-Lin's. After he stopped working at Jalbert Construction it was pretty much of a ritual for appellant to show up at Blodgett's between 11:30 a.m. and noon, make coffee, wake them up then sit around and talk and drink coffee for an hour or two. (25 RT 5331.)

Around 10:30-10:45 a.m., before he left for the Blodgetts', appellant

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[10] Appellant denied any knowledge of exhibit no. 7, a gun holster. (25 RT 5329.)

received a phone call from Mr. Wolden asking for a ride to Kulikov's house. Appellant agreed to do so and planned to drop off Wolden and leave[11]. (25 RT 5331.) However, Mr. Wolden wanted to make some stops so appellant told Wolden to drop him at Blodgett's, use the Jeep, and come back for him later. (25 RT 5332.)

When Wolden dropped appellant at the Blodgetts', appellant unloaded the tools he would be using there, locked the toolbox and threw Wolden the keys. He cautioned Wolden about being pulled over because there was a gun in the toolbox. (25 RT 5334, 5360-5361.)

Appellant entered the Blodgett house with the key he had been given about a month earlier and made coffee. The trio talked, then Cameron and Jo-Lin began getting ready to go to San Diego the next day and appellant worked on the old truck and helped clean up the back yard. Appellant was going to housesit while the Blodgetts were in San Diego. (RT 5335.) He left the Blodgett house well after 4:00 p.m. (25 RT 5336.)

That afternoon[12] when appellant returned to his condominium, Gary

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[11] Wolden and Hamilton both lived about a mile from appellant's condo; Kulikov lived at 2280 Powell Street, across town. (25 RT 5332.)

[12] At this point in the trial, the testimony concerning dates became a little confusing. After counsel had appellant testifying regarding Monday night and appellant spending the night at his condo (25 RT 5338), counsel moved to Tuesday the 9th asking what time Blodgett brought the key and what appellant did after Blodgett left which was going through the boxes, etc. brought over the day before, Monday. (25 RT 5339-5341.) Counsel then said, "Alright. Let's go back to that Monday ..." (5342.) Counsel asked who was there, what they brought, what time they left, etc. (5342-5344.) Right after appellant stated White and Feller left in Kulikov's truck counsel asked, "Now, that's about what time on Tuesday afternoon?" (5344.) Appellant said it was evening then continued to state what he and McGuire did on Tuesday evening when he and Ms. McGuire returned his mother's dog and went to feed the Blodgett animals. (5344-5345.) Later that night

Richards and McGuire were there. Just as appellant arrived, so did Debi Feller and Brian Hamilton. The latter two arrived in Mr. Kulikov's truck. (25 RT 5342.) Appellant's friends had the equipment he had purchased from Kulikov and a few other boxes of stuff Kulikov asked them to hold on to. (RT 5343.) Appellant did not take the equipment when he paid for it because it would not fit in the Jeep. Kulikov said he would deliver it, but Hamilton and Feller did so. (25 RT 5386.) After they unloaded, Richards left, but Hamilton, Feller, McGuire and appellant had a few beers upstairs. Around 6:00 to 7:00 p.m. Hamilton and Feller left in Kulikov's truck. (25 RT 5344.)

Appellant showered at his condominium and he and McGuire met Blodgett at the Village Pub between 8:00 and 9:00 p.m. They watched the Monday night football game, Blodgett won a bicycle and appellant and McGuire left between 10:00 and 11:00 p.m. (25 RT 5337.) Appellant dropped McGuire at his condominium then he returned to Blodgett's house and played video games until time to pick up Jo-Lin. Her shift ended around 2:00 to 2:30 p.m. (25 RT 5337-5338.) Appellant went home and spent the night at his condominium. (RT 5338.)

On Tuesday, the 9th, appellant had breakfast and called Cameron to ask for a key because he left his on the counter the last time he was there. (25 RT 5338-5339.) The Blodgetts dropped the key off between 2:00 and 3:00 p.m. After they left, appellant went to the garage and moved some of the stuff brought over the day before, the stereo equipment he had purchased and some stuff Ms. Feller and Mr. Hamilton said was theirs and

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they saw the news regarding Mr. Kulikov's death. (5345.)

asked appellant to store for them. (25 RT 5340.) Appellant paid Kulikov $1,000 for the stereo equipment. (25 RT 5341.)

Appellant had been dog-sitting his mother's dog and he received a telephone call from his mother asking him to return the dog. He and Ms. McGuire did so, then got something to eat, went to the pub for a beer or two then went to the Blodgetts' to feed the dogs and cat. (25 RT 5344-5345.) Appellant learned of Mr. Kulikov's death on the television news that evening. (25 RT 5345.) Later that evening they received a phone call concerning the death. (25 RT 5345-5346.)

A little later the dogs were really barking. Appellant turned on the lights and saw someone in a suit run across the back patio. The gun appellant purchased from Ms. Wiggins was still locked in his toolbox. Appellant thought the man on the patio was a police officer. He went to the Jeep, got the gun, took it outside and buried it. (25 RT 5346, 5355.)

Appellant remembered seeing a photograph of that gun under where a brick had been. (25 RT 5346.) That is not where appellant buried the gun; he buried it directly outside the sliding-glass door of the living room. He does not know why the photograph was taken in another area. (25 RT 5347, 5356.) After receiving a telephone call from Debi Feller, appellant told Ms. McGuire to get her stuff and get in the Jeep, he was taking her home. (25 RT 5347.) They were stopped by the police as they left the Blodgett home. (25 RT 5348-5349.)

Rebuttal Evidence

Detectives Harvey and Reyes interviewed Mr. Wolden at his residence on November 11, 1999. Their demeanor was cordial and neither

made any threats or promises. (25 RT 5402-5403, 5409.) Mr. Wolden accompanied them to the Palm Springs Police Department where they conducted a taped interview. (25 RT 5404.) Following the interview, Detective Harvey took Wolden home. (25 RT 5408.)

By the time of the interview the detectives had not given Mr. Wolden any of the facts of the case, nor revealed any of the physical evidence. At the time of Wolden's interview other witness had been interviewed and their stories matched. (25 RT 5409.)

Defense Investigator Michael Lewis testified that he spoke with Thomas Hamilton, III. (25 RT 5414.) They spoke for the first time in the jail on November 27th or 28th 2000. (25 RT 5415.) In that interview Mr. Hamilton relayed to Lewis that Wolden told Hamilton that Wolden did not know who shot Kulikov, but he, Wolden, did not do so. (25 RT 5416, 5419.)

Lewis spoke with Hamilton a second time at Hamilton's request. The second conversation was two weeks after the first interview and this time Hamilton told Lewis that Mr. Wolden told him that appellant shot Mr. Kulikov. (25 RT 5417, 5418.)

Prosecution Investigator Bowser interviewed Mr. Hamilton a few days after Hamilton's second interview with Investigator Lewis. Although Mr. Hamilton testified that when interviewed by Bowser he felt threatened regarding his housing, no direct threats were made. There was, however, a conversation regarding housing. The nature of the housing conversation was based upon Mr. Hamilton's comments that in the first interview he had with Lewis on November 28t.h. In that interview Hamilton indicated he did

not want to be involved. (25 RT 5422.) Mr. Hamilton was concerned about his housing status in custody and Bowser asked Hamilton if he was going to have a problem being in the general [prison] population. (25 RT 5423-5424.)

Investigator Bowser also testified that he spoke with Cameron Blodgett on more than one occasion. (25 RT 5424.) In the first interview Mr. Blodgett said he and appellant worked in the yard on November 8th; cleaned up after the dogs, filled in holes. Appellant came alone and that night, still alone, met Blodgett at the pub. (25 RT 5425.) In a second interview eight months later on March 27, 2001, Mr. Blodgett said he and Jo-Lin dropped off a key at appellant's condo then left for San Diego somewhere between 10:00 a.m. and noon, an early start for appellant. (25 RT 5426.) He also said that after his anger management class, he went home then met appellant at the club around 10 p.m. (25 RT 5427-5428.) However during an April 21, 2001, interview, Blodgett estimated he arrived at the pub around 8 to 8:30 pm. and did not go home after class. (25 RT 5428.)

On cross-examination, however, Mr. Blodgett admitted that in his interview on November 12, 1999, four days after the homicide, he said that he dropped off the keys to his home between 2:00 and 3:00 p.m. and that appellant brought Ms. McGuire to the pub. (25 RT 5435.)

PENALTY PHASE

Aggravating Evidence

Summary

Because appellant told the trial judge that he did not want any

evidence or argument presented on his behalf in penalty phase, the only evidence offered in the penalty phase was evidence in aggravation. This evidence consisted of two parts: appellant's behavior during his various incarcerations and victim impact statements.

Appellant was incarcerated at Calipatria State Prison and at the California State Prison at Corcoran. Most of the testimony involving altercations took place on the exercise yards at these institutions. All of the witnesses relied on their own written reports of the incidents for their testimonies. (25 RT 5426-27; 27 RT 5918; 5939; 5957; 5976; 6015; 6067; 2 RT 66111; 6133.)

Altercations are frequent in prison so each exercise yard has yard observation officers and yard gun officers. The difference between a yard observation officer and a yard gun officer is basically location. The former would be on the ground outside the perimeter and the yard gun officer twenty feet high on top of a building. (27 RT 5984-5985; 6002.)

Each yard observation officer is armed with a 37-millimeter launcher which fires either wooden blocks designed to ricochet or rubber rounds. (27 RT 5914; 5926; 5937-5938; 5984.) Each observation officer also has a tear gas grenade[13] at his disposal. (27 RT 5984; 5998-5999.) The yard gunners are similarly armed but in addition are armed with either a Mini 14 semi-

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[13] Officer Alfredo Cordova testified that at the time of appellant's incarceration at Corcoran there was not a grenade canister or smoke canister that could be used before going to a lethal level. (27 RT 5927.)

The gas grenade is referred to in testimony as a CN (central nerve gas) canister, tear gas canister or sometime a triple-chaser. The triple-chaser is so named because when the pin is pulled the grenade releases three small canisters which break apart and disperse tear gas. (27 RT 5984; 5993-5994.)

automatic rifle or an H and K nine-millimeter rifle, lethal weapons. (27 RT 5915; 5927; 5984; 6063.)

The procedure for breaking up fights on the yard is the same at both Corcoran and Calipatria. First the officers verbally order the yard down. This instruction should result in the inmates ceasing their current behavior and lying down prone on the ground. (27 RT 5884; 5916; 5926.) If there is no compliance one or more rounds are fired from the 37-millimeter launcher. (27 RT 5916; 5927; 5938.) If there is still no compliance, the gas grenade is thrown. (27 RT 5938.) Only when it appears that an inmate is in imminent danger of great bodily harm or death are the lethal weapons used. (27 RT 5915; 5927; 5985.)

Before any inmate can enter the yard he is processed in. (27 RT 5988.) This inspection entails an unclothed visual body search. (27 RT 6023; 6031.) Inmates are usually released onto the ad seg yard twice a day on an officer's shift. (27 RT 5935.) Time in the yard is usually an hour and a half to two hours, once in the morning and once in the afternoon. (27 RT 5936.) More than two or three inmates were allowed on the yard simultaneously, so fights often occurred. (27 RT 5937.)

Contraband

November 15, 1995

On November 15, 1995 John Burt was employed at Calipatria State Prison as a correction officer. (27 RT 5955-5956.) As an administrative segregation (ad seg) officer his duties include security, cell searches, feeding the inmates, etc. (27 RT 5956.) The cell searches are random and their purpose is to look for contraband. (27 RT 5956.) Officer Burt

conducted a cell search of the cell of inmates Taylor and Poore on November 15, 1995. (27 RT 5957.)

Each cell is furnished with a lower and an upper bunk and a lower and upper shelving unit. (27 RT 5958.) On the upper shelving unit, assigned to appellant, officer Burt found an inmate-manufactured weapon. (27 RT 5959.) It was in an envelope with appellant's name on it. Officer Burt took possession of the weapon and notified Sergeant Hopper of the contraband. (27 RT 5960-5961.)

Sergeant Hopper took possession of the weapon and interviewed appellant. (27 RT 5962-5963.) Appellant professed ownership of the weapon. (27 RT 5964-5965.)

December 10, 1995

Officer William Dunn worked as an ad seg officer at Calipatria. (27 RT 5970-5971.) On December 10, 1995 he conducted a cell search of a cell housing appellant and inmate Tyler. (27 RT 5973.) Appellant was assigned the lower bunk. (27 RT 5977.) Officer Dunn found two disposable razor blades in the cell, one in a brown lunch bag in the garbage and one on the lower shelving unit. (27 RT 5974-5975.) Officer Dunn also found a fish line, a torn piece of sheet used to attach something like a piece of cardboard to it to pass under the door. (27 RT 5977.)

Inmate Altercations

May 29, 1993

In May 1993 William Justus was employed as a correctional officer at the California Medical Facility. As a correctional officer he was also the J-3 housing officer. The facility consisted of thirteen dorms with twelve men in

each dorm. (28 RT 6128.) The inmates at this facility were mixed - inmates serving life sentences to those serving very brief sentences and inmates with or without mental problems. (28 RT 6129; 6137; 6145.) The officers tried to keep the inmates with mental problems separate, but it was not always possible. (28 RT 6138.)

On May 29, 1993 inmate Pyatt, an inmate with some mental problems, came out of dorm number 5 bleeding from the mouth and yelling he had been hit. (28 RT 6129, 6131; 6139.) Officer Justus escorted inmate Pyatt to the clinic. (28 RT 6130.) Officer Timothy Moser and Officer Justus then searched the dorm and found one or two of inmate Pyatt's teeth. (28 RT 6131-6132; 6136; 6141.)

Officer Justus and Moser described inmate Pyatt as being immature, almost childlike. He was easily taken advantage of as his mental problems were evident to the correctional officers and the inmates. (28 RT 6135; 6138.) It was unusual to have an incident where this particular inmate was assaulted. (28 RT 6136.)

Sergeant Edwards wrote the report of the incident. (28 RT 6132-6133; 6142; 6144.) His report indicates that the two inmates involved in this incident were inmate Pyatt and appellant. (28 RT 6134-6135.) Initially he questioned the inmates in dorm number 5. The inmates identified the assailant as wearing a gray sweatsuit, common in the dorms, and a dark blue beanie or cap, also very common. (28 RT 6146.) No one identified the assailant by name. The next day, however, appellant assumed responsibility for the assault because another inmate became the primary suspect and was to be placed in ad seg pending further investigation. (28 RT 6147-6148.)

As explanation, appellant said Pyatt publicly disrespected him. (28 RT 6149.)

Sergeant Edwards agreed with the assessment of Officers Justus and Moser as to Pyatt's mental condition, but stated that he could also stir up problems. It was evident to any inmate who had been there for a while to not take Pyatt seriously, but Edwards did not know how long appellant had been in the dorm prior to the incident. (28 RT 6151.)

August 22, 1994

On August 22, 1994 officer Mark Beach was on duty at Calipatria State prison as a housing unit officer in housing unit B-1 on B facility, a general population housing unit. (28 RT 6108-6109.) As such he oversaw the safety and security of the two tier unit. About 11 a.m. a commotion occurred on the top tier in cell 222. (28 RT 6110.)

Inmate Foster, one of the occupants of cell no. 222, was standing at the door with a swollen eye. (28 RT 6111.) Appellant was the other occupant in cell no. 222. (28 RT 6112.) Officer Beach alerted his partner in the control booth, heard another commotion and told his partner to activate the alarm. (28 RT 6114.) The responding staff placed inmate Foster and appellant in handcuffs and they were escorted out of the building to the medical facility on the yard. (28 RT 6115.)

Correctional lieutenant Robert Simmons' duties at Calipatria included supervising the officers and inmates and conducting hearings on minor offenses committed by the inmates. (28 RT 6119-6120.) He conducted a hearing on September 3,1994 on the incident that occurred on August 22, 1994. (28 RT 6123.) Appellant and another inmate were fighting. The

charge against appellant was assault on an inmate with sufficient force to produce great bodily harm. (28 RT 6124.) Appellant initially pleaded not guilty then said he had requested a bed change because he could not get along with his cellmate. (28 RT 6122, 6125.) Appellant also said he just got in a lucky punch. (28 RT 6125.)

May 21, 1995

On May 21, 1995 Officer Paul Spock was on duty as yard gunner on the ad seg yard at Calipatria. (27 RT 6056, 6059.) At 11:00 a.m. there were about ten to twelve Caucasian inmates on the yard. (27 RT 6056-6058.) They had probably been on the yard since 8:30-9:00 a.m, about two hours. All had been quiet until inmate Collins ran up to inmate Burke and began striking him in the head and neck area with closed fists. Before the altercation, appellant and inmate Burke had been walking together. (27 RT 6057-6060.)

Officer Spock ordered the yard down and everybody complied except Burke and Collins. Then it looked as if inmate Burke was making a slashing motion rather than a closed-fist striking motion. Officer Spock saw blood coming from inmate Collins' neck area. (27 RT 6060.) Inmates Burke and Collins continued to fight so Spock fired one round from his 37-millimeter gun. (27 RT 6016.) Both inmates stopped fighting at that point and assumed a prone position. After everything stopped, appellant jumped up and kicked inmate Burke in the head with his right foot. Inmate Burke was lying down in a prone position at the time. (27 RT 6061.) Officer Spock immediately racked a round into his Mini 14. Inmate Burke was lying in a prone position and bleeding from the neck and at that point

Officer Spock was concerned for Burke's life. (27 RT 6062-6063.)

Augustine Avilez, medical technical assistant at Calipatria in May 1995, examined inmates Burke, Collins and Poore). (27 RT 6066-6068.) Appellant had no injuries, nor did inmate Collins. (27 RT 6066, 6071.) Inmate Burke had a cut on the left part of his head, another cut on his back, a bruise on his forehead and a cut on the left side of his neck. (27 RT 6067-6068.) Ms. Avilez opined the wounds were caused by some kind of weapon. (27 RT 6069.)

June 7, 1995

On June 7, 1995 Officer Spock was again on duty as yard gunner on the administrative segregation yard at Calipatria. (27 RT 6022, 6024.) About 1:00 p.m. there was an incident involving appellant. (27 RT 6022, 6031.) Inmates Bennett and Poore were on the yard when inmates Carroll and Mays were processed in. The latter two inmates are African-American. (27 RT 6023; 6032.) As soon as inmates Mays and Carroll walked onto the yard a fight started. As inmate Mays opened the door he said, "Who wants a piece of this?", and rushed straight at inmate Bennett. Appellant walked towards inmate Carroll and both pairs started fighting. (27 RT 6024.)

Officer Tony Diaz, yard observation officer, also saw the fight break out and ordered the yard down. (27 RT 6028, 6035.) Inmates Carroll and Mays ceased their aggressions, but appellant and inmate Bennett continued to fight. (27 RT 6035.)

It appeared to Officer Spock that appellant was slashing or trying to stab inmate Carroll with something. (27 RT 6025; 6034.) Spock could see that appellant had something in his hand. Officer Spock had the 37-

millimeter launcher with rubber rounds in his hand so he fired one round directly at appellant. Normally one would fire in front of the inmate, but if an aggressor appears to be armed, you can fire directly at him. (27 RT 6025-6026; 6035.) Officer Spock thought he hit appellant because appellant stopped fighting immediately. Appellant dropped to a prone position and threw his weapon to the side next to the fence. (RT 6026; 6036.) Officer Spock then entered the yard and the security squad took over processing the evidence. Officer Spock could see some bleeding from inmate Carroll's chest area. (27 RT 6027.)

Felix Ramirez, security and investigations unit, took measurements of blood stains and took possession of the weapon involved in the altercation. (27 RT 6039-6040.) Officer Gil Cortez took pictures of the crime scene and stored the evidence in the evidence locker. (27 RT 6041; 6042-6044.) Court exhibits 135-142 show the injuries to inmate Carroll. (27 RT 6047-6049.) The wounds consisted of scratches and puncture wounds to the arms and chest area. (27 RT 6049-6051.) Court exhibits 143 and 144 depict an inmate-manufactured weapon. (27 RT 6052-6053.)

July 4, 1995

On July 4, 1995 Officer Spock was the yard observation officer for the administrative segregation unit at Calipatria. (27 RT 5982-5983.) Officers Ronald Crum and Michael Fisher were on duty as yard gun officers. (27 RT 5991; 5997-5998; 6005-6006, 6008.) All were armed with 37-millimeter launchers and tear gas grenades. (27 RT 5984; 5998-5999.)

Around 12:30 an incident involving appellant and inmates Bennett, Thomas and Taylor occurred. (27 RT 5985-5986; 6000.) Inmate Bennett

was appellant's cellmate and they were on the yard when inmates Thomas and Taylor were processed onto the yard. (27 RT 5988.) Each of the twosomes split up and a fight ensued. (27 RT 5990; 6000; 6008-6009.)

Officer Spock ordered the inmates down, but the fight continued. (27 RT 5990; 6001.) Officer Spock fired one round from his 37-millimeter launcher. (27 RT 5990; 6001.) Inmates Bennett and Taylor assumed prone positions after the first shot, but Thomas and appellant continued to fight. (27 RT 5993; 6010-6011.) Officers Crum and Fisher each fired a round from their 37-millimeters. (27 RT 5991-5992, 5995; 6001-6003; 6011.) At some point Officer Spock threw a triple-chaser onto the yard. (27 RT 5993, 5995; 6004.) Appellant and Thomas continued to fight. (27 RT 5994; 6004.) Officer Crum fired one more round from his 37-millimeter launcher and the fighting finally ceased. (27 RT 5995; 6005.)

July 7, 1995

Three days later on July 7, 1995, Officer Crum was again on duty as yard gunner on the adminstrative segregation yard. (27 RT 6013.) About 1:00 p.m. a fight broke out.[14] (27 RT 6014.) Appellant had a weapon (6014) and was fighting with inmate Carroll. (27 RT 6016.) The fight began with punches but escalated to a slashing or stabbing motion on the part of appellant. (27 RT 6017.) Officer Crum immediately ordered the yard down, but the fight continued. Officer Crum fired his 37-millimeter launcher, loaded with rubber rounds, directly at appellant and inmate Carroll. (27 RT 6018-6019.) The fight continued so Officer Crum fired a

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[14] Both this incident and the one on July 4, 1995 involved two Caucasian inmates fighting two African-American inmates. (27 RT 6014.)

second round and the fight stopped. (27 RT 6019-6020.) A medical evaluation report indicated inmate Carroll received a couple of puncture wounds and some slash wounds. (27 RT 6021.)

August 16, 1995

Officer Ronald Crum had yard gun duty on the ad seg yard at Calipatria on August 16, 1995. (27 RT 6072.) About 9:20 a.m. an incident involving appellant occurred. Eight to eleven Caucasian inmates, with weapons, were on the yard. Some began using the weapons on each other and others, including appellant, were engaged in fistfights. (27 RT 6073, 6076.) Officer Crum immediately ordered the yard down but none of the inmates complied. (27 RT 6077.) Officer Crum fired one round from his 37-millimeter launcher but the fights continued. He fired a couple of more rounds. All but two inmates then assumed the prone position. (27 RT 6078.) Appellant stopped fighting after the two rounds fired. The last two inmates, Dunham and Bennett, continued to fight until Officer Crum brought out the H and K, the nine-millimeter rifle. (27 RT 6078.) Bennett was appellant's cellmate and Bennett was one of the inmates who had a weapon. (27 RT 6079.)

November 24, 1995

On November 24, 1995 Officer Ronald Bender was on the yard at Calipatria. About 8:20 a.m. a fight broke out. Inmates Tolliver and Hyder were on the yard. (27 RT 5947.) When inmate Tyler and appellant were released onto the yard, all four inmates approached each other and started hitting each other with clenched fists. (27 RT 5948.) A verbal command and a round from Officer Bender's 37-millimeter failed to stop the

altercation. When he fired a tear gas grenade onto the yard, the fight stopped. (27 RT 5949.)

December 19, 1995

On December 19, 1995 Officer Bender was again on duty as yard officer. (27 RT 5934-5935.) At 12:42 p.m. a fight broke out between inmate McCarter and appellant. (27 RT 5939-5940.) Inmate McCarter was first on the yard. When appellant was released onto the yard both inmates approached each other and started hitting each other with clenched fists. (27 RT 5941.)

Officer Bender ordered the inmates to get down. The fight continued so Officer Bender fired one round from his 37-millimeter. The fight continued so Officers Diaz and Din came to assist. Officer Diaz fired a round from his 37-millimeter. When the fighting continued, Officer Bender fired a third round. He also released a tear gas grenade onto the yard. (27 RT 5943.) There was still no effect so Officer Diaz fired a fourth round. (27 RT 5943.) When Officer Din fired a fifth round, the fight finally stopped. (27 RT 5944.)

November 4, 1996

On November 4, 1996 Officer Kipper Phillips was on duty as yard gunner in the security housing unit (SHU) at Corcoran State Prison. (27 RT 5913.) At 12:25 p.m. a fight broke out between appellant and inmate Munoz. (27 RT 5917-5918.) Neither was the aggressor; they just walked up to each other and began fighting. (27 RT 5919.) Officer Phillips ordered the two inmates to get down. (27 RT 5920.) They complied after one verbal command. Officer Phillips dis not see any visible injuries on either inmate.

(27 RT 5922.)

November 16, 1996

Officer Alfredo Cordova was on yard duty on November 16, 1996. About 12:10 p.m., the beginning of the second yard for the day, Inmates Burns and Hernandez were released onto the yard. They walked towards the back of the yard and stood with their backs toward the yard looking towards the entrance. Then appellant was released onto the yard. (27 RT 5928.) Appellant walked towards inmates Burns and Hernandez and began fighting with inmate Hernandez. (27 RT 5928-5929.)

Prior to the commencement of the fight, Officer Cordova heard inmate Hernandez state to appellant, "Let's make this look good." Officer Cordova activated his alarm and ordered the inmates to get down. When the fighting continued he fired one round from his 37-millimeter launcher. (27 RT 5929-5930.) There was no effect on the inmates. Officer Cordova fired another round which had no effect on appellant and inmate Hernandez, but inmate Burns, who was watching the fight, assumed a prone position. After the blocks (wooden) ricocheted, inmate Burns got up and attacked appellant. Appellant retaliated. He knocked inmate Burns down and resumed his fight with inmate Hernandez. (27 RT 5931.)

Officer Cordova loaded another round into his 37-millimeter and fired one more time. All three inmates then assumed a prone position on the ground. (27 RT 5932.) The inmates were then secured and re-housed. (27 RT 5932.)

February 16, 2000

On February 16, 2000, Detective Gregory Bonaime was employed by

the Riverside County Sheriff's department. He was working at the Robert Presley Detention Center in Riverside (Riverside jail) as a jail investigator. Officer Shan Darling (27 RT 5903) was also employed there and was on jail security that day. (27 RT 5903-5904.)

About 11:25 a.m. several inmates were processed in, unhandcuffed and placed in the holding cells. (27 RT 5900-5901.) The holding cells have metal doors with windows about two feet by three feet. Those in the center were in view of Detective Bonaime's office. (27 RT 5898-5899.) Shortly after the inmates were placed in the cells, Detective Bonaime saw appellant in the back corner of cell number 2 making punching motions towards the corner of the cell. (27 RT 5901.) Mr. Boanime alerted Deputy Darling. (27 RT 5901-5902.)

Deputy Darling investigated and as he approached the cell he saw appellant on top of inmate Keyes striking inmate Keyes with both hands. (27 RT 5906-5907.) Inmate Keyes was in a fetal position and appellant was striking him with closed fists. Only after deputy Darling issued five or six verbal instructions to stop, did appellant stop hitting inmate Keyes. (27 RT 5908-5909.) Inmate Keyes is a black male, 25 to 30 years old, and smaller than appellant. (27 RT 5911.)

Victim Impact Statements

Frances and Alex Kulikov (28 RT 6155; 6177) had four children, three daughters and one son. (28 RT 6157; 6188.) They found out about Mark's death the day they traveled by car to Pismo Beach to attend the funeral of Alex's brother's wife. (28 RT 6163, 6167; 6184.) They turned on the news on the television in their hotel room and it gave Mark's name

and showed the van taking his body to the mortuary. (28 RT 6184.)

As a young boy, around four years old, Mark had rheumatic fever and had to be carried everywhere. (28 RT 6157; 6179.) He was not supposed to walk, but they caught him one day walking around the room on his knees. When confronted, he responded he was not walking on his feet, but his knees. (28 RT 6179.)

When well, Mark did all the things a young boy would do: piano and swimming lessons, climbed trees, owned a BB gun, and built tents with his sister from their bed sheets so they could read comic books with a flashlight in bed. (28 RT 6159; 6179.) He also had a dog named Cuddles. (28 RT 6160.)

Mark did not graduate from high school, but he did get his GED certificate and was an honor student. (28 RT 6160.) As a young man he assisted his father in the produce business by sorting oranges, and packing cataloupes and tomatoes. He worked with his father from six years old until fifteen years old. (28 RT 6159; 6181.) As an adult he worked for a produce brokerage firm. (28 RT 6182.) He was concerned for others, smart, kind and popular. (28 RT 6161; 6183.)

The last time Mr. Kulikov spoke with his son was about three months before the homicide. Mark needed a little money. Mr. Kulikov had already give him $20,000 as down payment on his house, but he sent Mark another $5,000. They had a good relationship. (28 RT 6187.)

The last time Mrs. Kulikov spoke to Mark was the day of the homicide. When she called Mark's home a woman answered the phone. The woman told her Mark was asleep, but Mrs. Kulikov said she needed to

talk to him, to wake him up. She needed to tell Mark about the funeral. (28 RT 6163.)

Janina Burton, Deborah Carruth and Elizabeth Meyers are Mark's sisters. (28 RT 6189; 6207-6208; 6217.) Each had their own special memories of their brother: for Janina, a trip to Canada and the national parks with Mark and her husband (28 RT 6193-6194); for Deborah, a couple of years when Mark turned 18 when he lived with her and her husband (28 RT 6209); and for Elizabeth teaching her to ride a bicycle and driving to her wedding. (28 RT 6218, 6220.)

All three sisters remembered Mark as being a very caring and sharing individual. (28 RT 6197; 6218.) He was very much in love with his wife, Joie, and his daughter, Alexa. (28 RT 6200; 6221.)

Shortly after Alexa's graduation in June 1999, Janina noticed a change in Mark. Unusual people were answering his telephone and she had a hard time getting through them to talk to Mark. (28 RT 6203.)

Mark's death was devastating to all of them (28 RT 6206; 6211; 6224.) Janina has gained weight and craves comfort food and sweets that she never cared for before Mark's death. (28 RT 6202.) She also has a sleep disorder. (28 RT 6203.)

Joie and Mark Kulikov were married twenty years. He was her best friend, her confidante. (28 RT 6233-6234.) He was kind, generous, fulfilled her needs and made her happy. (28 RT 6235-6336.) They were there for each other. (28 RT 6237.)

Both Joie and Mark worked. He was supportive of her work and was present at the birth of their daughter, Alexa. (28 RT 6236-6237.)

The house they purchased at 2280 Powell Road was a major fixer-upper. (28 RT 6241.) They had a good life in a good neighborhood. (28 RT 6241.) They were in the process of planning to put down new carpet, paint and remove the popcorn ceilings. Joie had begun patching before painting the walls. (28 RT 6242.) They pulled up the carpet in April 1999. (28 RT 6243.)

Around April to June 1999, Joie's relationship with Mark began to change. She was working extra hours at Marriott because Mark was not working. Alexa had graduated from high school. Mark became preoccupied and had a different set of friends. (28 RT 6244.) When she got home from work, Joie asked the friends to leave; she wanted the house to themselves. (28 RT 6245.) However, eventually it got to the point it was either them or her. Joie wrote Mark a letter and on September 3, 1999 moved to Palm Desert near to her work. She did not file for divorce. (28 RT 6246, 6247.)

Alexa had moved to the Redlands area and Joie wanted Mark to move to Palm Desert with her. She felt he was being influenced. She could not afford the mortgage payment. The last time she saw Mark was September 30, 1999, when she went by the house to get some of the things she had left there. She asked him to just leave the house and come with her to Palm Desert. (28 RT 6247-6248.) After she moved to Palm Desert she called Mark a couple of times but all contact stopped about October 1, 1999. (28 RT 6248.)

Joie got a transfer to Marriott in New Jersey. She was at work there when Alexa called and told her the street was closed and there was tape

around the house. (28 RT 6249.) She contacted the police department but could get no information. Then a friend called her and told her Mark was dead; her friend saw the news on television. (28 RT 6249-6250.) Joie called Frances, Mark's mother and assisted in the funeral arrangements. (28 RT 6250-6251.) Joie now has nightmares and cannot let go. She was hoping to reunite the family unit and start over. (28 RT 6252.)

Alexa remembered her father as kind, generous, loving, supportive. (28 RT 6255-6256.) When she was young he was very open. He was involved in her activities and helped her with ideas. (28 RT 6256.) They were very close even though he was always working, maybe two or three jobs at a time to support the family. (28 RT 6257.)

After graduation Alexa moved to the Redlands area. At the time of trial, she was planning to be married in March. Mark knew the man she was dating and approved of him. (28 RT 6257-6258.)

She learned of her father's death after a police officer contacted her at the door one evening asking where the black truck was. The police would not tell Alexa anything and she had to go to Palm Springs to find out what happened. (28 RT 6259-6260.) His death was devastating, probably the hardest thing she'll ever have to deal with. Not a day goes by that she doesn't think of her father. (28 RT 6260.)

GUILT PHASE ISSUES

I.

THE TRIAL COURT ERRED BY PAINFULLY SHACKLING APPELLANT TO AN UNDERSIZED CHAIR DURING TRIAL AS A PROPHYLACTIC MEASURE INSTEAD OF A MEASURE OF LAST RESORT TO CONTROL DISRUPTIVE BEHAVIOR.

Introduction

A defendant may not be shackled in the courtroom except on a showing of manifest need and as a last resort in an extraordinary case. Here, despite literally years of proper behavior in the courtroom, and despite other available less restrictive alternatives, because the prosecution painted appellant as a purported dangerous gang member, the trial court ordered appellant to be fitted with a REACT belt AND to be shackled to a chair that was deliberately set in too low a position to be comfortable.

These unwarranted restraints inflicted severe back pain and caused appellant to absent himself from part of his trial. Moreover, not only did the pain cause appellant to miss at least part of his trial, but when he was present, it likely interfered with his ability to communicate with his counsel, compromised his ability to concentrate on his trial and affected his demeanor before the jury when he testified at guilt phase. Further, although the record is silent on whether the jury could see appellant shackled to the chair, even the judge admitted that the jury could see the bulge created by the REACT belt under appellant's shirt and jacket.

The error is of federal constitutional dimension and requires a prejudice analysis under the *Chapman* "harmless beyond a reasonable

doubt" standard. Indeed, even if that was not so, the error here is prejudicial under any standard.

Factual Background

The issue of shackling was initially raised by the prosecution. On June 13, 2001, six months before trial started, the prosecutor filed a motion asking that appellant be physically restrained throughout the trial. (2 C.T. 328-332.) In the motion, the prosecution alleged that appellant had been "validated" by the California Department of Corrections as an associate of a white supremacist gang, the Aryan Brotherhood [hereafter AB]. (2 CT 328.) According to the prosecution, at the time of the offense appellant attempted to dissuade witnesses from reporting him or testifying against him by threatening them with retaliation by the Aryan Brotherhood. (2 C.T. 328-329.) Further, the prosecutor alleged that appellant sought to have other persons kill witnesses by administering a syringe containing a lethal dose of nitroglycerin and that the drugs and syringe were found on his person. Finally, the prosecution noted there were "many instances of violent conduct in prison" as alleged in the Penal Code 190.3 notice, and that appellant had previously been confined to security housing within the prison system. (2 C.T. 329, 330.)[15]

Significantly, the prosecution argued that there was no need to show that appellant intended to escape or otherwise disrupt the trial, and that **ANY** nonconforming conduct was sufficient to allow physical restraints. (2

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[15] As a side note, the defense observes that despite the purported "validation" by the Department of Corrections and the numerous prosecution witnesses who testified in support of the gang claims, appellant was acquitted of ALL the gang related charges and allegations.

C.T. 329. (Emphasis added).)

The prosecution advocated that, at minimum, the court should order the use of a REACT [stun] belt and further urged that a better solution would be to shackle appellant directly and/or shackle him to a chair which should then be bolted to the floor. (2 C.T. 330-331.)

The defense filed a motion objecting to the proposed shackling as violative of appellant's Fifth, Sixth and Fourteenth Amendment rights as well as Article I, Sections 15 and 17 of the California Constitution and Penal Code section 688. (2 C.T. 267-277.) The thrust of the defense motion was that shackling would impair appellant's ability to communicate with his attorney and would cause him unnecessary pain (2 C.T. 370) These considerations apply to both jury and non jury proceedings. (2 CT 370.) Further, shackling was not a remedy of last resort. Additional bailiffs could be stationed in the courtroom. (2 C.T. 374.) Moreover, the defendant could be seated farthest away from the witnesses, an orientation that could be easily accomplished in the courtroom where the proceedings would take place. (2 C.T. 375.) Additionally, metal detectors could be used. Moreover, money was no object in protecting an individual's constitutional rights. (2 C.T. 375.) Finally, counsel argued that shackles constituted cruel and unusual punishment when they inflict pain, humiliation or rage and resentment. (2 C.T. 375-376.)

When the hearing first convened on the prosecution's motion to have the defendant shackled, the trial judge observed that a showing of "manifest need" required the presentation of at least some evidence. (1 R.T. 180-181.) The defense concurred that the presentation of evidence was required before

there could be a determination on the issue of “manifest need.” (1 R.T. 180.) The court also reminded the prosecution that since it made the motion, it had the burden to produce evidence. Up to that point, however, the prosecution had been relying solely on unsworn materials. (1 R.T. 180-181.)

The prosecutor told the court that its moving papers were a sufficient basis for making a ruling, but that it would produce evidence if the court required it. (1 RT 187-188.) The court responded that the only case it could find where there was no presentation evidence in support of the issue of “manifest need” was *People v. Medina* (1995) 11 Cal.4th 694. In that case, however, the defense never objected to the prosecutor’s unworn statements. (1 R.T. 190-191.) The trial judge went on to note that in *People v. Cox* (1991) 53 Cal.3d 618, the California Supreme Court found error when the shackling order was based on “rumor and innuendo, including defense counsel's vague reference to a possible escape attempt.” (1 R.T. 191.)

The trial court then reviewed the “statement of counsel” concerning why the prosecution believed that appellant should be restrained. (1 R.T. 192-196.)[16] The court cited the prosecutor’s allegations that appellant is an admitted AB member; that a witness would testify that appellant received instructions before paroling that he needed to do “some stuff” for the AB; that appellant solicited inmates to help him have witnesses killed; that appellant was found with a syringe and nitroglycerine (components of a

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[16] There is no dispute that the “statement of counsel” to which the trial court referred was simply an **unsworn** assertion by the prosecution concerning the facts it believed it could prove. Indeed, the prosecutor offered to provide the court with a sworn declaration on these matters. (1 R.T. 187.) Apparently, however, the offer was never pursued.

lethal "hot shot"); that appellant threatened witnesses at the scene of the crime if they reported him to the authorities; that experts would say that the AB rules by fear; that appellant was housed in Pelican Bay, Security Housing Unit, and that appellant was a prime candidate to "go off" on somebody in court. (1 R.T. 194.)

The prosecution also noted that there was an assault on a black inmate and another inmate assault while appellant was in Riverside awaiting trial in this case. Additionally, the prosecutor invited the court's attention to the incidents of prison violence from prior incarcerations contained in the notice of aggravators. (1 R.T. 194-196.)[17]

The defense disputed many of the assertions and argued that although appellant was involved in fights during a prior prison incarceration at Calipatria, counsel also noted that young men in prison are occasionally involved in fights. (1 R.T. 196) Essentially, counsel disputed any claim that appellant made an unprovoked assault on other inmates. Further, counsel vigorously disputed any claim that appellant was a member of the Aryan Brotherhood. (1 R.T. 196-198.) Counsel also reiterated that appellant had never given the court any problems and that he had been polite and respectful over the previous 23 months worth of court appearances. Finally, the defense argued that restraints were unnecessary because courtroom deputies could easily handle any disruptive behavior. Counsel specifically objected to a "stun" belt or any sort of shackles. If any further security was

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[17] Although the prosecution referred the judge to the aggravators listed in the charge sheet, at the time of argument, it did not provide any documentation to support these bare assertions.

required in the courtroom, additional deputies could handle it. (1 R.T. 196-199.)

The prosecution responded that appellant had been validated by the prison system as a member of the Aryan Brotherhood. Further, appellant's prior violence in prison, his assaultive behavior in jail and his possession of contraband while in jail showed a sophistication level above that of the normal prisoner. (198-199.)

Finally, the prosecution argued :

> "I don't care how many deputies are placed within the courtroom. Mr. Poore is a large man. I would estimate probably six-foot-four, six-foot-five somewhere in the neighborhood of probably 240 to 250 pounds. The time it takes for a man that size, who is unshackled, unrestrained, to go six to eight feet to a pencil to stab -- or a pen -- a witness, a prosecutor, perhaps even a deputy who is unprotected about the neck, head and shoulders -- instantaneous.
>
> In my opinion, this court would be remiss if it did not bolt the chair to the floor and chain Mr. Poore to that chair, such that all of the court personnel can move about this court and conduct their daily business in a professional manner without any fear whatsoever of reprisal from the defendant.
>
> The top priority, in my opinion, of everyone in this courtroom at the close of court business and the beginning of court business is to make sure that they return to their families safely.
>
> This court can ensure that by shackling the defendant to a chair and bolting the chair to the floor. And we will then conduct courtroom business without any concern. But if the court does not do that, there will be concern in every deputy's mind, in this prosecutor's mind, and certainly in the minds of the witnesses as to their safety at any point in this trial.

He needs to be shackled to a chair which is bolted to the floor. He's earned that right." (1 R.T. 199-201.)

The Court determined that the parties should request information from the Sheriff's office on the type of restraints available. (2 R.T. 201.) Nevertheless, based on the information provided by the prosecution thus far,[18] the court found "good cause" for the restraints, although it just did not yet know what type of restraints would be necessary. The court then recessed overnight. (1 R.T. 203-204.)

When the court reconvened the next morning, the prosecution again argued that it had no role in calling witnesses on the court security issue. (1 R.T. 205-208.) In urging the court to call its own witnesses, the prosecutor stated: "I took the lead in this, it is my back that will be turned to that defendant when I stand in the well; it is my back that will be approaching the witnesses, not the court's, not deputy's, but mine and [assistant prosecutor] Ms. Kelly's."(1 R.T. 209)

After more argument, ultimately, the bailiff called a member of the Sheriff's office to provide information on the restraints available (2 R.T. 211) and Correctional Officer Miramontes took the stand. (2 R.T. 213.) Under questioning by the court, he testified that he was in charge of transportation of prisoners from the Indio jail and security. Part of his responsibility was to advise courts on security issues involving inmates. (2

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[18] At this point in the proceedings, not a single witness had been sworn to testify nor had a single document been introduced into evidence. The trial court was relying solely on the moving papers. Indeed, the prosecutor informed the judge that he would make his documents available to Court Services or whoever the appropriate party might be if the court required it. (1 R.T. 201)

R.T. 213-214.) He knows appellant (2 R.T. 214) and knows appellant was previously placed in a security housing unit [SHU] at Pelican Bay State Prison. (2 R.T. 216.) According to the classification notes, appellant was placed in the SHU because he had been validated as a member of the Aryan Brotherhood. (2 R.T. 218.) Many months prior to the instant hearing, appellant received a disciplinary marker from the Indio jail for smoking in violation the rules. (2 R.T. 219.) Officer Miramontes was not aware of any disciplinary markers from Pelican Bay. (2 R.T. 220.)

The testimony showed that since appellant arrived in the county jail system more than a year prior to trial, he had three disciplinary markers. The first was for fighting with another inmate by the name of Keyes. The second was for slipping one of his handcuffs and the third was for possession of nitroglycerin pills, a syringe, tobacco and a lighter. (2 R.T. 220-228.) Reviewing jail reports, Officer Miramontes testified that appellant purportedly told jail personnel that he was validated as a member of the Aryan Brotherhood. (2 R.T. 225.) Finally, appellant was involved in a fight with his cellmate, but no disciplinary marker was issued on that occasion. (2 R.T. 221.)

Officer Miramontes also noted that appellant had previously been placed in security housing [SHU] at both Pelican Bay and Tehachapi prisons. For all of those reasons he was placed in administrative segregation in the Riverside Jail. (2 R.T. 225.) Nevertheless, Officer Miramnates conceded that in his time in local custody, appellant never assaulted any staff member in the jail system and treated all staff with respect. (2 R.T. 228-229.)

Finally, Officer Miramontes suggested that appellant be restrained because in the officer's opinion, appellant posed a threat to other inmates who might appear as witnesses. Officer Miramontes said he based his opinion on appellant's assault of other inmates and his fight with his cellmate.

Nevertheless, Officer Miramontes admitted that he had no idea why the latter two fought or why the fight might justify restraints, but the officer explained, "That's just my feeling." (2 R.T. 229.) As for the syringe and nitroglycerine pills, Officer Miramontes testified that the syringe could be used as a weapon in jail because it had a needle point and that if appellant swallowed the pills or put them in someone's food they could cause a health danger. (2 R.T. 228.)

Under questioning by the prosecutor, Officer Miramontes admitted that it is **general policy** to handcuff inmates who are in administrative segregation. Other inmates in the general population are not handcuffed when staff moves them around the jail facility. (2 R.T. 231.) Based on his training and experience he knows that inmates often receive contraband. (2 R.T. 231.) In the officer's opinion, if a jailhouse "snitch"[informant] were to testify against appellant, the "snitch" would be in danger. The officer conceded, however, that **an informant would be in danger from virtually the entire general jail population as well**, not just appellant. (2 R.T. 235-236[Emphasis added].)

The jail has a REACT belt and the officer described how it worked. (2 R.T. 237.) However, the officer had never shackled or restrained anyone in court before because no one had ever asked the sheriff to do that. (2 R.T.

239.) Finally, Officer Miramontes opined that although appellant has been respectful of jail staff, that does not mean that he might not be dangerous to other persons.

Under questioning by defense counsel, Officer Miramontes admitted that appellant was placed in the general population for about four months when he first arrived at the county jail in Riverside. Moreover, this placement was made even though his prior prison records were reviewed by staff. It was not until he was brought to the Indio jail and Officer Miramontes reviewed his prison records that appellant was placed in administrative segregation. (2 R.T. 239-240.)

Officer Miramontes also admitted that he previously testified that Aryan Brotherhood members do not get along with Hispanics and other nonwhites. Nevertheless, he conceded that while in the Riverside jail, appellant was housed in a tank with both Hispanic gang members and nonwhites but there were no problems. (2 R.T. 240.)

Officer Miramontes also admitted that associate gang members are not necessarily validated Aryan Brotherhood members. Thus, a jail classification officer who said in a report that appellant admitted to being a validated Aryan Brotherhood member could have confused the two. (2 R.T. 241.)

With respect to the incident involving handcuffs, Officer Miramontes affirmed that when a prisoner is handcuffed, his hands are placed behind his back. (2 R.T. 241.) He also admitted that when appellant received a jail disciplinary marker for slipping his handcuffs, appellant did not actually take the handcuffs off or otherwise escape from them. Instead, appellant

merely moved the handcuffs around in front of him, probably by bending down and simply stepping backward through his arms. (2 R.T. 242.)

Regarding Officer Miramontes' concern about appellant's behavior in the courtroom, the officer admitted that he and three deputies would be present in the courtroom and they were trained on how to subdue a prisoner. (2 R.T. 242.) Further, if there were three deputies in the courtroom and they were worried that appellant might pose a danger to a witness, they could probably handle it. (2 R.T. 243.)

Regarding the stun belt, officer Miramontes admitted that if appellant was in court and wearing a stun belt underneath slacks and shirt, the jury could probably see it. (2 R.T. 244.) Finally, officer Miramontes admitted that the worst disciplinary marker that appellant received while in jail was simply the fight with inmate Keyes. (2 R.T. 244.)

The court then inquired whether the sheriff's office had a chair resembling the other chairs in the courtroom that could seat appellant but be bolted to the floor. Officer Miramontes replied that he was not aware of any such chair. (2 R.T. 245.) Nevertheless, if the court ordered him to find such a chair, probably he could. (2 R.T. 246.)

The court then expressed some concern that Officer Miramontes would not qualify as a custodian of records for statewide CDC prison records and might not be able to testify about those. The prosecution then offered to provide a witness from the CDC. (2 R.T. 247.)

Sgt. Trevino from the jail was called to testify. Initially she testified that she thought appellant was placed in administrative segregation for assaultive behavior. (2 R.T. 249-250.) When asked whether it was instead

because he possessed contraband, she admitted that she did not know. (2 R.T. 255.) She also admitted that appellant had always been very respectful of staff. (2 R.T. 253-254.)

Responding to questions from both the court and defense counsel, Sgt. Trevino testified that the jail did have a restraint chair, but it was nothing like the other chairs in the courtroom. Moreover, because of the way it was constructed, it would be immediately obvious to jurors that the defendant was being heavily restrained. (2 R.T. 251-255.) When asked by defense counsel if 3-5 deputies could restrain or subdue a person the size of appellant, she replied, "possibly." (2 R.T. 257-258.)

The court then called Captain Tyrrell from the sheriff's office to the stand. Capt. Tyrrell, testified that he was assigned to court services. (2 R.T. 260.) To his knowledge, the Riverside court had **NEVER** previously used a security chair for trial purposes although it had used one for arraignments. (2 R.T. 262 [Emphasis added].) Capt. Tyrrell was not aware of any type of security chair that was readily available to him for courtroom use. (2 R.T. 262.) Responding to questions from the prosecutor, Capt. Tyrrell admitted that knowing that appellant had been in security housing at Pelican Bay, that he was a member of the Aryan Brotherhood and that "snitches" would be testifying against him, were factors that would cause him concern for witness safety. (2 R.T. 262-265.) In Captain Tyrell's opinion it would be safer for witnesses to have the appellant chained up than to use a stun belt. (2 R.T. 266.)

Responding to defense questions, Captain Tyrrell candidly admitted that obviously it would be safer in the courtroom to have **ANY** defendant

restrained regardless of the defendant's personal circumstances. (2 R.T. 266. (Emphasis added).) Regarding the stun belt, if the defendant was wearing a stun belt and began to act up, a courtroom deputy could give him a warning jolt of electricity rather than the whole 50,000 volts. (2 R.T. 267.)

Regarding gangs, Officer Tyrrell testified that he was aware that some defendants are members of the Mexican Mafia, or Northern Hispanics, Southern Hispanics or Black Gorillas. All of these gangs have a reputation for violence similar to the Aryan Brotherhood and he would be more comfortable with **ANY** such gang member being restrained. (2 R.T. 268-269.) Captain Tyrrell conceded that three deputies might be able to restrain the defendant but it would depend on the circumstances. (2 R.T. 269.)

Upon reexamination by the prosecutor, Captain Tyrrell stated that activating the stun belt would cause an immediate jolt to the wearer. Usually, the wearer dropped right to the floor, but a particular defendant might be able to take step or to before dropping to the floor. The prosecutor then asked how long it would take two deputies to subdue the defendant if they were stationed as they currently were in the courtroom, that is, one seated near the defendant and one seated in the back of the courtroom. Captain Tyrrell testified that the deputies would not be stationed like that at trial. Both would be stationed right behind the defendant, and would be either seated or standing. (2 R.T. 272.)[19]

The prosecution then called Deputy District Attorney Bowser to the

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[19] Of note, the prosecutor did **NOT** ask the obvious follow up questions concerning how difficult it would be or how long it would take the deputies to restrain an unruly defendant under Captain Tyrell's seating scenario.

stand. Deputy District Attorney Bowser testified that he had been a member of the Riverside District Attorney's office for about 18 years. Before he became an attorney he worked for the Riverside County Sheriff's Office. (2 R.T. 273.) He received training on the use of the REACT [stun] belt, although he is not sure it was the same type of stun belt that the Riverside Sheriff's office uses now. (2 R.T. 273-274.)

Based on his training, however, he believes there is an issue with the stun belt. There is a delayed reaction time of a couple of seconds from the time a defendant could initiate an assault until the jolt from the stun belt could disable him. Thus, a determined defendant could at least initiate an assault before he was disabled by the belt. (2 R.T. 274.)

Further, DDA Bowser testified that he had been actively involved in the investigation of this case and had collected numerous police reports concerning witnesses (2 R.T. 275-276.), including police reports involving witness Brian White. (2 R.T. 275-276.) The reports contained copies of some handwritten notes that set forth the names of many of the witnesses in this case. (2 R.T. 277-278.) The mention of Brian White contained references to dismissed cases and child abuse charges. (2 R.T. 278.) Potential witness Kathleen O'Donnell explained to DDA Bowser that it was her understanding that the defendant wanted her to mail these documents to someone in the prison where Mr. White was located. (2 R.T. 278.) Other protected prison informants whom he contacted told him that these documents were essentially a death warrant issued by the Aryan Brotherhood. (2 R.T. 281.) DDA Bowser also indicated that in a taped phone call in the Riverside jail, appellant asked a third party to

communicate with another member of the Aryan Brotherhood. (2 R.T. 286-287.)

On cross-examination, DDA Bowser admitted that he was unaware of any threats against the prosecutor made by appellant. (2 R.T. 288.) Further, an obstacle such as a chair placed between appellant and the well in the courtroom would likely slow any attempt by appellant to reach a witness, probably in time for the REACT belt to work. (2 R.T. 289.) Finally, DDA Bowser admitted that since inmates cannot write to on another, the only way any inmate can communicate with another is through third or fourth parties. (2 R.T. 290.)

The prosecution then called Leo Duarte, a gang expert from the Department of Corrections. (2 R.T. 298.) He reviewed appellant's files from the Department of Corrections. (2 R.T. 299-301.) Mr. Duarte testified that based on the materials he reviewed, he believes that appellant is an associate of the Aryan Brotherhood gang and is trying to become a member. (2 R.T. 302-304.) In Mr. Duarte's view, an assault on a witness, prosecutor, or law enforcement would enhance appellant's status within the gang. (2 R.T. 304.)

Further, a review of appellant's records shows that at one time, he was housed in the security housing unit of Pelican Bay State Prison. Presumably, he was housed there because of disruptive behavior. (2 R.T. 304-306.) Mr. Duarte saw 25 incidents listed in those records, some as recently as 1997.[20] Nevertheless, despite any incidents of misbehavior, if an inmate is considered part of a prison gang, he would be placed in the

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[20] That is, fully **two years before** the charged homicide and about **four years before** guilt phase trial testimony began.

security housing unit anyway. (2 R.T. 306.) Some of the incidents involved possession of a razor blade, flooding a tier, mutual combat[21] and at least one involved an allegation that appellant ordered a stabbing. That said, the Aryan Brotherhood is no more violent a prison gang than any other prison gang. (2 R.T. 311.) Nevertheless, based on his review of the phone call where appellant was boasting to girlfriend about harming an informant if he had an unobstructed chance, Duarte opined that appellant would pose a danger in the courtroom. He would assault an informant witness, because that action would enhance his status within the gang. (2 R.T. 312.) Morever, given appellant's background, Duarte would recommend full restraint. (2 R.T. 312-313.)

On cross examination, Duarte admitted that no member of the Aryan Brotherhood, either a member or associate would admit to being part of the gang. The prison authorities would have to make that determination in some other way. (2 R.T. 314-315.) Further, Duarte admitted that he only reviewed appellant's disciplinary record, not any of his laudatory chronos or good work performance evaluations. (2 R.T. 315.) Additionally, Duarte noted that the fights between appellant and other inmates occurred primarily at Corcoran and Calipatria State Prisons where inmates are a little up tight and fights happen. (2 R.T. 316.) He also conceded that a belt and waist chains such as appellant was currently wearing would be adequate security, even a stun belt would be a good tool. (2 R.T. 317.)

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[21] The fighting incidents, including the alleged stabbing claim, occurred between 1993 and 1996 (2 R.T. 309-310), at least **three years before** the charged incident and **five years before** guilt phase trial testimony began. There is no indication that appellant was ever charged for these incidents.

After the witness was excused the prosecutor described a restraint chair whereby appellant could be strapped to the chair such that if he stood up, the chair would go with him. The prosecuor then noted that he still preferred a REACT belt in addition to the chair and that the chair be bolted to the floor. (2 R.T. 319.)

The defense continued to object and noted that if a restraint were to used, the REACT belt would be sufficient and if required by the court, a leg restraint. (2 R.T. 319-320.)

After a recess, a restraint chair was brought into court for the parties to observe. The court noted that the chairs for all the participants would have to be similar so that appellant's chair would not stand out. The court then recessed the hearing to do some further research. (2 R.T. 324.)

At a hearing on another matter, the trial court noted for the record that the facilities manager was in the process of modifying a chair so that it would work in the courtroom. (2 R.T. 447-448.)

When the judge convened the next hearing on the shackling issue, he noted that the modified chair was a modification of one of the chairs currently at counsel table. The court then tentatively ruled that it would use the modified chair plus a REACT belt "in light of all of the evidence which has been presented to the Court." (2 R.T. 452).

Defense counsel again objected noting that the defense would stipulate to a leg brace and a REACT belt, but the offer would be withdrawn if the restraint chair was used as well. Counsel again objected to any restraints, specifically arguing that the jury likely would see the restraints in the chair. Counsel also urged that if the modified chair was to be used, the

court should order counsel to remain seated when the judge takes the bench and the jury comes in. (2 R.T. 453.)

The prosecutor observed that the modified chair looks similar to other chairs at counsel table with the exception of a small hole near the lumbar area, on the inside. The prosecutor also noted that he tried the chair and could stand up easily. Therefore he requested that the chair be bolted to the floor, although he would go along with the court's indicated ruling. (2 R.T. 453-454)

The trial court then ruled: "I will make a finding at this time that there is a manifest need for the use of the chair and the particular restraints which are being proposed. I will also find that there is good cause based upon the totality of the facts and circumstances to utilize the security chair and the REACT belt." (2 R.T. 454.) The court also ordered counsel not to stand when the jury came and went. Nevertheless, he also ruled that for the formal opening of proceedings, the defendant would not be shackled and would be able to stand. (2R.T. 454-455.)

Defense counsel responded that if the court was comfortable having the defendant unshackled at the opening of trial, then the restraint chair was not really necessary. The judge replied that he was not comfortable, but wanted to take those actions to maintain the formality and gravity of the courtroom. (2 R.T. 455-456.)

When the Court reconvened the hearing on shackling, it noted that the chair had been appropriately modified for the trial and that it would be used along with the REACT belt. There would be a test fitting and the REACT belt would be tested to make sure it worked. The defense reiterated its

objection to restraints. The court noted the objection and observed that it already ruled. (2 R.T. 477.)

A few days later, the court mentioned that at the next session the court would do a test fitting of the chair and REACT belt. The defense requested that appellant be dressed out so that the parties could see how the restraints looked under his clothing. The court agreed. (3 R.T. 514.)

When the court again took up the shackling issue, the defendant was dressed in civilian clothes, although without a jacket. He was also wearing the REACT belt and was restrained to the chair. Defense counsel noted for the record that if Mr. Poore had a coat on, the restraints likely would not be visible. Nevertheless, defense counsel continued to object. (3 R.T. 528.)

The judge intitially responded that no one would be able to determine that Mr. Poore was restrained or that he was wearing a REACT belt. (3 R.T. 528.) After checking the seating situation from other angles, the judge noted that from behind counsel table, one could see a slight bulge on the defendant's left rear side. The judge then obtained the defense assurance that Mr. Poore would be wearing a coat during the proceedings. (3 R.T. 529.)

The judge also observed that the restraint chair was nearly identical in appearance to the others at counsel table. Moreover if Mr. Poore was wearing a coat, the jurors would not be able to tell that he was restrained. Nevertheless, the court also conceded that without a coat and with Mr. Poore leaning forward, the jurors could see a bulge from the REACT belt, although jurors might not be able to determine what it was. If the defendant sat back, however, the bulge could not be seen even without a coat. The

judge then had everyone else leave counsel table except the defendant. The court noted a slight bulge visible under Mr. Poore's shirt on the left side. (3 R.T. 528-530.) The court wanted to see whether the bulge was visible when Mr. Poore was wearing his jacket. The appropriate size jacket was not available, but a trial fitting with a smaller jacket borrowed from defense counsel still showed a bulge. (3 R.T. 531.)

Later, before the prospective jurors were seated, defense counsel observed that when Mr. Poore stood, the REACT belt was "quite obvious" even though Mr. Poore's suit fit well. The defense continued to object to the restraints. (3 R.T. 541.)

The court asked for suggestions concerning how to handle the formal opening of the trial. Defense counsel offered to stand beside Mr. Poore to shield the visibility of the bulge somewhat, but noted that with a full courtroom, the bulge still would be visible. (3 R.T. 542.)

The judge had the defendant stand and commented that his jacket appeared too small. Counsel replied that it was the right size. The judge then conceded that the bulge was noticeable. For that reason the judge ruled that neither the defendant nor counsel should stand when the case was introduced for hardship qualification. (3 R.T. 542-543.)

The prosecutor then asked that Mr. Poore be secured to the chair since he would not be standing. The court agreed. (3 R.T. 544.)

During one of the days of jury selection, but before jurors arrived, defense counsel asked the court to raise the seating level of Mr. Poore's chair. As counsel explained, the deputies had been ordered to lower the seat to its lowest setting. Since Mr Poore had been a "perfect gentleman" at

trial, there was no necessity for such an action. Further, because Mr. Poore was quite tall, his knees were now practically in his chest. Given that the stun belt was already uncomfortable, this new positioning made Mr. Poore doubly uncomfortable. Counsel requested that the chair be raised a couple of inches, at least to the level of counsel's chair. (8 R.T. 1863.)

The prosecutor objected noting that the Sheriff's department originally concluded that the chair was the most effective when the seat was at its lowest level. Thus, this morning the deputies probably noticed that the chair had been raised and they lowered it again. (8 R.T. 1863-1864.)

The court ruled: "Well that issue is in the hands of the security officers of the court and is an issue which the court will not interfere with. It is something that we discussed previously, and I ordered that the highest security measures be taken in this case, and that is of course one of the security measures." (8 R.T. 1864.)

Later in jury selection, defense counsel again raised the problem of the chair seat height. Defense counsel told the court that the lowered seat height was "extremely uncomfortable" for Mr. Poore. He could not lean back. (9 R.T. 1985.) Counsel urged that raising the seat an inch or two would not make much security difference since Mr. Poore was belted to the seat. Further, jail records show that Mr. Poore had been medicated for a bad back and the chair height aggravated the injury. If the court refused to raise the chair height, counsel suggested lowering the chair height for all counsel. Finally, counsel argued that the trial court could not delegate its control over security measures to the sheriff. (9 R.T. 1986.)

The prosecutor again objected noting the discussion in previous

hearings. Moreover, the prosecutor stated that he previously sat in the chair in restraints and could stand, albeit with some difficulty. Deputies told him that if the chair was lowered, it would be harder to stand. (9 R.T. 1986.)

The trial judge stated that he was not delegating his responsibility to the sheriff. He always intended the chair to be at the lowest setting, and if it had been raised, that action would be in violation of his order. Although the chair was lower than the other counsel chairs, Mr. Poore's own height made everyone approximately equal. The court noted that it would reconsider the chair height if there was evidence that the chair was aggravating Mr. Poore's medical condition. In that regard, **the court concluded that the jail records saying that Mr. Poore could not get out of bed because of the back pain were insufficient evidence of discomfort**. The court agreed, however, that Mr. Poore appeared to be taller than almost everyone else. (9 R.T. 1986-1987[Emphasis added].)

Through counsel, the defendant asked that he be allowed not to be present for further juror selection because the pain was too severe. The trial court ruled that appellant was free to absent himself. At the next session of court, Mr. Poore was not present and the court noted that he voluntarily absented himself. (9 R.T. 1990.)

At a later session during hardship screening for prospective jurors, Mr. Poore was again absent. Defense counsel told the court that jail personnel took Mr. Poore away for x-rays and jail personnel would not tell him anything further. (9 R.T. 2036.)

Before appellant testified in his own defense, the question of courtroom security was again raised. Defense counsel asked that appellant

be allowed to stand to take the witness oath like other witnesses. Appellant would still be wearing the REACT belt. The prosecutor complained that appellant was testifying in large part simply so that he could be free of his restraints. The trial court noted that appellant could remain seated to take the oath. In any event, appellant would not be allowed to take the stand until extra security officers were present. (25 R.T. 5296.)

Although the record is silent, when the trial resumed and appellant testified, presumably appellant was seated and shackled to the chair with extra uniformed security officers present in the courtroom. (25 R.T. 5297-5298.) During his testimony, appellant noted that before the incident for which he was on trial, he was working on a construction project. He got hurt when he was knocked off a roof and landed on his tailbone. (25 R.T. 5316-5317.)

Errors in the Trial Court's Shackling Decisions

There are four significant errors in the trial court's decision to shackle appellant during trial. First, the trial court made the initial decision to shackle appellant based **SOLELY** on unsworn allegations of general dangerousness made by the prosecutor. These allegations, however were disputed by the defense. There was simply **NO** evidence, let alone credible evidence, to support a shackling decision at the time it was made. The evidence presented **after** the shackling decision was made related entirely to the issue of how severe the physical restraints imposed should be.

Second, any physical restraints were simply unjustified on the facts of this case. Appellant had been coming to court for nearly two years prior to jury selection and had never manifested any sort of threat or behavioral

problem that would justify restraints in the courtroom. Instead, the trial court relied on its prior unsupported conclusion that as a purported gang member with a prior prison history of violence towards other inmates, appellant might present a problem in the courtroom. Therefore, the trial court's rationale for requiring the most severe restraints was based simply on the preference for a general prophylactic instead of the requisite legal standard - a measure of "last resort" premised on a demonstrated showing of "manifest need."

Third, even if it could be persuasively argued that restraints were warranted (which it cannot), equally effective but less restrictive alternatives were available. All of the law enforcement officers who testified showed the court that less restrictive alternatives likely would be effective in deterring any potential harm to witnesses. More to the point, nowhere did the trial court ever announce a finding that less restrictive alternatives would be ineffective or unworkable.

Fourth, even if it could be persuasively argued that the trial court's chosen restraints were appropriate (which it cannot) those restraints were improperly used in such a way as to cause appellant undue pain and suffering. An unjustified shackling that created undue pain and suffering for a defendant should be considered structural error. Therefore, no prejudice need be shown.

Finally, even if a showing of prejudice is required, that showing is manifest here. The shackling decision itself and the improper use of restraints caused severe pain. More importantly, the pain created by the restraints caused appellant to absent himself from trial. While the trial court

asserted that appellant's absence was voluntary; it was not. The evidence shows the pain inflicted by the shackling caused appellant to absent himself.

Moreover, in addition to the errors arising for the court's erroneous ruling on physical restraints, the trial court failed to get written waiver of the defendant's presence as required by statute. Had it done so, the record would have shown that Mr. Poore's absence was not voluntary. Additionally, the combination of the pain caused by the unjustified restraints coupled by the fear of being shocked by the stun belt obviously compromised appellant's ability to communicate with trial defense counsel, interfered with his concentration on witness testimony, clouded his judgment regarding trial strategy and undoubtedly affected his demeanor before the jury when he testified at the guilt phase.

Unjustified Restraint Violates Appellant's State and Federal Constitutional Rights

It has long been the law that the unjustified shackling of a defendant in court violates both state and federal law. Shackling may impair the accused's mental faculties and communication with counsel, cause unwarranted pain and discomfort; create an unwarranted aura of dangerousness and untrustworthiness, impair the presumption of innocence, as well as the dignity and decorum of the courtroom and violate an accused's right to due process, to a fair trial, to present a defense, to the effective assistance of counsel, to a trial by jury, and to a fair and reliable verdict determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 15, 16, and 17 of the California Constitution. (See *Estelle v. Williams*

(1976) 425 U.S. 501, 504-505 [forcing a defendant to stand trial in physical restraints may violate the Due Process clause and the Sixth Amendment right to trial by jury by undermining the presumption of innocence]; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712 [trial court's failure to consider or employ less drastic alternatives to shackling violated due process]; *Rhoden v. Rowland* (9th Cir. 1998) 172 F.3d 633 [unjustified shackling of defendant throughout trial violated due process]; *see also*, *Riggins v. Nevada* (1992) 504 U.S. 127 [forced medication which may have interfered with defendant's ability to follow the proceedings or communicate with counsel violated due process and Sixth Amendment trial rights.] .)

California courts also have long recognized the disadvantage a defendant faces when he appears in court shackled like a convict. Almost a century and half ago, this Court observed in *People v. Harrington* (1871) 42 Cal. 165,:

> "Should the Court refuse to allow a prisoner on trial for felony to manage and control, in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial should be reversed. In my opinion any order or action of the Court which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf." (*Id*., at p. 168.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the shackling issue was addressed by the United States Supreme Court. The court explained that

restraining a defendant is a measure that may be employed only "as a last resort" in an extraordinary case. (*Id*., at p. 344.) Explaining its decision, the court said:

> "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint." (*Ibid*.)

Shortly afterwards in *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105-106, cert. denied, 416 U.S. 959 (1974), the court discussed five factors supporting the rule against shackling the defendant in the courtroom: (1) physical restraints may prejudice the defendant in the minds of the jury, thus reversing his presumption of innocence; (2) the defendant's mental faculties may be impaired by the shackles; (3) communication between the defendant and his lawyer may be impaired by any physical restraints; (4) the dignity and decorum of the judicial proceedings may suffer; and (5) the restraints may be painful to the defendant. The court further held that a defendant may not be subjected to physical restraints of any kind in the courtroom, while in the jury's presence, unless a manifest need for the restraints has been demonstrated. (*Id*., at p. 105-106.)

In *People v. Duran* (1976) 16 Cal.3d 282, 290-291, **this Court affirmed California's reliance on the federal authorities**. The Court stated the general rule applicable to physical restraints and "reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind

in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (See also *People v. Covarrubias* (2016) 1 Cal.5th 838, 870.) Further:

> "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. (*Duran*, at pp. 291-292.)

The California Legislature has also limited the use of restraints in the courtroom. California Penal Code Section 688 provides, "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." (See former § 13, Stats. 1872.)

Under the standard set forth in *Duran*, the trial court's discretion to impose shackles is relatively narrow. (*Id*., at pp. 292-293; *People v. Cox, supra,* 53 Cal.3d 618, 651, disapproved on another ground in *People v. Doolin*, 45 Cal.4th at p. 421, fn. 22.) Thus, the "manifest need" required for the imposition of physical restraints "arises only upon a showing of unruliness, an announced attention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' ([*People v. Duran*, *supra*, 16 Cal.3d. at p. 292, fn. 1; see also *People v. Combs* (2004) 34 Cal.4th 821, 837.) Moreover, '[t]he showing of nonconforming behavior . . . must appear as a matter of record . . . . The imposition of physical restraints

in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.' (*Id*., at p. 291.)" (*People v. Cox*, *supra*, 53 Cal.3d at p. 651; *see also People v. Combs, supra*, 34 Cal.4th at p. 837, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

The federal courts have reached the same conclusion: due to the seriously debilitating effects inherent in the imposition of physical restraints on the accused during court appearances, the trial courts may impose them only to deal with "disruptive, contumacious [and] stubbornly defiant defendants" and even then only as a "last resort." *(Illinois v. Allen, supra*, 397 U.S. at pp.343, 344; *Spain v. Rushen, supra,* 883 F.2d at p. 721 see also *Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1485. [Shackling a defendant is only justified "as a last resort [citation], in cases of extreme need [citation], or in cases urgently demanding that action.[citation]"].)

Thus, the shackling decision is essentially a two part test. First, shackling is proper only if there is "manifest need," that is, a serious threat of escape, danger to those in or around the courtroom, or where disruption in the courtroom is likely. Second, restraints may be used only as a measure of "last resort."*(Illinois v. Allen, supra*, 397 U.S. at pp. 343, 344.) These two parts constitute a strict legal standard significantly different from, and significantly more demanding than a simple "parade of horribles"[22] based on frightened imagination and hypothetical conjecture, like those the

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[22] See Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 590-593 (1989-1990)

prosecution presented here.

Change in Jurisprudence

In *People v. Valenzuela* (1984) 151 Cal.App.3d 180, the appellate court noted that the decision in *Duran* has generally been read to require "that a defendant make specific threats of violence or escape from court or demonstrate unruly conduct in court before in-court restraints are justified." *(Id.,* at pp. 192-193.)

More recently, however, this Court has changed that longstanding jurisprudence. In *People v. Wallace* (2008) 44 Cal.4th 1032, 1050, this court concluded that evidence of a defendant's rules violations in jail while awaiting trial was sufficient to support the trial court's decision to restrain him. Moreover, a defendant's out-of-court misconduct could possibly support a finding of manifest need justifying courtroom restraints. (*Id*., at p. 1050.)

While emphasizing the "manifest need" language to impose shackles, this shift is nevertheless a shift in perspective. That is, the "manifest need" language obscures the other - and equal - part of the equation requiring that shackling only be used as a measure of "last resort" to control to "disruptive, contumacious [and] stubbornly defiant defendants"*(Illinois v. Allen, supra*, 397 U.S. at pp.343, 344).

After this court's decision in *Wallace*, the trial court has almost unlimited discretion to use shackling as a **prophylactic** to control defendants who **might** pose a danger to courtroom security, instead of a measure of last resort to control a disruptive, contumacious or stubbornly defiant defendant who actually exhibited disruptive behavior in the trial

court. That is not the law in federal court[23] and up until the *Wallace* decision, it was not the law in California. Prior to *Wallace*, this court repeatedly observed that a defendant's record of violence, or the fact he or she is a prison inmate, by itself does not justify shackling. (*See e.g. People v. Cunningham* (2001) 25 Cal.4th 926 at p. 986; *People v. Duran, supra*, 16 Cal.3d at p. 293.) More important, even a showing that a defendant had prior felony convictions involving the use of force or violence would be insufficient to establish the "manifest need" required to justify the use of restraints during trial. (*People v. Duran, supra*, 16 Cal.3d 282, 293.)

Indeed, in *Duran,* this court specifically disapproved the prior decision in *People v. Morris* (1971) 20 Cal.App.3d 659 [97 Cal.Rptr. 817], where the appellate court held that due to the vagaries inherent in any courtroom situation, shackling was a matter solely within the trial judge's discretion. Moreover, Morris placed a heavy burden on the defendant to show an abuse of discretion.[24] This court noted that such a view was

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[23] See *Stewart v. Corbin* (9th Cir. 1988) 850 F.2d 492 at p. 497 (9th Cir.); *Spain v. Rushen*, *supra*, 883 F.2d at p. 728 .

[24] In, *People v. Duran, supra*, 16 Cal.3d at p. 293,this court specifically observed:

> "In *People v. Morris* (1971) 20 Cal.App.3d 659 [97 Cal.Rptr. 817], it is stated that the decision to manacle a defendant was within the trial judge's discretion and that the jurors would disregard the presence of shackles as a collateral matter unrelated to the process of guilt determination. Morris held that "the vagaries of each individual case, the variation in security facilities in different jurisdictions, the conduct and attitude of a defendant and/or his counsel, and a myriad of other

inconsistent with the narrow discretion afforded trial court in shackling cases. (*Ibid*.)

As explained below, the facts here do not support the trial court's shackling decision. The facts here showed nothing more than unsubstantiated conjecture that appellant was a gang member with a checkered history of assaults against other prison inmates and who might act out against witnesses testifying against him. Not only was there no persuasive evidence of "manifest need," there was no evidence that shackling was a necessary measure of "last resort" or that lesser alternatives were not available. In fact, the opposite is true.

> factors all play a part in the decision of the trial judge as to what action must be taken with respect to restraints upon the defendant. The trial judge is in the very best position to make that judgment. We should adhere to the basic presumption that the trial judge has faithfully performed his duty until and unless the defendant shows without equivocation that there was no basis whatever for the restraint employed." (Italics added; id., at p. 666; see also *People v. Pena* (1972) 25 Cal.App.3d 414, 424-427 [101 Cal.Rptr. 804] and *People v. Earl* (1973) 29 Cal.App.3d 894, 900-901 [105 Cal.Rptr. 831], both of which adopt Morris' language concerning the trial court's power to order physical restraints and the defendant's burden to show the restraints were unlawfully imposed.) Morris is inconsistent with our views in that it not only affords the trial court virtually unlimited discretion to order shackling or other restraints but also places an extremely heavy burden upon the defendant to show an abuse of discretion. Accordingly, we conclude that to the extent *Morris, Pena* and *Earl* are inconsistent with this opinion they are disapproved."

Shackling Decision Made Before Any Evidentiary Support Showing Manifest Need

As noted above, when the hearing first convened on the prosecution's motion to have the defendant shackled, the trial judge observed that a showing of "manifest need" required the presentation of at least some evidence (1 R.T. 180-181), a ruling with which the defense agreed. (1 R.T. 180.) The court then summarized the prosecution's moving papers and listened to the defense dispute the factual allegations and offer to have additional deputies placed in the courtroom as a reasonable lesser alternative to shackling. At the conclusion of this brief hearing, and before a single witness had been called or a single document had been admitted into evidence, the court ruled that based on the matters presented, it found "good cause"[25] for imposing restraints. (2 R.T. 202-203.) The only remaining issue was the type of restraints to be used.

The facts set forth above demonstrate that the trial court made the shackling decision based solely on the prosecutor's disputed and unsworn assertions. As even the trial court recognized, absent agreement by the defense on the prosecution's factual assertions, the decision concerning manifest need required some evidentiary support. (1 R.T. 190-191.) The reason for requiring some sort of evidentiary showing is that a decision on "manifest need" must be based on fact, not "rumor and innuendo" (*People v. Cox, supra,* 53 Cal.3d at p. 651-652.)

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[25] From the previous discussion among counsel and the court concerning "manifest need,"it is nevertheless unclear from the context whether the court used the words "good cause," as a synonym for "manifest need," or whether the court was actually applying a lesser standard for the imposition of shackles.

Thus, despite a clear understanding of the required factual showing, and despite the absence of a single evidentiary fact or even so much as a sworn declaration by the prosecutor or other law enforcement official (1 R.T. 187), the trial judge apparently rejected the proposed lesser alternative of extra bailiffs in the courtroom and ruled that the defendant would be shackled in a manner to be determined later. Under those circumstances, the trial court's ruling was manifestly erroneous. (See *e.g. People v. Mar* (2002) 28 Cal.4th 1201 at p. 1221 [A trial court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others when ordering shackles or other restraints].).

Although it might be argued that this portion of the issue was forfeited because defense counsel did not object to the court's ruling on the precise grounds set forth above, the objection fairly presented the relevant constitutional principles that governed the court's ruling. As explained above, the trial court concluded that a ruling on the issue of "manifest need" for restraints had to be based on fact, and noted that the prosecution presented only its unsworn moving papers. (1 R.T. 180-181.) The defense agreed. Although an unsworn assertion of fact might be adequate support if the defense did not disagree, nevertheless, here, the defense not only disagreed with the prosecutor's assertions of fact but continued to object to the imposition of restraints at all. (1 R.T. 180-181.) Moreover, as explained in the recitation of underlying facts, in subsequent hearings, the defense reiterated its opposition to restraints and challenged the prosecution's factual basis for the imposition of restraints.

Nothing more was required of the defense. The defense made its position known to the trial court and disputed the prosecution's assertions of fact. On the facts presented here, any failure to make further objections to the ruling on "manifest need" would be futile. The defense was simply making the best of a bad situation brought on by the trial judge's erroneous ruling.

In that regard, this court's discussion in *People v. Coleman* (1988) 46 Cal.3d 749 is instructive. There, this court stated:

> "On this record, we find defense counsel did not waive or invite error. There is no indication of an express waiver, and in fact the more contemporaneous record indicates that defense counsel objected to the instruction but agreed to the supplemental instruction once it became clear that the Briggs instruction would be given. In addition, there was no clear tactical reason for defense counsel to agree to the giving of the Briggs instruction, and in the absence of such a purpose, we are reluctant to find invited error. [Citations] Defense counsel's decision to accept the supplementary instruction with the Briggs instruction does not abrogate his original objection to the instruction or constitute invited error. (*Id*., at p. 781 fn 26.)

Similarly, in *People v. Calio* (1986) 42 Cal.3d 639, 643, this Court observed:

> " '[a]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' [Citation.]" (*Id*., at p. 643.)

Given the state of the record at the time the ruling was made, no

further objection was required.

Focus on Courtroom Behavior

Perhaps it belabors the obvious, but before a defendant may be shackled there must be compelling evidence of imminent threats to **courtroom security** which are attributable to the defendant. *(People v. Duran, supra,* 16 Cal.3d at p. 293.) Thus the "focus rightly belongs on appellant's behavior in the trial court." *Stewart v. Corbin, supra,* 850 F.2d 492, 497. The "record must show the likelihood of escape from violence or a threat of violence or other nonconforming conduct in the courtroom." *People v. Jacla (1978)* 77 Cal.App.3d 878 at p. 883.

More to the point, not every possible threat to courtroom security will justify shackling. There must be "a serious threat of escape or danger to those in and around the courtroom, or … disruption in the courtroom [must be] … likely if the defendant is not restrained." *Hamilton v. Vasquez*, 882 F.2d at 1471. Further, "'the court is obligated to base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney.'" *People v. Mar*, *supra*, 28 Cal.4th at 1218, quoting *People v. Cox*, *supra,* 53 Cal.3d at pp. 651-652.

This Court has found the imposition of physical restraints to be an abuse of discretion in a number of cases, capital and non-capital. Cf.: *People v. Mar*, *supra,* 28 Cal.4th at 1220 [stun belt could not be justified by an alleged recent confrontation the defendant had with officers where the "trial court never required the security officers to present an on-the-record showing of the specific facts or details of the incident"]; *People v. Cox*, *supra,* 53 Cal.3d at 649-652 [neither shackling nor handcuffing warranted

even though: a) the defendant was charged with capital murder; b) defense counsel apprised court that the defense investigation revealed "some possibility that there may be an escape attempt in this case"; c) the trial court was not going to restrain the defendant until defense counsel requested that he be handcuffed to his chair; and d) the bailiff confirmed hearing several rumors about imminent escape attempt]; *People v. Duran*, *supra,* 16 Cal.3d at 293 ["No reasons for shackling the defendant appear on the record. There is no showing that defendant threatened to escape or behaved violently before coming to court or while in court"]; *People v. Seaton* (2001) 26 Cal.4th 598 at 651 [neither the capital-murder charge nor "the courthouse layout" justified "physical restraints"]Physical restraints may not be used "except as a last resort." *Deck v. Missouri* (2005) 125 S.Ct. 2009 at 2011, quoting *Illinois v. Allen*, (1970) 397 U.S. 337, 344.)

To the extent that the focus of the shackling decision should be on courtroom behavior, appellant's courtroom behavior was exemplary. As defense counsel pointed out, during **all** of his courtroom appearances in the nearly two years before the shackling decision was made, appellant had been a "perfect gentleman." (8 R.T. 1863.) Moreover there was **NO** testimony or **ANY** other evidence to the contrary on that point.

As explained below, because the appellant's courtroom behavior was exemplary, the prosecution chose instead to focus on events that occurred either during appellant's prior prison term, years before this trial, or on minor jail infractions. Most important, however, the prosecution relied heavily on speculation and innuendo to support its claim that as a purportedly dangerous gang member, appellant posed an unacceptable risk

to courtroom security.

Equally significant, because the judge made his decision to shackle appellant before the presentation of even a single shred of evidence, any argument that the trial court's decision was justified by the subsequent presentation of evidence of violent prior behavior is untenable. Such an argument would be nothing more than a post hoc rationale for a decision that, at its inception was blatantly violative of both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the federal constitution.

Moreover, as explained below, the evidence upon which the trial court based its decision to restrict appellant with a stun belt and then shackle him to a chair at its lowest and most uncomfortable setting for appellant did not even constitute a proper post hoc rationale. The evidence the court relied on was largely irrelevant because it was based on prior felony convictions and prior incarcerations. Moreover, the law enforcement testimony confirmed appellant's good behavior in court prior to this trial, but speculated that shackling was necessary as a prophylaxis to guard against the possibility of misbehavior in the courtroom.

None of the Evidence Demonstrated Manifest Need for Restraints.

Departing from the longstanding rule that courtroom behavior was a paramount consideration in the decision to shackle a defendant, this court held in *People v. Wallace, supra,* 44 Cal.4th at p. 1050, that a defendant's rules violations in jail while awaiting trial was sufficient to support a trial court's decision to use physical restraints in the courtroom. Nevertheless, clearly, not every minor jail rules violation would support a shackling

decision.[26]

Here for example, appellant was cited for smoking in jail (2 R.T. 219) and stepping through his handcuffs to make them more comfortable by moving them from back to front. (2 R.T. 242.) These are hardly examples of such dangerous threats to jail security that would support a reasonable inference that appellant posed a credible threat to courtroom security. Moreover, although appellant was also involved in a jail fight with his cellmate, that altercation apparently was not even serious enough to warrant a jail disciplinary citation. (2 R.T. 221.) Indeed, at the time of the hearing, there was no showing (let alone proof) that this fight was anything more than a mutual combat situation. Thus, there was only one jail fight that even resulted in a disciplinary marker, the fight with inmate Keyes. As for the syringe and nitroglycerine pills, while the prosecution asserted that they were to be used as a lethal "hot shot" to kill a witness (1 R.T. 194), Officer Miramontes testified to no such thing. He testified that the syringe could be used as a weapon in jail because it had a needle point and that if appellant swallowed the pills or put them in someone's food they could cause a health danger. (2 R.T. 228.) This was an insufficient basis for the restraints ordered by the court.

More significantly, however, corrections officials conceded that in his time in local custody, appellant never assaulted any jail staff member and treated all staff with respect. (2 R.T. 228-229, see also 2 R.T. 253-254.)

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[26] Even in *People v. Wallace*, *supra*, 44 Cal 4th 1032, appellant had been cited for 16 "rules violations while awaiting trial in the county jail," including "five jailhouse fights and possession of illegal razors." (*Id*. at p. 1050.)

(Compare, e.g., *People v. Lomax* (2010) 49 Cal.4th 530 at pp. 559-560, 562 [defendant's unprovoked violent attack on bailiff in courtroom holding cell sufficient to warrant restraints]; see also, *People v. Pride* (1992) 3 Cal.4th 195, 231-233 [shackling decision appropriate where defendant, who had muscular build, made threats of violence and behaved in a hostile manner toward deputies who transported him to and from courtroom]. Moreover there was no showing that appellant ever expressed an intent to escape from the courtroom, resisted officer's attempts to move him to or from the courtroom, or engaged in any threatening, unruly or violent behavior during transport or in the courtroom.

Precisely because there was no compelling (or even convincing) evidence of serious rules violations by appellant while he was in custody awaiting trial, the prosecutor relied on incidents that occurred years earlier during a prior prison incarceration to bolster his argument for shackling. First, the prosecutor elicited testimony from Officer Miramontes that appellant was previously placed in security house at Pelican Bay State Prison and Tehachapi State prison because he was allegedly a member of the Aryan Brotherhood. (2 R.T. 218.) The officer conceded, however, that he was not aware of any disciplinary markers from Pelican Bay. (2 R.T. 220.) Appellant was placed in administrative segregation in the Indio jail largely because he had been in security housing during those prior prison commitments. (2 R.T. 225.) Apparently this placement was standard operating procedure, rather than a reaction to any incidents during appellant's incarceration in the Riverside County Jail.

Officer Miramontes suggested that appellant be restrained because in

the officer's opinion, appellant posed a threat to other inmates who might appear as witnesses. Officer Miramontes said he based his opinion on appellant's assault of other inmates and his fight with his cellmate. In fact, Officer Miramontes admitted that he had no idea why the latter two fought or why the fight might justify restraints, explaining, "That's just my feeling." (2 R.T. 229.) He admitted, however, that while in the Riverside jail, appellant was housed in a tank with both Hispanic gang members and nonwhites but there were no problems. (2 R.T. 240.)

Under questioning by the prosecutor, Officer Miramontes admitted that it is general policy to restrain or handcuff inmates who are in administrative segregation. By contrast, he testified that other inmates in the general population were not handcuffed when staff moved them around the jail facility. (2 R.T. 231.) Although in the officer's opinion, if a jailhouse "snitch"[informant] were to testify against appellant, the "snitch" would be in danger. He conceded, however, that an informant would be in danger from the **entire general jail population**, not solely from appellant. (2 R.T. 235-236.)

Capt Tyrrell, from the Riverside County Sheriff's Department testified that because appellant had been in security housing at Pelican Bay, because he was a member of the Aryan Brotherhood and because "snitches" would be testifying against him, it would be safer for witnesses to have the appellant chained up than to use a stun belt. (2 R.T. 262- 266.) Under defense questioning, however, Captain Tyrrell admitted that it would be safer to have **ANY** defendant restrained regardless of the defendant's personal circumstances. (2 R.T. 266. (Emphasis added.) He also admitted

that gangs such as the Mexican Mafia, Southern Hispanics, and Black Guerrillas have reputations for violence that are similar to that of the Aryan Brotherhood. He admitted that he would prefer that **ALL** such gang members were restrained in the courtroom. (2 R.T. 268-269), but his testimony revealed no circumstances unique to the defendant that would justify shackles in the circumstances presented here.

Gang expert Duarte testified that he reviewed appellant's disciplinary file from his prior incarceration. Although appellant was placed in the security housing unit at Pelican Bay, because he was identified as a member of a prison gang, Duarte admitted that most likely he would have been placed there **regardless** of any disciplinary record. (2 R.T. 306.) According to his testimony, the Aryan Brotherhood is no more violent than any other prison gang. (2 R.T. 311.) Thus, appellant's purported association with that gang presented no proof supporting the call for harsh physical restraints.

Although there were 25 incidents of misbehavior listed in appellant's record, the most recent took place about 2 years prior to the charged homicide and 4 years prior to trial. Mr Duarte acknowledged that the fighting incidents, including an alleged stabbing claim, occurred between 1993 and 1996, at least three years before the charged incident and 5 years before guilt phase trial testimony began. (2 R.T. 309-310.). Moreover, Mr Duarte conceded that the fights between appellant and other inmates occurred primarily at Corcoran and Calipatria State Prisons where inmates are a little uptight and fights happen. (2 R.T. 316.)[27]

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[27] This concession essentially corroborated defense counsel's prior assertion that young men in prison get into fights. More important, this concession

The real heart of Mr. Duarte's testimony, however, was his assertion that because an informant would be testifying against appellant, if appellant were to assault the informant in the courtroom, the assault would enhance appellant's status within the gang. (2 R.T. 312.) For these reasons, he concluded that appellant should be restrained in the courtroom. (2 R.T. 312-313.)

Deputy District Attorney Bowser testified to similar concerns. He noted that appellant was alleged to have threatened witnesses near the time of the crime and speculated that subsequent conversations and letters initiated by appellant could have had the effect of urging other members of the Aryan Brotherhood to have the informant witness killed; or at least Mr. Bowser's own information led him to believe that a compilation of appellant's letters could have manifested such an intention. (2 R.T. 276-287.) Nevertheless, Mr. Bowser conceded that he found no evidence that

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also refuted the prosecution's implied assertion that appellant was the instigator of such fights or that such fights were unprovoked.

Indeed, as a matter of public record, "From 1989 to 1995, seven inmates were killed and 43 were wounded by guards firing assault rifles to stop inmate fights at Corcoran.... many of the fights occurred in the Security Housing Unit with the knowledge or approval of correctional officers. {para} The practice of guards pairing off rival inmates in tiny concrete exercise yards became known as "Gladiator Days." When the combatants then failed to heed the call to stop fighting, officers opened fire in the name of preventing inmate injuries." Eventually, eight corrections officers were indicted by the Department of Justice. At trial, however, they were acquitted. See the Los Angeles Times, *State Agrees to Pay $2.2 Million to Inmate Shot at Corcoran Prison,* May 16, 1999 by Mark Arax and Mark Gladstone. The article may be found at: http://articles.latimes.com/1999/may/16/news/mn-37888

appellant ever threatened the prosecution. (2 R.T. 288.)

Despite this purported litany of violence, the foregoing testimony was little more than a “parade of horribles,” that failed to provide an adequate rationale justifying the court’s prior decision to impose restraints. It did not constitute substantial evidence of a “manifest need” for restraints and it contravened most of the requirements for a showing of manifest need.

Nothing in this evidence supports a finding that appellant presented a unique or special danger to courtroom informant witnesses or law enforcement personnel that any other purported gang member would not. It is clear beyond peradventure, however, that the opinions of corrections officials concerning restraints were based on the notion that all members of violent prison gangs should be restrained while in the courtroom. (See e.g. 2 R.T. 229; 2 R.T. 266.) Nevertheless, their testimony revealed no facts unique to this defendant that posed some sort of special need for restraints.

Perhaps the most crucial determinant in the trial court’s shackling decision was the prosecution’s showing of altercations involving appellant that occurred during prior prison terms and appellant’s alleged requests for others to assault witnesses in this case. Such “evidence” however, is largely irrelevant. If the allegation that appellant shot an unarmed person 5 times at close range is insufficient to support a shackling decision, it is hard to imagine why prison fights that took place years before this trial would somehow be more probative of a grievous theat to courtroom security.[28] As

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[28] As Mr. Duarte admitted, many of these fights were simply “mutual combat” situations that took place on the general population yard at Calipatria State prison. (2 R.T. 316.)

this court has repeatedly pointed out "A defendant's record of violence, or the circumstance that he or she is a capital defendant, does not by itself justify shackling. (Citations.)" *People v. Cunningham, supra,* 25 Cal.4th 926, 986.)[29]

More to the point, the prosecution's recitation of these prior prison altercations amounted to nothing more than a species of bad character evidence that is relevant only if it conclusively demonstrated that appellant's behavior in court was in conformity with that conduct. In order to be lawfully admitted, however, evidence of uncharged offenses committed by a defendant must be relevant to prove some fact **other** than the defendant's disposition to commit criminal acts. (Evidence Code, section 1101, subdivision (a).) The fact that appellant was involved in prison fights with other inmates years before this trial was not probative of whether he would be likely to assault courtroom staff, witnesses or the prosecutor. The state's only purpose in presenting this evidence was to prove that appellant had a disposition to commit criminal acts.

Indeed, if there was any doubt about the matter, when the prosecution eventually presented evidence regarding the details of these altercations in the penalty phase, it showed that several of appellant's fights were with black or Hispanic inmates and were purportedly racially motivated. (See e.g.

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[29] In that same vein, the prosecution never presented **ANY** evidence that appellant "acted out" in any way during any previous trial or that he had to be restrained in any way during any previous trial. Evidence showing instances where appellant had to be restrained in a courtroom would be far more relevant to the shackling decision here than inmate fights on a prison yard that took place years before this trial.

27 RT 5911, 27 RT 5917-5918, 27 RT 5928-5929.) Even the fights involving other inmates had nothing to do with escape, assaults on law enforcement, courtroom staff/prosecutors or even assaults on the (mostly white) guilt phase witnesses.

Additionally, law enforcement and gang experts claimed that appellant was either an associate or a member of the Aryan Brotherhood; that the Aryan Brotherhood is a violent gang and further that assaulting witnesses and informants would enhance a defendant's status within that gang. (2 R.T. 312.) Perhaps so, but a lot of nonviolent activities would also enhance appellant's status within a gang. For example if the defendant were to make a rude hand gesture towards a testifying informant. That action would probably enhance his standing within a gang. But these generalized assertions of "gang status enhancement" were not only speculative, but were in no way probative of a the likelihood of violent behavior in the courtroom, particularly when there had been no incidents of such behavior during the proceedings. Given the facts of this case, such expert "opinions" were either speculative or did not establish any individualized suspicion that appellant himself would engage in such nonconforming conduct. *(People v. Hernandez* (2011) 51 Cal.4th 733, 742 [there must be "individualized suspicion" that a specific defendant would engage in nonconforming conduct in the courtroom if not physically restrained];*see also*, *People v. Sanchez* (2016) 63 Cal.4th 665, 676-677; *People v. Seaton, supra,* 26 Cal.4th 598, 652; *People v. Mejia* (2d. Cir. 2008) 545 F.3d 179, 191, .)[30]

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[30] By way of analogy:

The problem posed by the foregoing conjecture by the state's witness also existed with respect to testimony concerning appellant's purported

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> "It is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict--even more so when that expert happens to be one of the Government's own investigators. Any effective law enforcement agency will necessarily develop expertise on the criminal organizations it investigates, but the primary value of that expertise is in facilitating the agency's gathering of evidence, identification of targets for prosecution, and proving guilt at the subsequent trial. When the Government skips the intermediate steps and proceeds directly from internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its fact finding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense."

(People v. Mejia, *supra*, 545 F.3d at p. 191.)

In this case, the expert provided the crucial link necessary to establish the "inference" that because assaulting a witness would enhance his status within a gang, appellant was likely to assault witnesses in the courtroom regardless of the presence of armed deputies or other forms of interference. There is no evidence to support such speculation.

Indeed, it is clearly established law that speculation will not support an inference of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837.) Obviously, an expert's opinion is no better than the facts upon which it is based. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.) In other words, something is not so simply because an expert says it is so. Thus, the gang expert speculation offered here lacks evidentiary support and was irrelevant to the situation presented in the courtroom. The trial judge erred in considered it when making the shackling decision.

threats to other witnesses as well. For example, the prosecution alleged that appellant made a phone call fantasizing about eliminating a witness if he had an unobstructed opportunity. (2 R.T. 312.) Yet sitting behind a table in a courtroom secured by armed deputies precluded appellant from having an unobstructed opportunity to assault anyone.

In sum, the presentation of the correctional officer testimony amounted to nothing more than an expressed desire for maximum restraints as a prophylaxis for possible gang related violence. It did not show a “manifest need” for restraints or that restraints were necessary as a “measure of last resort” in this case. Indeed, the state’s unsubstantiated claims of the need for such measures served as the basis for virtually all the expert testimony presented by the prosecution on the shackling issue.

Less Restrictive Alternatives Were Available

The truly fatal flaw in the trial court’s shackling decision was the undisputed evidence that less restrictive alternatives were both available and would have been effective in eliminating the state's alleged concerns.

As a preliminary matter, the search for less prejudicial alternatives where constitutional rights are at stake is part of a much broader federal constitutional policy. See, e.g., *Shelton v. Tucker* (1960) 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (invalidating law that obligated school teachers to disclose the organizations to which they belonged in part because "less drastic means for achieving the same basic purpose" were available); *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, 267, 94 S. Ct. 1076, 1087, 39 L. Ed. 2d 306 (right to travel); *Dunn v. Blumstein* (1972) 405 U.S. 330, 342, 353, 92 S. Ct. 995, 1003, 1008, 31 L. Ed. 2d 274 (voter

residence laws);

Consistent with the foregoing constitutional principle, when evaluating the need for shackles, “Due process requires that shackles be imposed only as a last resort. In determining whether shackling is a last resort, a trial judge must consider the benefits and burdens associated with imposing physical restraints in the particular case. If the alternatives are less onerous yet no less beneficial, due process demands that the trial judge opt for one of the alternatives.” (*Spain v. Rushen*, *supra*, 883 F.2d at p. 728 , see also *Illinois v. Allen, supra*, 397 U.S. at 344; *Duckett v. Godinez* (9th Cir 1995) 67 F.3d 734, 748 , *Woodard v. Perrin* (1st Cir. 1982) 692 F.2d 220, 221; *Tyars v. Finner* (9th Cir. 1983) 709 F.2d 1274, 1284-85 *United States v. Esquer* (7th Cir. 1972) 459 F.2d 431, 433, cert. den., 414 U.S. 1006, 94 S. Ct. 366, 38 L. Ed. 2d 243 (1973) ("only in cases of extreme need")*; United States v. Theriault* (1976) 531 F.2d 281, 284 (5th Cir.), cert. den., 429 U.S. 898, 97 S. Ct. 262, 50 L. Ed. 2d 182("an extreme measure"); *Badger v. Caldwell* (9th Cir. 1978) 587 F.2d 968 ("trial court must look for corrective measures that do least injury to these rights consistent with the preservation of an orderly court atmosphere"); *United States v. Samuel* (4th Cir. 1970) 431 F.2d 610, 615-16, cert. den., 401 U.S. 946, 91 S. Ct. 964, 28 L. Ed. 2d 229 (1971) ("bound to have some prejudicial effect"); see also *People v. Mar* (2002) 28 Cal.4th 1201, 1206.*)*

Here, while virtually all of the sheriff’s deputies who testified preferred shackles, **NONE** testified that the courtroom deputies could not handle the defendant if they were stationed in a place near him. Indeed, as explained above, Officer Miramontes admitted that he and three deputies

were present in the courtroom and were trained on how to subdue a prisoner. (2 R.T. 242.) As he testified, if they were worried that appellant might pose a danger to a witness, they could probably handle the situation. (2 R.T. 243.)

Captain Tyrrell testified that if appellant was wearing a stun belt, activating the stun belt would cause an immediate jolt. Usually, the wearer dropped right to the floor, but a particular defendant might be able to take step or two before dropping to the floor. The prosecutor then asked how long it would take two deputies to subdue the defendant if they were stationed as they currently were in the courtroom, that is, one seated near the defendant and one seated in the back of the courtroom. Captain Tyrrell testified that the deputies would not be stationed like that at trial. Both would be stationed right behind the defendant, and would be either seated or standing. (2 R.T. 272.) As noted in footnote 20 , the prosecutor never asked Captain Tyrell how difficult it would be, or long it would take deputies to subdue a defendant if the deputies were placed right behind him.

When Deputy District Attorney Bowser testified that a stun belt might take a while to work, thus allowing a disruptive defendant to at least initiate an assault, he also admitted that placing an obstacle such as a chair between appellant and the well in the courtroom would slow any attempt by appellant to reach a witness, probably in time for the stun belt to work. (2 R.T. 289.) [31]

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[31] It should be noted also, that Deputy District Attorney Bowser admitted that he was not familiar with the sort of stun belt that would be used in this case. His testimony was based on the sort of stun belt that was in use at least 18 years ago when he was a Deputy Sheriff, before he became a lawyer. (2 R.T. 273-274.) Thus, because he was not familiar with the kind of stun belt currently in use by the Sheriff's office and did not know if it suffered from the same or similar defects that plagued stun belts used two decades ago, his testimony was

The foregoing testimony was uncontested and demonstrated conclusively that the presence and placement of deputies or obstacles in the courtroom would be adequate to prevent any attempted assault by the defendant. Nevertheless, when ruling on the need for shackles, the trial court made no reference to any of the deputies' testimony. Nor did the court explain why the security provided by the deputies or a stun belt would be inadequate to prevent any attempted assault by a defendant. Given that there was no testimony or other evidence that measures less onerous than shackling appellant to a chair would fail to prevent an assault, the trial court clearly abused its discretion. As explained above, if the alternatives provided are less onerous yet no less beneficial than shackles, due process requires that the trial judge use the less restrictive alternative. (*Spain v. Rushen*, *supra*, 883 F.2d at p. 728 , see also *Illinois v. Allen, supra*, 397 U.S. at 344.

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speculative, irrelevant and should not have been considered on the issue. (See California Evidence Code § 350 ["No evidence is admissible except relevant evidence."]; see *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Evidence is therefore admissible only when it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.).

Since judges are presumed to know the law (*Walton v. Arizona* (1990) 497 U.S. 639, 653 [110 S.Ct. 3047, 111 L.Ed.2d 511], overruled on another ground in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]), the judge should have realized that Mr. Bowser's testimony was irrelevant and should not have considered it when making the shackling decision. Nothing in the record indicates that the judge ignored Mr. Bowser's testimony; nor is there anything else in the record showing that his testimony did NOT contribute to the judge's shackling decision.

Prejudice

In general, a constitutional error does not automatically require reversal of a conviction and most constitutional errors can be reviewed for harmless error. (*Arizona v. Fulminante* (l 991) 499 U.S. 279, 306-307, citing *Rushen v. Spain* (1983) 464 U.S. 114, 117-118, and fn. 2 (denial of a defendant's right to be present at trial).

There are however, some constitutional rights which are so basic to a fair trial that their absence can never be treated as harmless error. (*Chapman v. California* (1967) 386 U.S. 18.) In particular, this Court has previously recognized that the unjustified shackling of an accused is inherently prejudicial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 997, citing *People v. Duran, supra*, 16 Cal.3d 282.) Nevertheless, trial errors which occur during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented, may be subject to harmless error analysis if the prosecution proves beyond a reasonable doubt that the error did not affect the fairness or the reliability of the trial. (*Arizona v. Fulminate* (1991) 499 U.S. 279 at p. 308; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

By contrast, structural defects in the trial itself which "affect the framework within which the trial proceeds" are not "simply error in the trial process itself' and therefore defy harmless error analysis. (*Id.* at 309-310.) Such structural errors include the denial of counsel *(Gideon v. Wainwright* (1963) 372 U.S. 335), the denial of counsel of choice (*United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 126 S.Ct. 2557), the denial of a public trial *(Waller v. Georgia* (1984) 467 U.S. 39), the denial of an

impartial decision maker (*Tumey v. Ohio* (1927) 273 U.S. 510), and racial discrimination in the selection of the grand jury *(Vasquez v. Hillery* (1986) 474 U.S. 254).

Appellant contends that the trial court's decision to shackle him produced numerous structural errors which defy harmless error analysis. First, the decision to shackle appellant stripped him of his presumption of innocence and undermined the legitimacy of the trial. Second, the shackling suggested that the trial court may have pre-judged the case and exhibited bias against appellant. Third, and perhaps most important, because Mr. Poore was shackled apparently without considering the less restrictive and readily available alternatives, the pain from the unjustified shackling impaired his ability to consult with counsel, affected his demeanor at counsel table and on the witness stand, and ultimately drove him from the courtroom at two further proceedings involving jury selection.

The consequences of the unnecessary and excessive shackling of appellant bear directly on the "framework within which the trial proceeds" and affected the entire trial. (See*, United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 at p. 150, citing *Arizona v. Fulminante, supra*, 499 U.S. at 310.)

Therefore, because of the extensive harm caused by the unconstitutional restraints, each of appellant's criminal convictions must be vacated, without any further showing of prejudice, because each conviction was obtained at a criminal trial which was fundamentally unfair, unreliable and structurally unsound.

Even if a prejudice analysis was called for, shackled defendants are

not required to make a specific showing of prejudice. Rather, the presumption is that there was prejudice. The question then becomes whether the shackling was nevertheless justified under the circumstances. See, e.g., *Kennedy v. Caldwell* (6th Cir. 1973) 487 F.2d 101, 107, cert. den., 416 U.S. 959, 94 S. Ct. 1976, 40 L. Ed. 2d 310 (1974); *United States v. Samuel* (4th Cir. 1970) 431 F.2d 610, 615, cert. den., 401 U.S. 946, 91 S. Ct. 964, 28 L. Ed. 2d 229 (1971); *Loux v. United States* (9th Cir.) 389 F.2d 911, 919, cert. den., 393 U.S. 867, 89 S. Ct. 151, 21 L. Ed. 2d 135 (1968). That is,"the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" *Deck v. Missouri, supra,* 544 U.S. at p. 635 (quoting *Chapman* v. *California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705). Moreover, the amount of prejudice which may flow from a decision to impose physical restraints is not constant; instead, the degree of prejudice is a function of the extent of the shackles that are applied and their effect on the defendant. (*Spain v. Rushen, supra*, 883 F.2d at 722.)

Unquestionably, shackling presents a number of distinct and potentially unconstitutional disadvantages. First, it has long been recognized that one of the highest costs incurred in shackling the accused is the pain and suffering it causes: Lord Coke commented more than three hundred years ago that "if felons come in judgment to answer they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason." (*Spain v. Rushen, supra* at p. 723, quoting 3 *Coke Inst*. 34 (1797).)

Another danger is the possibility that the defendant may feel confused,

frustrated and embarrassed, thereby impairing his mental faculties. (*Id*. at p. 722.) Third, excessive shackling can seriously interfere with the defendant's ability to cooperate and communicate with his attorney. (*Ibid*.) Finally, the use of unnecessary restraints is an affront to the court and an insult to the non-violent accused: "manacles, shackles, waist belts and chains are painful devices ... [which] engender pain, humiliation, rage and resentment. (*Id.* at p. 715, fn. 3)

Despite the appellant's perception that he had done nothing to warrant these special restraints and the obvious discomfort they inflicted, it is difficult to deny that the restraints impaired the appellant's ability to concentrate on the proceedings or meaningfully participate in his defense. Even though appellant is not required to enumerate specific instances of prejudice, those set forth below demonstrate prejudice beyond peradventure.

Prejudice - Pain Caused by the Shackles

As explained in the fact section above, during jury selection, defense counsel asked the court to raise the seating height of Mr. Poore's chair. Defense counsel argued that the chair height needed be raised for three reasons: first, appellant was quite tall and the improper height caused his knees to be practically at chest height. Thus, he was very uncomfortable. Second, appellant was already uncomfortable with the stun belt so the height of the chair exacerbated the problem and made him doubly uncomfortable. Third, since appellant had been a "perfect gentleman" at trial, there was no reason to inflict the extra pain caused by the improper chair height. Counsel requested that the chair be raised a couple of inches, at least to the level of counsel's chair. (8 R.T. 1863.) The prosecutor objected noting that the

Sheriff's department originally concluded that the chair was the most effective when the seat was at its lowest level. (8 R.T. 1863-1864.)

The court ruled that shackling to the chair was an issue discussed previously and that it ordered that the highest security measures be taken in this case. Chair height was one of the security measures. (8 R.T. 1864.)[32]

Later in jury selection, defense counsel again told the court that the lowered seat height was "extremely uncomfortable" for Mr. Poore because he could not lean back. (9 R.T. 1985.) Counsel urged that raising the seat an inch or two would not affect courtroom security since Mr. Poore was belted to the seat. Further, jail records show that Mr. Poore had been medicated for a bad back and the chair height aggravated the injury. (9 R.T. 1986.)

The prosecutor again objected, noting the discussion in previous hearings. Moreover, the prosecutor stated that he previously sat in the chair in restraints and could stand, albeit with some difficulty. Deputies told him that if the chair was lowered, it would be harder to stand. (9 R.T. 1986.)

The trial judge stated that he always intended the chair to be at the lowest setting, and if it had been raised, that action would be in violation of his order. Further, even though appellant's chair was lower than the other counsel chairs, appellant's own height made everyone approximately equal.

The rationale of lowering the appellant's chair to keep all the participants at roughly the same height does not withstand even the mildest scrutiny. Visibility was not the issue. Setting the chair at the lowest height

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[32] It should be noted that prior to appellant's complaint, NOTHING in the record reflects a discussion of chair height, nor did the trial court ever say that it wanted the highest level of security available.

only increased the defendant's pain and this is the fact on which the court should have been focused. Moreover, as trial defense counsel pointed out, raising the seat just a few inches was not causally related to courtroom security. As explained above, no deputy testified that appellant could be restrained only if the chair was at its lowest setting and all conceded that appellant could be handled even if there was no shackling whatsoever.

Even if a jail deputy's unsworn assertion to the prosecutor could be credited by the trial judge (which it cannot) what the deputy told the judge was that it would be safer if the chair was at the lowest setting. That is not the test. The test is whether appellant would present an unreasonable danger to the security of the courtroom if another lesser form a shackling was imposed instead. The same can be said of the prosecutor's assertion that he tried the chair and it was more difficult for him to get up if the chair was set on the lowest setting.

The court noted that it would reconsider the chair height if there was evidence that the chair was aggravating Mr. Poore's medical condition. In that regard, however, the court erroneously concluded that the jail records saying that Mr. Poore could not get out of bed because of the back pain was not sufficient evidence of discomfort. (9 R.T. 1986-1987.) Indeed, at a later session during hardship screening for prospective jurors, Mr. Poore was absent. Defense counsel told the court that jail personnel took Mr. Poore away for x-rays and jail personnel would not tell him anything further. (9 R.T. 2036.) Significantly, there is no indication in the record that this medical procedure was somehow unrelated to his spinal issues or what the

outcome of the x-ray procedure was and the court didn't bother to find out.[33]

As noted above, more than 300 years ago Lord Coke recognized that a high cost of shackling is the pain imposed and the consequential burden placed on the body and mind of the defendant. Apparently paraphrasing (and expanding upon) Bracton, Lord Coke observed:

> Bracton saith . . . if felons come in judgment to answer they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason. . . . And in another place he saith . . . It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted.

3 Coke Inst. 34 (1797), quoted in Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis Univ.L.J. 351 (1971). While shackles used today may be less painful, they may still cause enough pain to be improper. (See *United States v. Whitehorn* (D.D.C. 1989) 710 F. Supp. 803, 840, rev'd on unrelated grounds sub nom. *United States v. Rosenberg* (D.C.Cir. 1989) 888 F.2d 1406.))

Indeed, "The unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment which is forbidden by the Eighth Amendment" and, if pain is inflicted on a pre-trial detainee, then the wanton infliction violates the Fifth and Fourteenth Amendments as well. (See, *Hope v. Pelzer* (2002) 536 U.S. 730, 737.) Unnecessary and wanton inflictions of pain are those acts that are "totally without penological justification." (*Ibid*.)

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[33] If, as seems likely, evidence that would be revealed during appellant's habeas corpus investigation shows that this absence was related to a spinal condition that led to appellant's multiple spinal surgeries shortly after he was delivered to San Quentin, there may be a significant discovery or withholding evidence violation here as well.

Here, the undisputed evidence shows that the appellant was in pain as a result of the shackling decision and that he repeatedly complained about the pain. (8 R.T. 1863; 9 R.T. 1985.) Nevertheless, the judge remained intractable, despite undisputed evidence to the contrary. That is, the judge found that the jail records showing back pain and that the defendant could not get out of bed were of no real value. Moreover, there was apparently no inquiry on the record into the reasons for or the result of the defendant's removal for medical examination. The trial judge's offer to revisit the shackling issue if additional evidence presented itself was clearly an empty gesture. The trial judge simply rejected the undisputed evidence before him. Under those circumstances, there is virtually no reasonable evidence that the defense could have presented that would have persuaded the trial court to re-examine its ruling or change its mind.

In sum, the trial court's actions here were simply a revival of the discredited "Morris" doctrine. That is, because of the myriad scenarios set forth by the prosecution that might (or might not) play out, the trial judge simply exercised his unfettered discretion to impose shackles and to implement them in such a way as to cause the defendant significant pain.

Missing from the trial judge's ruling was any sort of rigorous analysis of whether shackles were even warranted, or whether lesser restraints were appropriate. Further, even if shackling was appropriate, the record does not indicate whether the trial judge engaged in an evidentiary analysis concerning why the shackles imposed were appropriate or whether other less painful methods would have achieved the same results. What little analysis is on the record appears to confirm that the trial judge relied on his own belief

that shackling was appropriate ab initio. As explained above, no evidence of any sort had been presented when the shackling decision was initially made. Further, there is no indication that the trial judge made either the shackling decision or the decision concerning the appropriate type of shackling based on relevant evidence concerning jail or courtroom behavior. Rather, those decisions were based, in large part, on fights that occurred in appellant's prior incarceration years before the instant trial, and which involved generic gang and/or racial issues that were not involved in this case and would NOT affect the security of the courtroom in this trial. The shackling ruling was therefore an abuse of discretion.

Additional Prejudice - Impairment of the Right to Participate in the Trial

Directly related to the pain caused by the shackles was the defendant's absence from the courtroom. Of course a defendant always has the right to be present at his own trial. *Badger v. Caldwell* (9th Cir. 1978) 587 F.2d 968, 970. Moreover, his presence secures other fundamental guarantees such as the right to confront witnesses, the right to help prepare his own defense by assisting counsel during trial, the right to listen to testimony, and the right to testify on his own behalf. See *United States v. Gagnon* (1985) 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., *Illinois v. Allen* (1970) 397 U.S. 337, 25 L. Ed. 2d 353, 90 S. Ct. 1057, but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.") (per curiam); *Badger,* 587

F.2d at 970-71[34]; *United States v. Latham* (1st Cir. 1989) 874 F.2d 852, 856. Indeed, a criminal defendant has a general right to be present at every stage of his trial, **including jury selection**. (emphasis added)(*Illinois v. Allen* (1970), 397 U.S. 337, 338, 25 L. Ed. 2d 353, 356, 90 S. Ct. 1057, 1058.) Moreover, in a capital murder trial the accused should be personally present so that the public may see that he is being dealt with fairly and not unjustly condemned, and to "'keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.' [Citation]" *(Waller v. Georgia, supra*, 467 U.S. 39, 46.)

In addition to his constitutional right to be personally present at the guilt phase of the trial, appellant also had a statutory right to be personally present at the trial where his life hung in the balance. (see California Penal Code sections 977 and 1043.

At the time of appellant's trial, section 977 (b)(1) provided, inter alia,

> "in all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of the plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of the sentence. **The accused shall be personally present at all other proceedings unless he shall, with leave of court, execute in open court, a written waiver of his right to be personally present**." (Emphasis added.)

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[34] In *Badger,* the court noted that "The Supreme Court has stated that the confrontation,' clause of the Sixth Amendment guarantees the right of an accused to be present not only whenever testimony is taken, [*Massachusetts v.] Snyder, supra*, 291 U.S. at 102, 54 S. Ct. 330, but 'in the courtroom at every stage of his trial.' *Illinois v. Allen,* 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353 (1970)"

Similarly, at the time of the trial, section 1043 provided, in relevant part,

"(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at trial. (b) The absence of the defendant in a felony case shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that the trial cannot be carried on with him in the courtroom; (2) any prosecution for an offense which is not punished by death in which the defendant is voluntarily absent." (See, e.g., *People v. Majors* (1998) 18 Cal.4th 385, 414.)

Read together, these sections provide that a death penalty defendant may not voluntarily absent himself during trial unless he has engaged in disruptive behavior before trial and the court has reason to believe the disruptive behavior will continue. *(People v. Huggins* (2006) 38 Cal.4th 175, 201-02.) These two statutory mandates do not permit a capital defendant to be absent from the courtroom except under very narrow and limited circumstances.

A violation of sections 977 and 1043 which results in the defendant's absence from critical stages of his trial further violates the United States Constitution. This is so because an arbitrary violation of a state statute which deprives a defendant of a state-created liberty interest violates the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 477 U.S. 343, 346; see also *People v. Butler* (2009) 46 Cal.4th 847, 861. [state created right under CA Const. Art. 1 is generally coextensive with the due process federal right].) As noted above jury selection is a critical stage of

trial. (*Illinois v. Allen, supra*, 397 U.S. at p. 338.)

The trial court failed to comply with the statutory mandate of sections 977 and 1043. Clearly there was a failure to execute a knowing and voluntary written waiver.

Moreover, appellant could not be involuntarily excluded from the guilt phase of the trial because he was not disorderly, disruptive or disrespectful; on the contrary, the defense explained to the judge that appellant was in pain from the shackles and chair height. (8 R.T. 1863.) Thus, it was the improper shackling that led appellant to request, that he be allowed not to be present for further juror selection because the pain was too severe. (9 R.T. 1988.)

The trial court ruled on the record that appellant was free to absent himself. (9 R.T. 1988.) At the next session of court, Mr. Poore was not present and the court noted on the record that the defendant voluntarily absented himself. (9 R.T. 1990.)[35]

The next day during additional hardship screening for prospective jurors, Mr. Poore was again absent. Defense counsel told the court that jail personnel took Mr. Poore away for x-rays and jail personnel would not tell him anything further. (9 R.T. 2036.) The judge continued hardship screening in the absence of the defendant anyway, without inquiring whether the reason for his absence was related to the pain caused by the shackles or whether the shackles exacerbated his back condition. (9 R.T. 2036.) [36]

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[35] It should be noted that actions involving jurors took place in the defendant's absence. Alternate juror number 4 was NOT excused for hardship on that date. (9 R.T. 2021.)

[36] It should be noted again that in the defendant's absence, juror numbers 8 and 9 as well as alternate juror number 3 were NOT excused for

Although the court characterized appellant's absence from the courtroom as a voluntary relinquishment of his right to be present, the pain from being shackled to the chair belies the court's characterization. As a preliminary matter, the United States Supreme Court has repeatedly emphasized that there is a high standard of proof which is required to demonstrate that the defendant waived one of his fundamental constitutional rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Waiver is "an intentional relinquishment or abandonment of a known right or privilege." (*Id*. at p. 464.) To preserve the fairness of the trial process the United States Supreme Court has established "an appropriately heavy burden on the Government before waiver can be found." (*Schneckloth v. Bustamante* (1973) 412 U.S. 218, 236.)

The State bears the burden of showing a valid waiver of constitutional rights in a criminal case. (*Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 275- 280.) The existence of a valid waiver depends on "the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." (*Ibid*.) A defendant's waiver of a fundamental constitutional right is not valid unless the waiver is truly "voluntary." *(Whitmore v. Arkansas* (1990) 495 U.S. 149, 165.)

A waiver is voluntary if, under the totality of the circumstances, it is the product of a free and deliberate choice rather than coercion or improper inducement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178; *United States v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074. Conversely, a waiver is involuntary if it stems from coercion-either mental or physical. (See, e.g.,

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hardship during that day's session. (9 RT 2050.)

Brady v. United States (1970) 397 U.S. 742, 752.)

In certain cases a decision to waive the right to pursue legal remedies in a criminal case may be involuntary if it results from coercion or duress: a procedure may be inherently coercive if it imposes an impermissible burden upon the assertion of a constitutional right. (*United States v. Jackson* (1968) 390 U.S. 570, 582-583.) In particular, a decision to waive the right to pursue legal remedies may be involuntarily induced by the defendant's onerous conditions of pre-trial confinement. (*Smith v. Armantrout* (8th Cir. 1987) 812 F.2d 1050, 1058-59 (reviewing decision of the district court on whether petitioner's conditions of confinement rendered his decision to waive appeals invalid); *Groseclose ex rel. Harries v. Dutton* (M.D. Tenn. 1984) 594 F.Supp. 949, 961.) The United States Supreme Court has recognized the crippling effect of oppressive conditions of pre-trial confinement in involuntarily inducing waivers of fundamental constitutional rights and has held that any waiver of a fundamental constitutional right is not "effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause [of the waiver]." (*Minnick v. Mississippi* (1990) 498 U.S. 146, 155.)

Though constitutional rights may be waived, the government may not procure a waiver of an accused's rights through unconstitutional conditions. (*United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 866.) An unconstitutional condition exists where the government uses overwhelming leverage to coerce a person into accepting a waiver of his or her constitutional rights. (See, *Kathleen M. Sullivan, "Unconstitutional Conditions,"* 102 Harv.L.Rev. 1413, 1428 (1989)). Giving the government

free rein to exact such coercive waivers of a defendant's constitutional rights "creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals, and gradually eroding constitutional protections." *(United States v. Scott, supra*, 450 F.3d at 866.)

Here, because appellant had never been disrespectful in court and because there was no written waiver of the right to be present, appellant's absence clearly violated sections 1043 and 997. Further, the trial court erred by failing to make any findings concerning the reasons for excusing appellant from his capital murder trial and also by failing to make any determination that the waiver of appellant's personal presence was entered knowingly, intelligently and voluntarily without any coercion or duress.

More to the point, however, even if the waiver was valid without being in writing, the waiver was coerced by the trial court because appellant's shackles caused undue pain and suffering with no legitimate cause. Thus, the error in permitting him to waive his personal presence at trial as the only alternative to avoid continued shackling was both grievous and not harmless beyond a reasonable doubt.

Finally, even if it could be argued persuasively [which it cannot] that the defendant's initial absence was voluntary, his absence from trial for the second time was certainly NOT voluntary. Law enforcement simply removed him from jail (hereby excluding him from trial) and took him away for x-rays. Law enforcement wouldn't even tell defense counsel where it took him or the reason why he was taken to see a physician for x-rays. (9 R.T. 2036.) There is nothing in the evidence that the prosecution can point to that would show that this absence was voluntary. Therefore, absent some evidence of a

knowing and voluntary relinquishment of the right to be present at a critical stage of trial, the error is prejudicial.

Additional Prejudice - Shackles Violated the Dignity and Decorum of the Courtroom

The dignity and decorum of the judicial proceedings may suffer as a result of unjustified physical restraints. The United States Supreme Court has mandated that trial courts consider this factor before ordering restraints. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 344.) In this situation, the dignity and decorum of judicial proceedings was destroyed by the totally uncalled for and unnecessary shackling. Indeed, to permit shackling of any defendant without proper due process constraints insults the system as a whole.

This Court has also consistently denounced the imposition of unnecessary restraints on a defendant during trial. The practice is condemned because of "possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant[] … ." *(People v. Duran, supra*, 16 Cal.3d at p. 290.) We join our high court in denouncing unnecessary shackling as an "affront to human dignity," which can foment "disrespect for the entire judicial system … ." (*Ibid*.)

Although the record in this case does not disclose whether any members of the jury observed appellant wearing shackles or sitting with obvious restraints, it remains a possibility that such an observation might have been made. Indeed, the judge admitted that the jury could see the bulge in appellant's jacket from the stun belt, but he hoped the jury would not understand what it was. (3 R.T. 542-543.)

Nevertheless, the trial court never inquired of the jurors whether they saw the restraints nor did it instruct the jurors that any visible restraints were not to be considered during their deliberations. Thus, this reviewing court has **no factual basis** upon which to make a determination that the jurors could **NOT** see the restraints or understand what they represented. (See e.g. *Deck v. Missouri, supra,* 544 U.S. ____ [125 S.ct. 2007, 2015; 61 L.Ed.2d 953] [Death sentence reversed even though record ambiguous about whether the jury saw the restraints or the effect the restraints had on the jury.][37]

Additional Prejudice - Shackling Affected Appellant's Demeanor at Trial and Prevented Him from Fully Participating in His Defense.

"In addition to their prejudicial effect on the jury, shackles may distract or embarrass a defendant, potentially impairing his ability to participate in his defense or serve as a competent witness on his own behalf. (*Deck v. Missouri*, *supra,* at p. 630; *Duran,supra*, at pp. 288–290; *People v. Harrington, supra,* 42 Cal. 165, 168.) Similar concerns have been raised

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[37] Although it does not appear than any instructions were given to the jury to ignore the defendant's physical restraints, to the extent that the instructions given could be construed to convey such a warning, the warning would have been futile. It is certainly true that an instruction telling the jury to ignore the restraints can have some efficacy. Nevertheless, although " "we may presume that jurors can follow such an admonition [citation], [but] 'if reviewing courts automatically find that an admonition and presumption that jurors follow it cure the failure to make a determination that shackling is necessary, trial courts could shackle prison inmates as a matter of routine, knowing that a subsequent admonition and appellate presumption would in most cases render any abuse of discretion harmless. . . . [Thus,] a blanket application of the presumption could, as an unintended consequence, undermine the trial court's *sua sponte* obligation to make a determination on the record that shackling is reasonably necessary.' [Citation.]" (*People v. Miller* (2009) 175 Cal.App.4th 1109, 1117

about the use of physical restraints not normally visible to the jury, like stun belts. (*People v. Mar, supra,* 28 Cal.4th 1201, 1218–1220.)

Moreover in *Duran, supra*, this court said, "we held over 100 years ago in *People v. Harrington, supra,* 42 Cal. 165, that 'any order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.' " (*Ibid*.) Therefore, to avoid these impediments to a fair trial, a defendant may not be required to wear physical restraints during trial until there is a showing of manifest need. (*People v. Mar*, *supra,* 28 Cal.4th at pp. 1216, 1219.)

Additionally, as the United States Supreme Court observed: "One of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint." (*Illinois v. Allen*, *supra*, 397 U.S. at 344.) Even though appellant was not gagged, the shackling here amounted to virtual total restraint.

Further, as this court pointed out in *People v. Mar, supra*, 28 Cal.4th at p. 1224.) "From the cold record before us, it is, of course, impossible to determine with any degree of precision what effect the presence of the [restraint] had on the substance of defendant's testimony or on his demeanor on the witness stand." But the possibility of an impact on defendant's mental

faculties or demeanor cannot be dismissed. (*Cf., ibid*. [defendant "clearly stated that the device made it difficult for him to think clearly and that it added significantly to his anxiety"].) Such potential impact is crucial in this case. Here, to a significant extent, "the resolution of this matter turned [] on the jury's evaluation of the credibility of the witnesses, an evaluation that depended in large part upon the demeanor of each witness on the witness stand." (*Ibid*.) As this Court also noted in *People v. Mar*: “Even when the jury is not aware that the defendant has been compelled to wear a [restraint], the presence of the [restraint] may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury....” (*People v. Mar, supra,* 28 Cal.4th 1201, 1219.)

Moreover, unlike the discredited “*Morris*” doctrine, the burden is **NOT** on the appellant to show that there was no basis whatsoever for the trial court’s ruling. Instead, in order to prevail on a claim that the error here was harmless, the **prosecution has the burden** to show that not only was the shackling decision proper, but it did not cause undue pain; it did not affect appellant’s participation in this trial, and that it did not detract from the dignity and decorum of the trial. There is simply no evidence of record upon which respondent could make those claims.

Finally, if the cumulative effect of the unnecessary physical restraints adversely impaired the defendant's ability to participate in the trial proceedings or consult with his attorney, then the resulting conviction is a violation of due process. *(Spain v. Rushen, supra*, 883 F.2d at p. 728.) That is certainly the case here.

For these reasons, both the initial shackling decision and the level of pain caused by the unduly restrictive shackling were grossly improper. Therefore, appellant's judgment of conviction must be reversed.

II.

DISMISSAL OF PROSPECTIVE JURORS WHO WOULD LISTEN TO THE EVIDENCE AND CONSIDER VOTING FOR EITHER DEATH OR LIFE IMPRISONMENT CANNOT BE EXCUSED ON GROUNDS THAT THEY COULD NOT BE ABSOLUTELY SURE THAT THEY COULD IMPOSE THE DEATH PENALTY. THEIR DISMISSAL WAS IMPROPER AND VIOLATIVE OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS THE CALIFORNIA CONSTITUTION.

Summary of Argument

The trial court excused several prospective jurors for cause pursuant to prosecution challenges urging they could not vote for the death penalty. The record does not support the trial court's ruling excluding prospective jurors Siebert and Walker because even though they were not absolutely certain whether they could vote for the death penalty in this case, their views would not have prevented or substantially impaired the performance of their duty as jurors. Therefore, the dismissal of these jurors violated appellant's right to be tried by a fair and impartial jury and his right to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and under article I, sections 7, 15, 16 and 17 of the California Constitution, and reversal of appellant's sentence is therefore required. (*Wainwright v. Witt*

(1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 105 S.Ct. 844]; *Gray v. Mississippi* (1987) 481 U.S. 648, 658 [95 L.Ed.2d 622, 107 S.Ct. 2045]; *People v. Mickey* (1991) 54 Cal.3d 612, 679-680; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112 [269 Cal.Rptr. 530]; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266.)

Factual Background

In her jury questionnaire, prospective juror Siebert was very much in favor of the death penalty. Question 53 asked her to describe her general feelings about the death penalty. She replied that she was "for it." (15 CT 4191.) Question 60 asked "On a scale of 1-5 please indicate your views on the death penalty" Ms. Siebert checked the response that said "I have no position on the death penalty: however, would consider the death penalty in some cases." (15 CT 4193.) Finally, question 61 asked," Have you ever held a different opinion about the death penalty?" Ms. Siebert wrote, " Too many cases of wrong imprisonment now that DNA is here." (15 CT 4193.)

During voir dire, the following colloquy took place:

> THE COURT: In number 53, I think you had the briefest response that I have seen. Is that your current general feeling about the death penalty?
>
> PROSPECTIVE JUROR SIEBERT: If the case is right, yeah. I mean, I'm not -- I'm kind of -- I got -- I mean, under certain circumstances, sure, I'm for the death penalty.
>
> THE COURT: Okay. And flip over to page 18, number 60. Is that your view regarding the death penalty, the one that you have checked there?

PROSPECTIVE JUROR SIEBERT: Yes.

THE COURT: Okay. I'm looking at number 61. Can you explain your response in (b), please?

PROSPECTIVE JUROR SIEBERT: Mostly just what I have heard on the news. And I know that I have heard of a few cases lately where people were on death row, and then they found out -- you know, over many years -- and they found out from the DNA tests that they were innocent all that time. I mean, this is what I have heard on the news.

THE COURT: Mm-hmm.

PROSPECTIVE JUROR SIEBERT: There were a couple of releases. Maybe not that many. Maybe three.

THE COURT: In the news that you were reading, did the reporter actually say that someone was innocent?

PROSPECTIVE JUROR SIEBERT: Well, there was -- I saw it on a talk show or something. There was five men there that had all been imprisoned, and they had been released when they did DNA.

THE COURT: Oh, I see. Okay. (7 R.T. 1534-1535.)

Later in the voir dire, the prosecutor was questioning a juror about his views on the death penalty and interrupted his questioning to ask the entire prospective jury panel "Anybody here that generally opposed it [the death

penalty] or feels weakly against that, other than you, sir? I think I know your feeling." (7 RT 5797.) Ms. Siebert replied:

> PROSPECTIVE JUROR SIEBERT: Uh –
>
> MR. McNULTY: Yes, ma'am?
>
> PROSPECTIVE JUROR SIEBERT: I'm for the death penalty, but I would have to be honest and say if it down to the point that I had to say "Kill him," I really can't honestly say. I don't know if I could do it or not.
>
> MR. McNULTY: All right. Thank you for offering that. I appreciate that. (7 RT 5797-5798.)

The answers on the questionnaire from prospective juror Walker were roughly similar to those of Ms. Siebert. Responding to Question 53 concerning her feelings about the death penalty, Ms. Walker wrote, "If I felt the defendant was guilty beyond any doubt, I would be for the death penalty but would rather vote for life in prison." The question further inquired if there was a reason why she felt that way. She wrote: "crimes must be punished." (15 CT 4306.)

Responding to question 60 asking her to rate her feeling from 1-5 regarding the death penalty, Ms. Walker checked the answer that said, "I am in favor of the death penalty but will not always vote for death in every case of murder with special circumstances. I can and will weigh and consider the aggravating and mitigating circumstances." (15 CT 4308.)

During voir dire when Ms. Siebert said she was for the death penalty

but was not entirely sure she could impose it, Ms. Walker said, “Sir, I feel the same way as she (Ms. Siebert) does.”

MR. McNULTY: All right. So when it comes down to it, you're not sure?

PROSPECTIVE JUROR WALKER: I am not sure if when it comes down to the nitty-gritty, whether I could do that, vote to kill him.

MR. McNULTY: All right. Thank you. (7 RT 1599-1600.)

Returning to the questioning of Ms Siebert, the prosecutor engaged in the following colloquy:

MR. MCNULTY: Miss Siebert, you're indifferent to sitting as a juror?

PROSPECTIVE JUROR SIEBERT: I'm what?

MR. McNULTY: I believe on one of your answers you said you were kind of indifferent about your feelings toward jury service.

PROSPECTIVE JUROR SIEBERT: I -- I will sit if I'm needed or wanted.

MR. McNULTY: Would it be fair to say that this is a case that you really don't want to sit on?

PROSPECTIVE JUROR SIEBERT: Well, because of – of the death penalty thing, I really -- I -- I would – I might be doing an injustice, because even though he was found 100-percent guilty in every respect, I don't know if I could live with myself after saying I am putting someone to death. I don't know if I could live with myself.

MR. McNULTY: All right.

PROSPECTIVE JUROR SIEBERT: So, as I said, I might be able to do it, but I don't know. (7 RT 1601.)

At the close of voir dire, the prosecutor challenged Ms. Siebert under the "Witt standard" (7 RT 1605.)

Then the following exchange occurred:

THE COURT: Miss Siebert. What did she say?

MR. McNULTY: She said she can't be sure that she could give death.

THE COURT: Is she the one who said "I don't know if I could vote for the death penalty"?

MR. McNULTY: Yes.

THE COURT: And Miss Walker said that too.

MR. McNULTY: Yes. I haven't gotten to her, but she would be the next challenge for cause as well.

After a brief conversation on other matters, defense counsel asked:

MR. HEMMER: Your Honor, you're going to excuse Miss Siebert and Miss Walker?

THE COURT: Yes.

MR. HEMMER: I think they just said they didn't know. I think most of the jurors don't know. I would object to that, for the record.

THE COURT: All right. The record will so reflect. (7 RT 1606-1607.)

Both prospective jurors Siebert and Walker were formally excused shortly thereafter. (7 RT 1608.)

Witt-Witherspoon Standard as Interpreted by this Court

In *Wainwright v. Witt, supra*, 469 U.S. 412 the United States Supreme Court clarified its decision in *Witherspoon* and held that the standard for dismissal is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id*. at p. 424, reaffirming *Adams v. Texas* (1980) 448 U.S. 38, 45, [65 L.Ed.2d 581, 100 S.Ct. 2521].) The *Witt* standard was adopted by California in *People v. Ghent* (1987) 43 Cal.3d 739, 767 [239 Cal.Rptr. 82].

The *Witt* Court explained,

> [T]his standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many venire
> questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may
> not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [Fn. omitted.] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law .... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright v. Witt, supra*, at pp. 424-425.)

"As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks

impartiality." (*Id.*, at p. 423.)

A year later, the Court reminded,

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, [90 L.Ed: 137, 106 S.Ct. 1758].)

Thus, this Court affirmed that personal opposition to the death penalty is insufficient for excusal. (*People v. Kaurish* (1990) 52 Cal.3d 697, 699.)

> A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. (*Ibid.*)

On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple or conflicting inferences, the trial court's determination of that juror's state of mind is binding. (*People v. Mason* (1991) 52 Cal.3d 909, 953-954 [277 Cal.Rptr. 166] [conflicting responses]; *People v. Coleman, supra,* 46 Cal.3d 749, 766-767[same]; *People v. Ghent*, *supra*, 43 Cal.3d at p. 768 [equivocal responses].) If there is no inconsistency, the only question being whether the juror's responses in fact demonstrated an opposition to (or bias in favor of) the death penalty, the court's determination will not be set aside if it is supported by substantial evidence and hence is not clearly erroneous. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1262; *People v. Cooper* (1991) 53 Cal.3d 771, 809.)

There are, however, corollary principles that also affect the decision to dismiss a juror under the *Witherspoon, Witt* standard. First, "[t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.' *Wainwright v. Witt, supra,* 469 U.S. at pp. 658-659.

Second, the oath taken by California jurors in death penalty cases promises only that they will "well and truly try the cause now pending before this Court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." (Cal. Civ. Proc. § 232, subd. (b).)

Third, the evidence presented and the instructions given to California jurors do not require that jurors impose death under any circumstances. California jurors need only consider evidence for and against imposing death, weigh that evidence and determine whether death is the appropriate sentence. (*People v. Stewart* (2004) 33 Cal.4th 425, 447.)

Gray, Witt, Adams & Witherspoon Were Violated by The Removal of Prospective Jurors Walker and Siebert Because they were Not Sure they Could Impose the Death Penalty Where The Instructions, as Explained by the Court, Did Not Require a Juror to Impose Death or Say That a Juror Should Do So.

As noted above, "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering

constitutional capital sentencing schemes by not following their oaths.' *Wainwright v. Witt*, *supra,* 469 U.S. 412 at 423, 105 S. Ct. 844, 83 L. Ed. 2d 841. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon v. Illinois* (1968) 391 U.S. [510], at 523, 88 S. Ct. 1770, 20 L. Ed. 2d 776." (*Gray v. Mississippi, supra*, 481 U.S. 648, 658-659,

Complementing the foregoing, the oath taken by California jurors in death penalty cases requires only that they will "well and truly try the cause now pending before this Court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." (Cal. Civ. Proc. § 232, subd. (b).) These instructions do not require that jurors impose death under any circumstances. Jurors need only consider evidence for and against imposing death, weigh that evidence and determine whether death is the appropriate sentence.

In so doing, however, they need not set aside their views on the appropriateness of the death penalty in general. As this Court explained in *People v. Stewart, supra,* 33 Cal.4th 425, 447:

> “Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the 'death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will “substantially impair the performance of his [or her] duties as a juror” under *Witt, supra*,

> 469 U.S. 412. In other words, the question as phrased in the juror questionnaire did not directly address the pertinent constitutional issue. A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under Witt, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law."

Moreover as this Court pointed out more recently in *People v. Pearson* (2012) 53 Cal.4th 306: To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate" (*People v. Rodrigues* (1994) 8 Ca1.4th 1060, 1146), the juror is not disqualified by his or her failure to enthusiastically support capital punishment. (*People v. Pearson, supra*, 53 Cal.4th 306, 332.)

In the present case, based on the responses given, Siebert and Walker made clear that they would "conscientiously consider" all of the sentencing alternatives, including death. Nevertheless, rather than questioning whether these jurors could set aside their beliefs and follow the court's instructions to conscientiously consider the death penalty, the court questioned whether these jurors believed they could decide to impose the death penalty. The issue is whether the court's finding in that regard justified removal of these jurors as a matter of law.

The trial court's focus on whether the juror could or would vote for the death penalty was certainly understandable. Many decisions of this Court have approved a trial court's removal of a prospective juror who says she cannot impose, or will not impose, a death penalty. (See, e.g., *People v. Thomas* (2011) 52 Cal.4th 336, 357-358 [juror answered yes where asked whether her moral, religious, or philosophical beliefs in opposition to the death penalty were so strong that she would be unable to impose the death penalty regardless of the facts]; *People v. Ramos* (2004) 34 Cal.4th 494, 517 [juror indicated "she could never vote to impose the penalty, regardless of the evidence, and repeated similar sentiments when the court's questioning continued."]; *People v. Haley* (2004) 34 Cal.4th 283, 306-307 [juror stated that "man shouldn't take a life"]; *People v. Bolden* (2002) 29 Cal.4th 515, 536-537 [responses of "I would not impose the death penalty" and "I don't think I could find the death penalty ever appropriate" indicate unequivocally that their death penalty views would have prevented or substantially impaired their performance of the duties of a juror in a capital case as defined by the court's instructions and the juror's oath."] *People v. Rodrigues, supra*, 8 Cal.4th 1060, 1147, fn 51 [juror said I don't think so" when asked if she could vote for death if she thought it was justified]; fn. 52 [juror said "moral views and sleeping at night" would impair her ability to return death verdict she believed to be appropriate]; *People v. Millwee* (1998) 18 Ca1.4th 96, 146-147 [juror C said he thought imposing death sentence might haunt him, etc., juror L did not believe the state had the right to take life, juror G said he would not impose death because life imprisonment is worse punishment].)

More recently, in *People v. Capistrano* (2014) 59 Cal.4th 830, 859, a five-Justice majority of this Court flatly declared: "If a prospective juror states unequivocally that he or she would be unable to impose the death penalty regardless of the evidence, the prospective juror is, by definition, someone whose views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Witt, supra*, 469 U.S. at p. 424.)"

That said, appellant's research has uncovered no case in which this Court has articulated the application of *Witt, Witherspoon* principles where a juror states he or she would follow the law and the court's instructions, but is unsure whether she could impose death. This court's many references to *Witt* imply that this Court believes that such jurors will suffer from some impairment or inability to comply with their instructions. Moreover, the above quoted statement of the five-Justice majority in *Capistrano* clearly declares that all who will not vote for death "regardless of the evidence" are, by definition, impaired by their death penalty views.

Conversely, however, this Court has not described the instructions that such jurors would find especially challenging. On the contrary, this Court has emphasized that "a juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law. (*People v. Stewart, supra*, 33 Ca1.4th 425, 447.)

The competing pronouncements in *Capistrano* and *Stewart* present a conundrum in determining whether prospective jurors who express general support for or opposition to the death penalty properly can be excluded because such views do not necessarily mean they would be impaired in the performance of their duty as jurors.

California jury instructions direct jurors to consider all of the aggravating evidence and determine whether it is sufficient to warrant death. People opposed to capital punishment have no difficulty discharging that responsibility. As Justice Antonin Scalia put it, "A direction to a person to consider whether there are 'sufficient' reasons to do something does not logically imply that in some circumstance he must find something to be a 'reason,' and must find that reason to be 'sufficient.'" (*Morgan v. Illinois* (1992) 504 U.S. 719, 744, fn. 2 [Scalia, J., dissenting from decision authorizing removal of capital jurors who will always vote for death, calling the inference that such a juror will not follow Illinois law (which requires a death vote absent sufficient mitigating circumstances) "plainly fallacious."].) Every juror has a "standard of judgment regarding how evidence deserves to be weighed" and even when that standard is least favorable to the defense, "the juror is not therefore 'biased' or 'partial' in the constitutionally forbidden sense." *(Morgan v. Illinois, supra*, 504 U.S. at p. 741 (dis. opn. of Scalia, J.).

In contrast, the reasoning and the lineage of this Court's decisions approving disqualification of jurors who will always vote for life is partly visible in the competing opinions of this Court in *People v. Martinez* (2009) 47 Cal.4th. 399, 425 (maj. opn. of George, C.l), 460 (cone. & dis. opn. of Moreno, J.) The removal of Juror E.H. was the flashpoint. As recounted in

the majority opinion, E.H. expressed "strong feelings" against the rule that a person who could never impose the death penalty should be excluded from a capital jury, and "displayed signs that she was 'upset' and 'irritated'" and "resistant" when the prosecutor attempted to probe her views. (*Martinez, supra*, 47 Cal.4th at pp. 436-437.) "The trial court was concerned that Prospective Juror E.H. had, if not exactly "an agenda," at least a combination of views that would, despite the potential juror's evident good faith, substantially impair her ability to abide by her oath as a juror." (*Id*., at p. 438.)

The *Martinez* majority concluded that the trial court had not been mistaken about the law, noting that the trial court had asked the juror if imposing the death penalty was a realistic and practical possibility for her in the case for which she was called, and that the juror had given multiple equivocal responses culminating in a statement that she could not say so without hearing the evidence. (*People v. Martinez*, *supra*, 47 Cal.4th 399 at pp. 433-434.)

Dissenting from the affirmance of the penalty judgment, Justice Moreno concluded that "E.H. was improperly excused for cause because of the trial court's determination that E.H. was unable to realistically impose the death penalty." (*People v. Martinez, supra*, 47 Cal.4th 399, 456 (conc. & dis. opn. of Moreno, J.) Justice Moreno explained:

> In California, our capital statutory scheme requires that penalty phase jurors weigh various aggravating and mitigating factors in order to determine whether death or life imprisonment without possibility of parole is the proper sentence. Although jurors are statutorily directed to consider such aggravating and mitigating factors, their evaluation of those factors is by its very nature

> subjective: " 'Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider . .' " (*People v. Boyde* (1988) 46 Cal. 3d 212, 253.) For this reason, the standard and burden of proof requirements for determining guilt in criminal proceedings are neither required nor appropriate at the penalty phase of a capital trial. " 'Unlike the guilt determination, "the sentencing function is inherently moral and normative, not factual" [citation] and, hence, not susceptible to a burden-of-proof quantification.' " (*People v. Box* (2000) 23 Cal.App.4th 1153, 1216.) Accordingly, it is understood that jurors will bring their values, beliefs, and opinions into·the jury room when determining the proper penalty. As we explained in *People v. Kaurish* (1990) 52 Cal.3d 648, 699, "A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Martinez, supra*, 47 Cal.4th 399,458 (conc. & dis. opn. of Moreno, J.)

The *Martinez* dissent also observed that removal of jurors whose reservations about capital punishment make them unlikely to impose death is properly accomplished by exercise of peremptory challenges. (*People v. Martinez, supra*, 47 Cal 4th. at p. 460.) Further, "the problem of how to deal with prospective jurors in capital cases who oppose the death penalty may well be a large and growing one." The 2005 Field Polls "show that about one-third of those surveyed in this state oppose the death penalty, up from only 14 percent in 1989 ... The exclusion of one out of three potential jurors because the

attitudes toward the death penalty might predispose them to vote for life imprisonment without parole would indeed result in a jury panel "uncommonly willing to condemn 'a man to die" in violation of the defendant's Sixth Amendment rights. (*Witherspoon, supra*, 391 U.S. at p. 521.)" (*People v. Martinez, supra*, 47 Ca1.4th at p. 459, fn.l.)

In defense of the trial court's exclusion of E.H., the *Martinez* majority asserted that the court had applied settled law, citing *People v. Mason, supra,* 52 Ca1.3d 909, 953-954. *Mason* is indeed the source of the "realistic possibility" language used by the *Martinez* trial court, but *Mason* did not apply it to exclude or justify exclusion of any juror, let alone a juror with scruples against capital punishment. In *Mason*, this Court simply approved a trial court's refusal to remove for cause a juror who had initially indicated she would never vote for a life sentence, but, after the court and counsel explained a juror's obligation to hear and consider mitigating evidence, [the juror] answered that such evidence, even in a case of murder committed in jail, could persuade her to vote against the death penalty. On this point, [the juror] specifically answered that she "would try to leave [her] mind open and listen to everything" and that she could "really" and "realistically" see herself voting for life imprisonment without the possibility of parole." The trial court "expressly found that she would not 'foreclose' consideration of mitigating evidence and that a vote by her against the death penalty was 'still a realistic, practical possibility. '"

The *Mason* court concluded that the juror's "voir dire does not indicate that she had views on capital punishment which would have prevented or

substantially impaired the performance of her duties. (See *Wainwright v. Witt, supra*, 469 U.S. at p. 424 [83 L.Ed.2d at pp. 851-852], quoting from *Adams v. Texas* (1980) 448 U.S. 38, 45 [65 L.Ed.2d 581, 589-590, 100 S.Ct. 2521]; cf. *Witherspoon v. Illinois, supra*, 391 U.S. 510.)" Further, the trial court's determination of the juror's state of mind and "the court's finding that a vote against the death penalty was "a realistic, practical possibility" clearly satisfies the [*Witt*] standard." (*People v. Mason, supra*, 52 Cal.3d 909, 953-954.)

Appellant has no quarrel with *Mason*. California jury instructions direct jurors to consider all of the aggravating evidence and determine whether it is sufficient to warrant death. If prospective jurors state they would follow the court's instructions despite their general opposition to or support for capital punishment, they would be able to discharge their duties as jurors. Thus, a juror who says she will always vote for death may be fully rehabilitated if she later affirms that there is a "realistic, practical possibility" that she will vote for life. Likewise, a juror who says she will always vote for life may be rehabilitated by affirming a "realistic, practical possibility" that she will vote for death. But that is not to say that the latter juror may or should be removed for cause if the court does not find a realistic, practical possibility that she will vote for death. California law requires that capital jurors vote for life if the aggravation does not outweigh mitigation. And, California law does not require a death verdict or declare that a juror should return a death verdict under any circumstances. The claim of error presented here, however, is the propriety of excusing a juror because he cannot say how he would vote until he hears the evidence.

In addition to *Mason*, the *Martinez* majority opinion cited *People v. Lancaster* (2007) 41 Cal.App.4th 50, 80, which clearly holds that trial courts may remove death-scrupled jurors who "gave answers during voir dire indicating there was only a slim possibility they could vote for the death penalty, regardless of the state of the evidence. " But the rationale for that conclusion is nowhere stated.

Instead, the *Lancaster* court gave only the usual explanation for upholding a trial court ruling excluding a death-scrupled juror who has stated his or her willingness to consider and weigh all the evidence before making a decision, i.e.,"'[W]e pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakeably clear answer from the juror, and there will be times where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially follow the law .... [T]his is why deference must be paid to the trial judge who sees and hears the juror. '" (*Citations)*" (*People v. Lancaster, supra*, 41 Cal.App.4th 50, 80.)

The *Lancaster* court's citation of *People v. Cain* (1995)10 Cal.4th 1, 60, is instructive, for therein lies another precedent without a rationale for employing willingness to impose a death sentence as a litmus test for capital jury service in a state where imposing death is never required. The *Cain* decision rejected claims of error in the removal of two prospective jurors, citing the fact that one

> "unambiguously indicated he would vote against death regardless of the evidence" while the other's "responses were equivocal and could have been understood to mean merely that

> she was unable to predict what her emotions would be were she in a position to vote for a sentence of death" while offering substantial support for the contrary conclusion that, despite her desire to have an open mind, her emotional leaning against death was so strong she probably could not vote for that penalty even if she thought the evidence justified it. We defer to the trial court's resolution of this factual ambiguity. [Citation.] Our conclusion is further supported by the fact not only the trial judge, but all of the other three participants--the prosecutor, defense counsel and Canton herself--agreed with this assessment of her mental state. [Footnote omitted.]" (*People v. Cain, supra*, 10 Cal.4th 1, 61.)

Thus, *Cain* strongly implies that jurors who could not vote for death whenever they thought the evidence 'justified it" are incompetent to serve on a capital jury if the trial court finds them so. The fatal flaw in *Cain* is the failure to state why the court believed that to be proper under *Witt*. The court appears to have relied on the erroneous theory, prevalent when *Cain* was decided in 1995, that *Witt* compelled state reviewing courts to review the trial court's ruling deferentially.

One year after *Cain*, in 1996, the High Court disabused state courts of that mistaken interpretation of *Witt* when it reversed the Georgia Supreme Court on this exact point. Now, it is settled that:

> "*Witt* is not 'controlling authority' as to the standard of review to be applied by state appellate courts reviewing trial courts' rulings on jury selection. *Witt* was a case arising on federal habeas, where deference to state-court findings is mandated by 28 U.S.C. § 2254 (d).
>
> But this statute does not govern the standard of review of trial court findings by the Supreme Court of Georgia. There is no indication in that court's opinion that it viewed *Witt* as merely persuasive authority, or that the court intended to borrow or

> adopt the *Witt* standard of review for its own purposes. It believed itself bound by *Witt's* standard of review of trial court findings on jury-selection questions, and in so doing it was mistaken." (*Greene v. Georgia* (1996) 519 U.S. 145, 146.)

In 2002, this Court acknowledged the *Greene* decision "for the proposition that a state appellate court need not give deference to a trial court's findings relating to juror bias." (*People v. Farnam* (2002) 28 Cal.4th 107, 132.) However, the *Farnam* decision summarily concluded, "[t]he law in California, however, is settled on the point." (*Ibid*.)

Significantly, however, such a conclusion begs the question of whether it should stay so. That is, should this Court instead review trial court removal of jurors the same way it reviews other trial court rulings affecting the defendant's fundamental constitutional rights? In those instances, the only deference is to factual findings that are supported by demeanor or other evidence not visible in an appellate record, yet the court still exercises its independent judgment as to questions of law, as well as the ultimate determination of the mixed question of law and fact concerning whether the ruling violated a constitutional right.

In *People v. Capistrano, supra*, 59 Ca1.4th 830, this Court was split five to two on the question of whether deference is owed to a trial court's exclusion of prospective jurors based solely on their response when asked to raise a hand if they could not impose death and their subsequent affirmation that they would not or could not do so. The majority declared:

> In reviewing the trial court's determination, we apply a "rule of deference" (*Uttecht v. Brown* [2007] 551 U.S. [1] at p. 7) based on the trial court's ability to assess the demeanor and credibility of the prospective witness

(*Darden v. Wainwright* (1986) 477 U.S. 168, 178 [91 L. Ed. 2d 144, 106 S. Ct. 2464]). The dissent rejects application of the rule here, asserting the trial court spent insufficient time questioning the individual prospective jurors to have drawn any conclusions regarding their demeanor or credibility. (*Conc. & dis. opn., post*, at pp. 897-898.) Certainly the trial court could have conducted a fuller inquiry and the better practice is to do so. But the reviewing court applies the rule to the circumstances before it, not the circumstances it might have wished for. (*Uttecht v. Brown, supra*, at p. 7 ["Deference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment. ") The fact remains the trial court was present at the voir dire and we were not. The dissent cites no authority for the proposition that the trial court must spend a certain amount of time, give certain explanations, ask certain questions, or make findings on the record in support of its determination before a reviewing court applies the rule of deference. (*People v. Capistrano, supra*, 59 Cal. 4th 830, 859-860.)

The majority's reliance on *Uttecht* and *Darden v. Wainwright* as authority for deferring to trial court judgments was not questioned by the dissent, but it should have been. As the high court confirmed in *Greene*, the the high court deference employed in *Witt, Darden* and *Uttecht* was a function of a federal habeas statute that compelled federal reviewing courts to presume correct all state court findings on any "factual issue" absent one of the exceptional circumstances specified in Section 2254 (d).[38]

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[38] As noted in *Wainwright v. Witt, supra*, 469 U.S. 412, 427 fil 7, Section 2254(d) required that all state determinations of any "factual issue" evidenced by written record be "presumed correct unless the applicant shall establish or it shall otherwise appear, or the

Furthermore, the trial court decisions raised no issue of law. It was clear in

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respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;
;;(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
"(3) that the material facts were not adequately developed at the State court hearing;
"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
"(7) that the applicant was otherwise denied due process of law in the State court proceeding;
"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual deterrnhlation, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. " (*Wainwright v. Witt, supra*, 469 U.S. 412,427-428.)

all three cases that the excused jurors could not follow their states' death penalty laws or impartially determine guilt. All the removal decisions challenged on appeal were, in light of the jury instructions used in those states, proper under the "substantial impairment" standard established in *Adams v. Texas, supra*, 448 U.S. 38, 45, for reasons inextricably intertwined with the demands of particular state laws as made known to the venire prior to voir dire.

In *Witt*, the court explained its approach this way:

> This Court has recently decided several cases dealing with the scope of the § 2254(d) presumption. [Citations.] These cases have emphasized that state-court findings of fact are to be accorded the presumption of correctness. [Citations.] .' .. We noted that the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. [footnote omitted] Such determinations were entitled to deference even on direct review; "[the] respect paid such findings in a habeas proceeding certainly should be no less." *Id*., at 1038 "

Turning to the specific claims of error presented by the petitioner in *Witt*, the high court focused on the removal of one Mr. Colby, whose removal was deemed erroneous by the Eleventh Circuit because:

The court found the following exchange during voir dire, between the prosecutor and venireman Colby, to be insufficient to justify Colby's excusal for cause: [footnote omitted]

"[Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

"[A Colby:] I am afraid personally but not--

"[Q]: Speak up, please.

"[A]: I am afraid of being a little personal, but definitely not religious.

"[Q]: Now, would that interfere with you sitting as a juror in this case?

"[A]: I am afraid it would.

"[Q]: You are afraid it would?

"[A]: Yes, Sir.

"[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?

"[A]: I think so.

[Q]: You think it would.

"[A]: I think it would.

"[Q]: Your honor, I would move for cause at this point.

"THE COURT: All right. Step down." Tr. 266-267.

Defense counsel did not object or attempt rehabilitation. (*Wainwright v. Witt, supra*, 469 U.S. 412, 415-416.)

Reversing the circuit court, the high court concluded, and no one could seriously doubt, that the trial court's decision was indeed a finding on

"a factual issue" within the meaning of 2254(d) and had to be presumed correct. The trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record."[39] (*Wainwright v. Witt, supra,* 469 U.S. 412, 429.)

Notably, the juror whose removal was discussed in *Witt* expressed an inability to impartially decide the defendant's guilt. In that situation, the issue was indeed not only primarily factual but also one of credibility, where the trial court's unique ability to observe the juror's demeanor would demand deference under ordinary rules of appellate review.

In *Darden v. Wainwright, supra,* 477 U.S. 168,176-178, the court briefly addressed a claim of error based on the removal of jurors who said only that they would be unable or unwilling to recommend a death penalty regardless of the evidence. The Florida death penalty law underlying *Darden v. Wainwright* compelled jurors to recommend death if aggravating factors outweighed mitigating. Mr. Darden's trial court had prefaced its examination of the venire by noting that "under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by

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[39] A footnote at this juncture states:

> Respondent argued in the Court of Appeals that 3 of the 11 prospective jurors excused for cause -- veniremen Colby, Gehm, and Miller -- were improperly excused. The court considered Mrs. Colby's colloquy the "least certain statement of inability to follow the law as instructed," and limited its discussion to her questioning. See 714 F .2d, at 1 081. We agree that Mrs. Colby provided the least clear example of a biased venireman, and we therefore need not discuss the voir dire of veniremen Gehm and Miller.

mitigating , then it would be proper under the law your correct verdict would be to recommend the death penalty. (*Darden v. Wainwright* (M.D. Fla. 1981) 513 F. Supp. 947, 960.) The trial court removed all veniremembers who gave affirmative answers when they "were interrogated as to whether they would be 'unwilling' or 'unable' to recommend a death sentence 'regardless of the facts' or 'regardless of the evidence. '" (*Id*., at p. 962.)

In the United States Supreme Court, Mr. Darden attacked only the removal of a single juror whose questioning did not mention Florida's demand that jurors recommend the death penalty where aggravation outweighs mitigation. To quote:

> Petitioner contends that one member of the venire, Mr. Murphy, was excluded improperly under the test enunciated in *Wainwright v. Witt*, 496 U.S. 412 (1985). Petitioner's argument on this issue relies on the wording of a question the trial court asked Murphy before excluding him. The court asked: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" App. 9.
>
> Petitioner argues that this question does not correctly state the relevant legal standard. As Witt makes clear, however, our inquiry does not end with a mechanical recitation of a single question and answer. 469 U.S., at 424-426. We therefore examine the context surrounding Murphy's exclusion to determine whether the trial court's decision that Murphy's beliefs would "substantially impair the performance of his duties as a juror" was fairly supported by the record.

During voir dire but prior to individual questioning on this point, the trial court spoke to the entire venire, including Murphy, saying: "Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious,

moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?"

> The court then proceeded to question the members of the venire individually, but did so while the entire venire was present in the courtroom. Thus, throughout the individual questioning, all the veniremen could hear the questions and answers. In fact, the prosecution frequently incorporated prior questioning of other veniremen by reference, each time with the assurance from the individual being questioned that he or she had heard and understood the previous questions. See Tr. 89-90, 112, 141-142; see also *id*., at 150.
>
> The court repeatedly stated the correct standard when questioning individual members of the venire. [Footnote omitted.] Murphy was present and heard the court ask the proper *Witherspoon* question over and over again. n3 30 After many instances of such questioning, Murphy was seated in the jury box. The court first asked Murphy his occupation, and learned that he was retired, but had spent the eight years before retirement working in the administration office of St. Pius Seminary. As previously noted, the court then asked: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" After Murphy responded "Yes, I have" he was excused. (*Darden v. Wainwright, supra*, 477 U.S. 168,176-178.)

As noted by Justice Liu's dissent in *Capistrano*, the high court in *Darden* declared:

> The precise wording of the question asked of Murphy, and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death

penalty. But Witt recognized that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." 469 U.S., at 424. The trial court, "aided as it undoubtedly was by its assessment of [the potential juror's] demeanor," *Id*., at 434, was under the

> obligation to determine whether Murphy's views would "'prevent or substantially impair the performance of his duties as a juror,'" *Id*., at 424. In making this determination, the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear. (*Darden v. Wainwright, supra*, 477 U.S. 168, 175-178.)

The majority of this Court in *Capistrano* dismissed the dissent's reliance on *Darden* as incapable of supporting the dissent's claim that more questions should have been asked before dismissing the first 16 death penalty opponents at trial. But whether or not a trial court is obliged to ask questions additional to those at issue in *Capistrano* and *Darden* is not the issue here. The issue here is whether a juror who was asked many questions should have been removed because she could not vote for death where the law neither requires nor recommends such a vote. As appellant reads *Darden*, the answer is no. Where jury instructions do not require a vote for death under any circumstances, and particularly where the veniremember is assured that the law requires only a willingness to consider all the relevant factors, no veniremember can be disqualified based on inability or unwillingness to state unequivocally that he or she would vote for death.

Appellant's concern is buttressed by close reading of *Uttecht v. Brown, supra*, 551 U.S. 1. In *Uttecht*, the defendant was sentenced to death in Washington state. The Washington scheme, as explained to the venire by the juror questionnaire, did not allow penalty jurors to choose life for a capital

offense on any basis other than the presence of mitigating factors warranting leniency. (*Uttecht v. Brown, supra*, 551 U.S. 1, 12-13.) To quote:

> "[I]f you found Mr. Brown guilty of the crime of first degree murder with one or more aggravating circumstances, then you would be reconvened for a second phase called a sentencing phase. During that sentencing phase proceeding you could hear additional evidence [and] arguments concerning the penalty to be imposed. You would then be asked to retire to determine whether the death penalty should be imposed or whether the punishment should be life imprisonment without the possibility of parole.
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> "In making this determination you would be asked the following question: Having in mind the crime with which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? If you unanimously answered yes to this question, the sentence would be death .... [Otherwise] the sentence would be life imprisonment without the possibility of release or parole." Id., at. 1089-1090. (*Uttecht v. Brown, supra*, 551 U.S. at pp. 12-13.)

As the high court observed, the juror whose removal was at issue in *Uttecht v. Brown* ("Juror Z") was "impaired not by his general outlook on the death penalty, but rather by his position regarding the specific circumstances in which the death penalty would be appropriate." The high court found that the "transcript of Juror Z's questioning reveals that, despite the preceding instructions and information, he had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case." (*Uttecht v. Brown, supra*, 551 U.S. at p. 13.)

Further:

“Despite having been told at least twice by the trial court that if convicted of first degree murder, Brown could not be released from prison, the only example Juror Z could provide [of a situation where he would impose death] was when "a person is . . . incorrigible and would reviolate if released." (Id., at p. 14.)

"[H]is questionnaire indicated he was in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." After the State explained that the burden of proof was beyond a reasonable doubt, not beyond a shadow of a doubt, and asked whether Juror Z understood. He answered, "[I]t would have to be in my mind very obvious that the person would reoffend. " After "the State once more explained to Juror Z, now for at least the fourth time, that there was no possibility of Brown's being released to reoffend. Juror Z explained, '[I]t wasn't until today that 1 became aware that we had a life without parole in the state of Washington,' [citation.] although in fact a week earlier the trial judge had explained to Juror Z's group that there was no possibility of parole when a defendant was convicted of aggravated first-degree murder. The prosecution then asked, 'And now that you know there is such a thing. . . can you think of a time when you would be willing to impose a death penalty . . . ?' [Citation.] Juror Z answered, 'I would have to give that some thought.' [Citation.] He supplied no further answer to the question. (*Id.*, at pp. 14-15.)

When "the State sought to probe Juror Z's position further by asking whether he could "consider" the death penalty; Juror Z said he could, including under the general facts of Brown's crimes. [Citation.] When asked whether he no longer felt it was necessary for the State to show that Brown would reoffend, Juror Z gave this confusing answer: 'I do feel that way if parole is an option, without parole as an option. I believe in the death penalty.' [Citation.] Finally, when asked whether he could impose the death penalty when there was no possibility of parole, Juror Z answered, ' [I]f I was convinced that was the appropriate measure.' [Citation.] Over the course of his

> questioning, he stated six times that he could consider the death penalty or follow the law, [Citations], but these responses were interspersed with more equivocal statements." *(Uttecht v. Brown, supra,* 551 U.S. at pp. 14-15.)

After the "State challenged Juror Z, explaining that he was confused about the conditions under which death could be imposed and seemed to believe it only appropriate when there was a risk of release and recidivism ... the defense volunteered, "We have no objection." (*Uttecht v. Brown, supra*, 551 U.S. at p. 15.)

In light of the Washington death penalty scheme's demand for imposition of the death penalty in circumstances where Juror Z did not believe it would be proper, the high court hardly needed to give deference to either the trial or state reviewing courts in order to conclude that Juror Z was subject to challenge for cause. As the high court explained: Juror Z's answers, on their face, could have led the trial court to believe that Juror Z would be substantially impaired in his ability to impose the death penalty in the absence of the possibility that Brown would be released and would reoffend. (*Uttecht v. Brown, supra*, 551 U.S. 1,17.)

Instead of attacking the majority's wholesale reliance on *Witt*, *Uttecht* and *Darden*, the *Capistrano* dissent drew a narrow bead on the majority decision, focusing on the implausibility of asserting that the trial court based its decisions on the demeanor of the rapidly removed prospective jurors. Prospective jurors were removed from the first two panels, prior to any instruction on the law, based on this trial court question and request directed to the panel as a whole: "Because of your feelings about the death penalty in general, is there anyone who would be unable to vote to impose the

punishment of death in this case or in any case, regardless of the evidence? If the answer is yes, if you'd rise." (*People v. Capistrano, supra*, 59 Ca1.4th at p. 854.) The dissent reported:

> Ten prospective jurors on the first panel rose in response to the initial screening question. The court proceeded to ask essentially the same question or a portion of the question to each juror individually. For example, the court asked Prospective Juror T.L., "[Y]ou woul impose the punishment of death in this case, regardless of the evidence?" And the court asked Prospective Jurors C.M. and S.C., "[T]hat is regardless of what the evidence is; is that correct?" The court excused nine of the 10 prospective jurors after they answered "Yes, "Right, "Correct," or "That is correct" to such questions. The tenth prospective juror, K.O., was dismissed after saying, "Yes. I just don't believe in the death penalty." (*People v. Capistrano, supra*, 59 Cal.4th at pp. 893-894.)
>
> Deference is warranted where a finding of substantial impairment "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*Witt, supra*, 469 U.S. at p. 428; see *Whalen, supra*, 56 Cal.4th at p. 26 [deference is appropriate because the trial judge is in a position to hear " , "the person's tone of voice, apparent level of confidence, and demeanor" , "].) "But such deference is unwarranted when ... the trial court's ruling is based solely on the 'cold record' of prospective jurors' answers on a written questionnaire, the same information that is available on appeal." [Citations.] By the same token, deference is unwarranted where, as here, the trial court's rulings were based on nothing more than seeing prospective jurors stand up as a scattered group in a courtroom full of other prospective jurors in response to an initial screening question, and then hearing those jurors utter one-word responses to substantively identical leading questions.
>
> Recall that the trial court, in questioning each prospective juror who stood up on October 10, simply repeated the initial screening question or a portion of it: "That is regardless of the evidence; is that correct?"

> "Your answer is that you would be unable to impose the penalty of death, regardless of the evidence?" "And that would be in any case; is that correct?" Fourteen of the 16 jurors were excused after saying nothing more than "Yes," "Right," or "Correct" in response to such questions. Prospective Juror K.O. said, "I just don't believe in the death penalty," and the court did not inquire further. When Prospective Juror A W. tried to explain her views by saying, "I just don't believe-," the trial court interrupted her and continued with the same questioning. In light of the rote and rapid process by which the trial court excused the 16 prospective jurors from the two October 10 panels, it strains credulity to suggest that the trial court based its rulings on an evaluation of "their credibility and their conviction." (Maj. opn., ante, at p. 858.) (*People v. Capistrano, supra*, 59 Ca1.4th at pp. 896-897.)

Deference to trial court decisions disqualifying jurors unable or unwilling to impose death in California is wrong for an additional reason as well. The legal issue of whether unwillingness to vote for death where not required or recommended by law disqualifies a citizen from capital jury service has never been decided by this Court. No doubt, this Court is the appropriate body to determine the law on the point in light of the complexity of the related federal law and the way this Court has addressed that issue by implication.

As previously noted, the roster of decisions approving removal of jurors who said they would not or could not impose death is long. The rationale is missing, but the message from this Court is clear. Trial judges "should" remove for cause a death penalty opponent who says she would not vote for death, notwithstanding her ability to obey the court's instructions

and her oath as a juror.

The notion that people who will not impose a death penalty should be excluded from serving as jurors in capital cases is a recent product of this nation's judiciary, and lacks any footing in the text of the Constitution or the expressed intent of the Framers. (Quigley, *Capital Jury Exclusion of Death Scrupled Jurors and International Due Process* (2004) 2 Ohio St. Crim. L 262, 269-271; Cohen & Smith, *The Death of Death-Qualification* (2008) 59 Case W. Res. L. Rev. 87.) As stated in the latter article, "the exclusion of prospective jurors based upon their views on the death penalty was not permitted at common law or at the adoption of the Sixth Amendment to the United States Constitution" and "substantially weakens the people's check" on government power. (*Id*., at p. 90.)

Neither the California legislature nor the electorate has ever enacted a statute authorizing exclusion of prospective jurors who will not or cannot impose a death penalty. The statute governing jury selection in criminal cases authorizes exclusion of death penalty opponents from capital jury service only upon a finding that the juror's opinions "would preclude the juror finding the defendant guilty" if the offense charged is punishable with death. (Code of Civ. Proc.§ 229, subd. (h).) The quoted language was enacted in 1872 as part of the initial codification of California's penal laws and has remained intact since then. (*Hovey v. Superior Court* (1980) 28 Ca1.3d 1, 9, fn. 7, 9 [acknowledging language in the old statute, section 1074 subdivision (8)].)

As noted in *Hovey*, this Court has long provided a "judicial gloss" to this statutory language so as to allow the "for cause" removal of jurors whose

views would preclude them from imposing a death penalty, notwithstanding their ability to find the defendant guilty of a capital crime. (See *Hovey v. Superior Court, supra*, 28 Ca1.3d 1, 9, tn. 7, 9, and cases cited therein interpreting the language of Code of Civ. Proc. § 229, subd. (h) in former Pen. Code § 1074, subd. 8.) This court has not been entirely consistent in how it has construed that language. (*Hovey, supra*, 28 Ca1.3d 1, 9, fn. 7, 9 [acknowledging inconsistent interpretations of the language in former section 1074(8)].) This court reasoned that the statute was ambiguous, and that any failure to construe the statutory language to permit removal of jurors who would not impose death "would in all probability work a de facto abolition of capital punishment, a result which, whether or not desirable of itself, is hardly appropriate for this Court to achieve by construction of an ambiguous statute." (*People v. Riser* (1956) 47 Ca1.2d 566, 575-576.)

Such reasoning overlooks the ability of the legislature to amend that statute or provide for additional peremptory challenges in capital cases. That reasoning is also untenable, for the language of the statute is unambiguous in authorizing removal of only those death penalty opponents who would be unable to return a guilty verdict in a capital case. In addition to being clear, the statutory language is also consistent with the federal constitutional law, which, as noted at the outset of this argument, acknowledges a legitimate state interest in removing death penalty opponents only if they cannot or will not follow their oaths. That oath requires the return of a guilty verdict when guilt is shown beyond a reasonable doubt, but it does not require return of a death verdict under any circumstances.

Moreover, the practical effect of *Riser's* 'judicial gloss" is to ensure

that prosecutors who wish to pursue death sentences will be able to secure cooperative juries no matter how small a percentage of the citizenry believes that the pursuit of death sentences makes good sense. Yet under this Court's construction of the statute, prosecutors can pursue death sentences ad infinitum, excluding from capital jury service however a large percentage of the venire that cannot or will not impose death. That construction is inconsistent with the proper separation of powers (see *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053.)[40], and with the defendant's right to an impartial and representative jury. (U.S. Const., amends. 6, 14; *Witherspoon v. Illinois, supra*, 391 U.S. at p. 521.)

As noted in *Hovey*, this Court's history of placing a judicial gloss upon or disregarding the plain language of the governing California statute goes back to *People v. Hoyt* (1942) 20 Cal.2d 306,

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[40] As *Steen* pointed out:

> The separation of powers doctrine owes its existence in California to article III, section 3 of the state Constitution, which provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." We have described the doctrine as limiting the authority of one of the three branches of government to arrogate to itself the core functions of another branch. Although the doctrine does not prohibit one branch from taking action that might affect another, the doctrine is violated when the actions of one branch defeat or materially impair the inherent functions of another. [Citations.] (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal. 4th 1045, 1053.)

38. Howe, *Can California Save Its Death Sentences? Will Californians Save the Expense?* (2012) 33 Cardozo L. Rev. 1451, 1452-1460.

> "wherein on occasions a prospective juror was asked whether in the event he was 'satisfied beyond all reasonable doubt and to a moral certainty that five defendants would be guilty of murder in the first degree,' he had 'any conscientious scruples against the infliction of the death penalty as to the defendant that didn't actually participate in the killing of Ferrari?' Under the circumstances existing at the time, the query was permissible and an answer in the affirmative furnished sufficient basis for the court's allowance of a challenge for cause. (Penal Code, § 1074, subd. 8.)" (*People v. Hoyt, supra*, 20 Cal.2d 306, 318.)

Although the *Hoyt* decision did not specify the circumstances "existing at that time" that would validate removal of the juror based on an affirmative answer to the posed question, decisions from the 1950's to the late 1960's put forth various rationales for construing the statutory language to permit exclusion of jurors who would not impose death. (See *Hovey, supra*, 28 Ca1.3d at p. 9, fn 7, 9.) None are persuasive.

Adherence to the plain language of the governing statute would not abolish the death penalty in California. It would not prevent the legislature from raising or lowering the number of allowable peremptory challenges to facilitate or restrict the pursuit of death sentences throughout the state. In other words, the power to prevent prosecutors from producing more death sentences than California can carry out would be returned to the people and their representatives.

In all events, federal constitutional law tells us that the trial court erred in removing jurors Siebert and Walker. Appellant's trial court did not find

that either juror’s opinions would preclude or impair their ability to follow their oath and instructions. "Neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Adams v. Texas, supra*, 448 U.S. 38, 50.)

Further, even in a jurisdiction that requires capital jurors to impose death upon finding specified facts, it is error to exclude all "who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." (*Adams v. Texas, supra*, 448 U.S. 38, 50.)

The United States Supreme Court has long told us that "it is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman* (1969) 394 U.S. 478, 483-484.)

It has also instructed that "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 523; accord *Uttecht v. Brown, supra*, 551 U.S. 1, 9 [right to impartial jury includes right to a jury drawn

from a venire that was not tilted toward capital punishment by selective prosecution challenges for cause].)

Although *Witherspoon* permitted exclusion of those who "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them" (*Witherspoon, supra*, 391 U.S. at p. 522, fn. 21) that proviso does not aid the state in this case. The trial court did not make or imply a finding that either juror would vote against death automatically, nor was there evidence to support such a finding. Likewise, the state can take no comfort in the fact that the *Witherspoon* decision expressly reserved judgment on any "State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." (*Id*., at pp. 513-514.) In all the years and all the cases in between *Witherspoon* and the present day, the high court has never recognized any "State's right" to exclude such jurors on grounds broader than that of impairment or inability to follow the juror's instructions and oath.

Likewise, the statement of the majority in *Morgan v. Illinois* declaring it "clear" that a "juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause" (*Morgan v. Illinois, supra*, 504 U.S. 719, 728) is unhelpful to the State where, as here, the instructions do not require a vote for death under any circumstances and, the court did not make or imply a finding that the juror would disregard any instructions. A juror who will not impose death unless her instructions require her to do "is not promising to be

lawless." (*Morgan v. Illinois, supra*, 504 U.S. at p. 754 (dis. opn. of Scalia, 1.).)

The *Morgan* dissent, authored by Justice Scalia and joined by Justice Thomas and Chief Justice Rehnquist, is relevant to appellant's claim in other respects as well. First, the dissent took issue with the majority's reasoning in several respects, including its use of 'jurors' standards of judgment concerning appropriateness of the death penalty" to establish partiality. (*Morgan, supra*, 504 U.S. at p. 741.)

Further, the dissenters declared that "[t]he fact that a particular juror thinks the death penalty proper whenever capital murder is established does not disqualify him." (*Ibid.*) This position was based on a close examination of Illinois law, which was quite the opposite of California law, in that it required imposition of death absent a finding of sufficient mitigating circumstances. To quote:

> In the first stage of Illinois' two-part sentencing hearing, jurors must determine, on the facts, specified aggravating factors, and at the second, weighing stage, they must impose the death penalty for murder with particular aggravators if they find "no mitigating factors sufficient to preclude [its] imposition." But whereas the finding of aggravation is mandatory, the finding of mitigation is optional; what constitutes mitigation is not defined and is left up to the judgment of each juror. Given that there will always be aggravators to be considered at the weighing stage, the juror who says he will never vote for the death penalty, no matter what the facts, is saying that he will not apply the law (the classic case of partiality) - since the facts may show no mitigation. But the juror who says that he will always vote for the death penalty is not promising to be lawless, since there is no case in which he is by law compelled to find a mitigating fact "sufficiently mitigating." The people of Illinois have

> decided, in other words, that murder with certain aggravators will be punished by death, unless the jury chooses to extend mercy. (*Morgan v. Illinois, supra*, 504 U.S. 719, 751 (Scalia, J. diss.)

At the time of this writing, the high court's only subsequent decision on exclusion of prospective jurors based on their death penalty views is *Uttecht v. Brown, supra*, 551 U.S. 1. As explicated previously, the Washington state law that the Court faced in *Uttecht* was like the Illinois death penalty law, and thus not analogous to California's. In particular, the Washington scheme, as explained to the venire by the juror questionnaire, did not allow penalty jurors to choose life for a capital offense on any basis other than the presence of mitigating factors warranting leniency. (*Id.*, at pp.12-13.)

Appellant has no quarrel with the *Uttecht* majority's analysis of the treatment of Juror Z. Because Washington law required that jurors impose the death penalty "in the absence of the possibility that Brown would be released and would re-offend" the majority properly asked whether he was impaired in his ability to impose the death penalty in accordance with his state's law.

Finally, unlike any other case discussed in this argument, appellant's claim forces examination of the propriety of removing prospective jurors who say they are unwilling to impose death after being told, orally and in writing, that California law does not require or recommend that jurors impose death under any circumstances. In addition to framing the question of how such a juror could be considered biased or "lawless" as Justice Scalia put it in *Morgan v. Illinois, supra*, 504 U.S. at p. 751, this case calls into

question the integrity of a capital juror screening process in which citizens "must be banished from American juries -- not because the People have so decreed, but because such jurors do not share the strong penological preferences of this Court." (*Id*., at p. 752.) In appellant's view, and in Justice Scalia's view, "that not only is not required by the Constitution of the United States; it grossly offends it." (*Ibid.*)

Conclusion

Under the United States Constitution, amendments 5, 6, 8, and 14, as construed by the high court, trial courts cannot remove a prospective juror from a capital case simply because the citizen does not know if she could impose the death penalty where imposing the death penalty is not required by law upon the finding of particularized facts. To do so is to tilt the jury venire in favor of capital punishment by granting a selective prosecutorial challenge for cause of a qualified juror within the meaning of *Uttecht v. Brown* (2007) 551 U.S. 1, 9. (*People v. Pearson, supra*, 53 Cal.4th 306, 328-330 [finding reversible error under *Uttecht*].)

Accordingly, the state may not execute a death sentence imposed by a jury from a venire tilted in favor of capital punishment. The removal of both jurors "for cause" in appellant's case demands reversal of the penalty judgment under existing law. (*Gray v. Mississippi, supra*, 481 U.S. 648, 658-659.) And, as discussed in the next argument, the Sixth and Fourteenth Amendments require reversal of the guilt determination as well.

III.

EXCLUSION OF PROSPECTIVE JURORS BECAUSE OF UNWILLINGNESS OR INABILITY TO IMPOSE A DEATH SENTENCE VIOLATES THE FEDERAL CONSTITUTION AS IT WAS UNDERSTOOD BY THE FRAMERS AND REQUIRES REVERSAL OF TIIE GUILT AND PENALTY JUDGMENTS IN THIS CASE

Introduction

In the previous argument, appellant established that the removal of a death-scrupled juror for reasons other than those recognized as cause for removal by the United States Supreme Court violated the federal constitution as presently construed by that court. Here, appellant submits that death qualification of capital juries violates the federal constitution for reasons not yet considered by the United States Supreme Court: the capital defendant's constitutional rights to an impartial jury and due process of law, as those rights were understood by the Framers of the Bill of Rights. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the State sought a sentence of death. Death-qualification of capital jurors reflects none of the history of the impartial jury guarantee -- and conflicts with all of it.

The High Court's Death-qualification Cases Must Be Re-examined in Light of the Original Understanding of the Bill of Rights

In a series of decisions issued over the last 15 years, the Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the Court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing

interests but instead are to be determined by assessing the intent of the Framers. (See, e.g., *Alleyne v. United States* (2013) _ U.S. _, 133 S.Ct. 2151 overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584 overruling *Walton v. Arizona* (1990) 497 U.S. 639; *Crawford v. Washington* (2004) 541 U.S. 36 overruling *Ohio v. Roberts* (1980) 448 U.S. 56; *Jones v. United States* (1999) 526 U.S. 227.)

In *Jones*, the court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury beyond a reasonable doubt under the Sixth Amendment) or merely a sentencing factor which could be decided by a judge. In making this assessment, the Court emphasized the Sixth Amendment implications based on the historical role of juries. The court explained that, historically, there had been "competition" between judge and jury over their respective roles. (*Id*., at p. 245.) Juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid*., quoting 4 William Blackstone, Commentaries on the Laws of England at pp. 238-39.)

The court explained that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." (*Jones v. United States*, *supra*, 526 U.S. 227, 245.)

One year after *Jones*, the court again invoked the Sixth Amendment's

"historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate-crime statute. But in analyzing the question presented, the court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties .... " (*Ibid*., quoting 2 Joseph Story, Commentaries on the Constitution of the United States, pp. 540-41 (4th ed. 1873)).

These principles, important in a case where the consequence at stake for a defendant is imprisonment, are indispensable in the context of a capital case. Two years later, the Court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (See *Ring* v. *Arizona*, *supra*, 536 U.S. 584.) *Ring* involved the question whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the Court reversed its earlier holding in *Walton v. Arizona, supra*, 497 U. S. 639 and recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,] ... [0]ur precedents are not sacrosanct." (*Ring, supra*, 536 U.S. at p. 608.)

In *Ring*, the Court continued its focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law --just as Justice Stevens had done in his *Walton* dissent. (See *Walton,*

supra, 497 U.S. at p. 711.) *Ring* unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." (*Ring, supra*, 536 U.S. at p. 608.) In addition, the court repeated that "the Sixth Amendment jury trial right ... does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Id*., at p. 607.) "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free." (*Ibid*.)

Two years after Ring, the court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the 'Sixth Amendment. In *Crawford v. Washington, supra*, 541 U.S. 36 the court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts, supra,* 448 U.S. 56.

As noted above, in *Roberts* the court had held that the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the Government's interest in effective law enforcement. (448 U.S. at p. 64, 77.) In *Crawford*, however, the court took a very different approach, one that was consistent with the approach it took in *Jones*, *Apprendi* and *Ring*. The court examined the "historical record" and concluded that under the common law in 1791,

"the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial. . . ." *(Crawford v. Washington, supra*, 541 U.S. at pp. 53-54.) The court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." (*Id*. at p. 63.)

Only three months after *Crawford*, the court applied its historical record model yet again in the Sixth Amendment context. In *Blakely v. Washington* (2004) 542 U.S. 296, the Court held that it violated the Sixth Amendment for a judge to impose a longer sentence based on fact-finding not made by the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id*. at p. 301.)

Once again the Court focused on the Framers' intent, stressing that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id*. at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti -Federalist 315, 320 CH. Storing ed., 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed., 1850) ("[T]he common people, should have as complete a control. . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ("Were I

called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."); *Jones, supra*, 526 U.S. at pp. 244-48.)

More recently, the Supreme Court again overruled a Sixth Amendment precedent which had not been connected to a historical understanding of the Sixth Amendment. In *Alleyne v. United States, supra*, 133 S.Ct. 2151, the Court held that the Sixth Amendment required a jury trial even for facts that served only to increase the mandatory minimum sentence for a crime. The Court overruled its contrary decision in *Harris v. United States, supra*, 536 U.S. 545 precisely because it was "inconsistent . . . with the original meaning of the Sixth Amendment." (133 S.Ct. at p. 2155.)

Due Process of Law and the Right to an Impartial Jury as Seen by the Framers of the Bill of Rights Did Not Permit Judges to Exclude Citizens Based on Scruples Against Capital Punishment

Death-qualification "is a practice of recent origin in the long history of capital punishment. It was not used in the courts of Britain's American colonies, or in the courts of England. No precedents are cited from British courts upholding an exclusion for cause of a death-scrupled juror. Prospective jurors in Britain were not asked their views on this subject or any subject." (Quigley, Exclusion of Death-Scrupled Jurors and International Due. Process (2004) 2 Ohio St. J. Crim. L. 261, 269, hereafter Quigley.)

Public opposition to capital punishment in England "was widespread and had to be reflected in the views of those called for jury service. Quakerism was practiced from the mid- seventeenth century in England. [Citation.] With death as the predominant penalty for felony, British juries

were widely thought to find facts more favorable to an accused than was warranted, to avoid capital punishment. [Citation.] This was especially so in larceny cases, where the difference between felony larceny (a capital offense) and petty larceny (a non-capital offense) was based on the value of the items stolen. Jurors frequently found the value to be below the cutoff point to spare the life of the accused." (*Id*., at p. 275.)

"The courts of the American colonies, and then of the independent United States, followed the British practice in grounds for challenge[41], and in an absence of routine questioning of prospective jurors." (*ld*., at p. 270.) As noted in *McGautha v. California* (1971) 402 U. S. 183, 198, there was almost from the beginning of this country a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. (*Ibid*.) But juries "took the law into their own hands" and refused to convict on the capital offense. (*McGautha v. California, supra*, 402 U. S. 183, 199.)

Thus, when the Founders contemplated "due process" in capital cases, they saw the guarantee of trial by a jury as including unchecked discretion to

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[41] "Under British law, a prospective juror could be challenged for cause on one of four grounds: propter honoris respectum (where the juror was a peer), propter defectum (for want of qualification in respect of age), propter affectum (partiality based on a relationship with a party or from a stated partiality), and propter delictum (crime committed previously by the prospective juror). The category propter affectum comes closest to death-qualification since it relates to partiality. However, it was not used to determine whether potential jurors had reservations about capital punishment, or to exclude them." (Quigley, *supra*, 2 Ohio St. J. Crim. L. 261, 269-270.)

spare the defendant's life. Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. The jury was free to use its verdict to reject the application of a law that it deemed unjust – indeed, it was its duty to do so -- and this was (and should again be) at the heart of the "impartial jury" guaranteed by the Sixth Amendment. Indeed, permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury."

At common law, striking a juror on the basis of bias, or "propter affectum," was limited to circumstances in which the juror had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. As Blackstone cogently articulated:

> Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favor: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled for jurors must be omni exceptione majores." (3 William Blackstone, Commentaries on the Laws of England

363.)[42]

Chief Justice Marshall acknowledged this exact understanding of the propter affectum challenge, and its connection to the Sixth Amendment, in *United States v. Burr* (C.C.Va. 1807) 25 F. Cas. 49, 50, noting that:

> "[t]he end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality." And the limited understanding of "bias" or "partiality" is not some historical footnote: at the time of the Framers, bias as to the law was both welcomed and expected from jurors. The colonial and early American experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal fo
> death, English juries responded by committing "pious perjury," i.e., rejecting these politically motivated laws by acquitting the defendant of the charged offense. (Hostettler, Criminal Jury Old and New: Jury Power from Early Times to the Present Day (2004) p. 82; see also Sparf v. United States (1895) 156 U.S. 51, 143 [Gray, J., and Shiras, J., dissenting] [observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law].)

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an

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[42] Blackstone specified three other grounds that justified the exclusion of a juror: propter honoris respectum, which allowed challenges on the basis of nobility; propter delictum, which allowed challenges based on prior convictions; and propter defectum, which allowed challenges for defects, such as if the juror was an alien or slave. (*ld*. at pp. 361-364.)

effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. (Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 78-79 (Stanley N. Katz ed., 2d ed. 1972).) Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> "It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions. It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent." (*People v. Croswell* (N.Y. Sup. 1804) 3 Johns. Cas. 337, 346.)

The notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust -- this was at the heart of the impartial jury as understood by the Framers.

As John Adams wrote in 1771:

> And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the Court in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to a direction of the Court against their own Opinion, Judgment of Conscience." Legal Papers of John Adams 230 (L. Kirvin Wroth & Hiller B. Zobel eds., 1965).

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

[O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. But still both objects are lawfully, within your power of

decision." (*Georgia v. Brailsford* (1794) 3 U.S. 1, 4).

Indeed, appreciation for the importance of this right was widely shared by those attending the Constitutional Convention. (See Federalist 83 (Hamilton), reprinted in The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

Death Qualification Protocols Emerged Too Late and with Too Little Rationale, to Command Adherence Today

Death-qualification was devised "in the United States in the early nineteenth century, where it appeared initially in scattered statutes and court decisions." (*Quigley, supra*, 2 Ohio st. J. Crim. L. 247 at p. 270.) Early cases and statutes provided for removal of those with religious scruples such as would prevent finding the defendant guilty of a capital crime. (*Id*., at pp. 270-273, citing *United States v. Cornell* (C.C.D. R.I. 1820) 25 F. Cas. 650, 655 (No. 14,868); *Commonwealth v. Lesher* (Pa. 1828) 17 Sergo & Rawle 155.) An 1801 New York initially declared that "no Quaker or reputed Quaker shall be compelled to serve as a juror upon the trial of any indictment for treason or murder." Later, the statute was expanded to include: "Persons of any religious denomination, whose opinions are such as to preclude them from fmding any defendant guilty of an offense punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for any offense punishable with death." (*Quigley, supra*, 2 Ohio St. 1. Crim.

L. at p. 272.)

The United States Supreme Court looked at death qualification for the first time in *Logan v. United States* (1892) 144 U.S. 263, and approved it with little explanation. Essentially, the high court declared that a juror who has scruples against the death penalty can be excluded for cause because "a person who has a conscientious belief that polygamy is rightful may be challenged for cause on a trial for polygamy." (*Id*., at p. 298, citing *Reynolds V. United States* (1879) 98 U.S. 145, 147, 157; *Miles V. United States* (1880), 103 U.S. 304, 310.) Nevertheless, the logic was flawed. People who oppose the death penalty do not believe that capital murder is rightful or that punishment is unwarranted. Nor do they share the exposure to prosecution for a criminal offense like the polygamous jurors who were questioned in *Reynolds*, one of whom declined to answer on the grounds that it might incriminate him when asked "Are you living in polygamy?" (*Reynolds v. United States, supra*, 98 U.S. 145 at p. 148.)

The *Logan* court also relied on its perception that removal of death penalty opponents had been approved "by Mr. Justice Story in *United States v. Cornell*, 2 Mason, 91, 105, and by Mr. Justice Baldwin in *United States v. Wilson*, Baldwin, 78, 83, as well as by the courts of every State in which the question has arisen, and by express statute in many States. Whart. Crim. PI. (9th ed.) § 664].)" (*Logan v. United States, supra*, 144 U.S. at p. 298.) *Logan*, however, actually pushed the practice a step further than did those early cases and statutes. They excluded only those whose religious views were thought to prevent them from returning a true verdict as to guilt if capital punishment could result. (*United States v. Cornell* (C.C. D.R.I.

1820) 25 F. Cas. 650, 656.)[43]

As to the high court's subsequent cases, *Morgan v. Illinois* was a 6-3 decision. The dissenters in *Morgan v. Illinois* were even then of the opinion that removal of jurors based on death penalty views is unconstitutional in a jurisdiction where jurors are not required to vote against their preference under any circumstance. California is such a jurisdiction.

This court need not wait for the high court to find death qualification as practiced in California to be a violation of the federal constitution. As "*Crawford* overturned significant case law to hold that the Sixth Amendment right to confront witnesses required the exclusion of testimonial hearsay evidence regardless of the reliability of that evidence, and *Apprendi* and *Blakely* reversed long-standing precedent to maintain that the Sixth Amendment right to a jury determination of guilt required the jury to make factual findings even if a judge might be more accurate," appellant suggests that this Court "reevaluate- in its historical context--the Sixth Amendment right to a jury trial." (Cohen & Smith, Death of Death Qualification, *supra*, 59 Case W. Res. L. Rev. 87, 90-91.)

Specifically, this Court and the high court should reconsider the

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[43] As Justice Story, serving as Circuit Justice, declared in *Cornell*: It is well known, that the Quakers entertain peculiar opinions on the subject of capital punishment. They believe men may be rightfully punished with death for the causes set down in the divine law, but for none others; and in point of conscience they will not give a verdict for a conviction where the punishment is death, unless the case be directly within the terms of the divine law. (*United States v. Cornell, supra*, 25 F. Cas. 650, 656.) In *dicta*, *Logan* approved removal of all those who had scruples against capital punishment, and had to be disapproved on that point in *Witherspoon v. Illinois, supra*, 391 U.S. at p. 523, fn. 22.)

framework laid out in *Witherspoon v. Illinois*, *Wainwright v. Witt*, and by the majority in *Morgan v. Illinois*, and hold that the Sixth Amendment prohibits the state from excluding prospective jurors based upon an unwillingness or inability to impose a death penalty. Justice Scalia's dissent in *Morgan* points the way.[44]

Reversal is Required

In *Witherspoon*, the United States Supreme Court recognized that the State's removal of jurors opposed to capital punishment violated the Sixth Amendment impartial jury guarantee, yet "held that mere reversal of the subsequent death sentence was all that was necessary - as if a little violation of the Sixth Amendment was acceptable, or only providing half a remedy for a Sixth Amendment violation was required." (Cohen & Smith, Death of Death Qualification, *supra*, 59 Case W. Res. 87, 90.) Erroneous removal of a single death-scrupled juror requires reversal only as to penalty under existing decisions of this Court and the United States Supreme Court. However, it is beyond cavil that the Sixth Amendment right to an impartial jury applies to guilt as well as penalty juries. Death qualification, particularly as applied at appellant's trial substantially increased the risk that appellant would be convicted of capital murder by permitting the removal for cause of any

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[44] As noted at the end of Issue III, appellant quoted Justice Scalia’s dissent In Morgan :

> [t]his case calls into question the integrity of a capital juror screening process in which citizens "must be banished from American juries -- not because the People have so decreed, but because such jurors do not share the strong penological preferences of this Court." (*Morgan v. Illinois*, at p. 752.) ... "that not only is not required by the Constitution of the United States; it grossly offends it." (*Ibid.*)

juror who expressed scruples against the death penalty but never stated they would not follow the law. (*See* Swafford, Qualified Support: Death Qualification, Equal Protection, and Race (2011) 39 Am. J. Crim. L. 147, 158, fn. 99 [citing multiple studies on the point].) The judgment should be reversed in the entirety.

PENALTY PHASE ERROR

IV.

THE TRIAL COURT ERRED IN ALLOWING THE DEFENSE TO FOREGO THE PRESENTATION OF EVIDENCE IN PENALTY PHASE AFTER TRIAL DEFENSE COUNSEL INFORMED THE COURT THAT THERE WAS MITIGATING EVIDENCE AVAILABLE.

Summary of Argument

When the penalty phase trial began, defense counsel told the court that appellant did not want him to present any evidence in appellant's defense even though counsel's investigation revealed that there was substantial mitigating evidence available. The trial court ascertained from defendant that such was his wish. The trial court then informed appellant that the jury would likely sentence him to death and the defendant said he understood Nevertheless, he would not change his mind. Unsurprisingly, the jury sentenced appellant to death.

Unquestionably, this court has held that a defendant may waive his right to present mitigating evidence and refuse argument that resists the death penalty. Further, it is not ineffective assistance for a defense counsel to

accede to his client's wishes even if mitigating evidence is available. (See e.g. *People v. Mai* (2013) 57 Cal.4th (986), 1020-1023.) Nevertheless, the trial court erred in allowing the defendant to refuse to present evidence in mitigation or to make any argument challenging the death penalty.

Because death is a normative decision, the issue of whether the defendant should be put to death is a jury question that must be based on all the available evidence not just the evidence that the state believes will support the death determination.

As this court pointed out in a situation where the defense wanted to waive an instruction on a lesser included offense and gamble on whether the jury would convict him of the greater offense, the state has no legitimate interest in obtaining a conviction of the offense charged where a jury may be unwilling to acquit but could find a defendant guilty of a lesser offense. "Our courts are not gambling halls but forums for the discovery of truth." (*People v. St. Martin* (1970) 1 Cal.3d 524, 533.) Evidence may support a jury finding "that the defendant is guilty of some inter mediate offense included within, but lesser than, the crime charged." (*People v. Barton* (1995) 12 Cal.4th 186, 196.)

Similarly, just because a defendant may wish to gamble on whether he gets the death penalty, allowing the defendant to waive the presentation of mitigating evidence puts the state in the position of affirmatively trying to kill a person who is not sufficiently culpable to deserve the death penalty. Under such circumstances, death becomes a foregone conclusion. In the vernacular, the penalty phase is reduced to "suicide by jury." Nevertheless, because the death determination is a normative one based on community values, it cannot

properly be made on a one sided presentation of the evidence.

Factual Background

After the guilt phase ended and before the penalty phase began, Mr Poore made a *Faretta* motion asking to represent himself. (27 R.T. 5829.) Further, defense counsel advised that the defendant did not want him to present any evidence in mitigation. (27 R.T. 5830.) Defense counsel told the court that he advised the defendant that there was mitigating evidence. Additionally, defense counsel stated that although he found it offensive that the defendant could prohibit the presentation of mitigating evidence, nevertheless, under the existing case law, he was bound to respect the defendant's wishes. (27 R.T. 5830.)

The defendant told the court that he disagreed with his counsel's approach to penalty phase. He believed that defense counsel would present mitigating factors that he did not approve of. What he wanted to do was present two witnesses who would defend against the gang allegations, although he conceded that those allegations had been found untrue at the guilt phase. (27 R.T. 5832.) He urged that the two witnesses (who were in prison and allegedly gang members) were there to rebut the prosecution's assertion that because he had been a validated gang member by CDC, he had violent tendencies. That is, they knew him and knew that he did not have such a character. (27 R.T. 5837-5838.)

The judge eventually denied the *Faretta* motion. (27 R.T. 5840.) Thereafter, defense counsel asked to put a few things on the record. Since he was still counsel of record and since he still had control of the trial tactics, defense counsel noted that he would not be calling the two witness that the defendant requested. Further, in accordance with the defendant's wishes, he

would not would be calling other witnesses or presenting other mitigation evidence. (27 R.T. 5840-5841.)

The trial judge then asked if the defense really did not intend to present any mitigating evidence or otherwise fight against the death penalty. (27 R.T. 5841.) Trial defense counsel affirmed that the defendant did not want him to present any mitigating evidence. (27 R.T. 5841.)

The judge then inquired if the defendant was effectively asking for the death penalty. (27 R.T. 5841.) The defendant said "No." Defense counsel noted, however, that although he was not sure the defendant wanted death, the defendant certainly did not want defense counsel to present any other mitigation. (27 R.T. 5841.) This impasse between client and counsel remained despite extensive conversation about the matter. (27 R.T. 5841.) The judge then advised counsel to read several cases and noted that in order to be sure that the defendant made an intelligent waiver of the right to present mitigating evidence, the court would have to make an inquiry of the defendant before the jury convened. (27 R.T. 5841-5842.)

At the next session of trial, trial defense counsel noted that he read the cases and observed that if the defendant told him not to present mitigating evidence he would comply; although he was not happy about it. (27 R.T. 5844.) Further,

> "Mr. Poore has made it clear to me that he does not want me to present a mitigating case in mitigation, let's put it that way. And, of course, if he wants me not to do that, I will not do that, and I will sit here and say no questions, no objections and no final argument, I suppose."

The trial judge then conducted the following colloquy:

THE COURT: Mr. Poore, you've heard what your attorney has just said; correct?

THE DEFENDANT: Yes.

THE COURT: Is that what you wish him to do?

THE DEFENDANT: Yes.

THE COURT: You understand that there may be some evidence which is mitigating evidence?

THE DEFENDANT: Yes.

THE COURT: And you understand that there may be some argument that your attorney can make which may convince the jurors that life without possibility of parole would be the appropriate penalty rather than death?

THE DEFENDANT: Yes.

THE COURT: But you don't wish him to make that argument; is that correct?

THE DEFENDANT: That's correct.

THE COURT: So it is your position that you are ordering your attorney not to present any mitigating evidence; correct?

THE DEFENDANT: Correct.

THE COURT: And you are ordering your attorney not to

> argue against the death penalty; correct?
>
> THE DEFENDANT: Correct.
>
> THE COURT: Knowing that the jury may order the death penalty, you do not wish to resist that; is that correct?
>
> THE DEFENDANT: Correct. (27 R.T. 5845-5846.)

The trial judge found the inquiry sufficient and began the penalty phase of trial. (27 R.T. 5846.)

Thereafter at penalty phase, trial defense counsel did not offer any evidence in mitigation, cross-examine any prosecution witnesses, or make any closing argument. Unsurprisingly, he was sentenced to death.

A Death Sentence Imposed in the Absence of Substantial Mitigating Evidence Is Constitutionally Unreliable

The Eighth and Fourteenth Amendments forbid a capital sentence decided under circumstances where the death penalty is a "foregone conclusion." *(Sumner v. Shuman*, 483 U.S. 66, 78, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987).) To this end, the United States Supreme Court has struck down every mandatory capital sentencing scheme it has reviewed. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 646, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (holding that a mandatory death sentence is unconstitutional); *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (same). In no circumstance has the Court permitted the death penalty to be nondiscretionary, regardless of how narrowly defined the class. *Shuman*, *supra*, 483 U.S. at 78 (holding that state could not automatically impose the death penalty on prison inmates serving life sentences without the possibility

of parole at the time of a subsequent murder conviction); *Roberts v. Louisiana* (1976) 428 U.S. 325, 336, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (striking down a state statute that made the death penalty automatic for all defendants convicted of first degree murder).

Instead, the Eighth Amendment requires that punishment "be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh* (1989) 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (overruled on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335.) The primary means of safeguarding against the risk that death might be imposed "in spite of factors which may call for a less severe penalty" is the presentation and consideration of mitigating evidence. *(Lockett v. Ohio* (1978) 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973; see also *McKoy v. North Carolina* (1990) 494 U.S. 433, 443, 110 S. Ct. 1227, 108 L.Ed. 2d 369 ("[I]ndeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence .... "). So unacceptable is the risk of over-sentencing that, in each and every circumstance in which the Supreme Court has encountered a bar to the jury's consideration of mitigating evidence, it has struck it down. Thus, neither statute, judge, evidentiary ruling, nor "a single juror's holdout vote" has been tolerated in the High Court's cases. (*Mills v. Maryland* (1988) 486 U.S. 367, 375, 108 S. Ct. 1860, 100 L. Ed. 2d 384.)

The decisions on this point are unequivocal: an unbroken line of cases maintain that it is unconstitutional to sentence a defendant to death without permitting the sentencer to hear all relevant mitigating evidence. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 8, 106 S. Ct. 1669, 90 L. Ed. 2d 1

(holding that a death sentence was unconstitutional when the judge ruled that some of the defendant's mitigating evidence was inadmissible); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113, 102 S. Ct. 869, 71L.Ed.2d 1 (finding that a death sentence was unconstitutional when the judge decided as a matter of law that mitigating evidence could not be considered); *Beck v. Alabama*, *supra*, 447 U.S. 625, 627, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (holding that it was unconstitutional to sentence defendant to death without permitting the jury to consider a conviction for a lesser included offense that was supported by the evidence); *Lockett*, *supra*, 438 ·U.S. at 608 (striking down a state statute that limited the categories of evidence that could be considered in mitigation); *Woodson*, *supra,* 428 U.S. at 304 (holding that mitigating evidence is a "constitutionally indispensable part" of any capital sentencing scheme); *Roberts*, *supra*, 428 U.S. at 333-34 (striking down a state statute that did not allow consideration of mitigating circumstances in the imposition of the death penalty).

The above cases demonstrate that consideration of mitigating evidence is central to any constitutional capital sentencing proceeding. In fact, "[t]he system is designed to consider both aggravating and mitigating circumstances ... in every case." *Roper v. Simmons* (2005) 543 U.S. 551, 572, 125 S. Ct. 1183, 161L.Ed.2d 1 (emphasis added). Consideration of mitigating circumstances has long been established as essential to ensuring the heightened reliability the constitution demands of any death verdict. *Woodson*, *supra*, 428 U.S. at 305 (explaining that the requirement of individualized sentencing "rests squarely" on the need for reliability in the meting out of a punishment of such finality); *Mills*, *supra*, 486 U.S. at 376 (requiring "even greater certainty" that there are proper grounds to justify a

capital sentence). Mitigating evidence is, in essence, our system's bulwark against "capricious or arbitrary" decisions to condemn a fellow human being to die. *Gregg v. Georgia* (1976) 428 U.S. 153, 189, 194-95, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (explaining that without such consideration, "the system cannot function in a consistent and rational manner").

It is this very focus on reliability that best demonstrates that the Eighth Amendment's protections serve all of society, not just the criminal defendant. As described by Justice Stevens:

> From the point of view of the defendant, [capital punishment] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. *Gardner v. Florida* (1977) 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393

Indeed, that "the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons" lies at the heart of its protections. *Simmons*, *supra,* 543 U.S. at 560; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (explaining that the Eighth Amendment's special reliability requirements in capital cases stem from a "fundamental respect for humanity"); *Woodson*, *supra*, 428 U.S. at 304 (stating that a "fundamental respect for humanity" undergirds the Eighth Amendment); *Trop v. Dulles* (1958) 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 ("The basic concept underlying the Eighth Amendment is the dignity of man.").

The societal interest of the Eighth Amendment's protections is

particularly acute for those of its members who are called upon to enter the jury box in order to "undertake the grave task of imposing a death sentence." *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 264, 127 S. Ct. 1654, 167 L. Ed. 2d 585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (stating that a jury decides the issue of whether a defendant should live or die **"on behalf of the community"** [Emphasis added].). The "evolving standards" that inform the Eighth Amendment's protections flow in part from the recognition that "[t]he decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make." *Mills*, *supra*, 486 U.S. at 375; see also *Gregg*, *supra*, 428 U.S. at 189 n.38 ("[I]t is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."); *Jurek v. Texas* (1976) 428 U.S. 262, 271, 96 S. Ct. 2950, 49 L. Ed. 2d 929 ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, **but also why it should not be imposed**."(emphasis added.)).

Permitting a criminal defendant to choose the death penalty does not further the purposes that justify its imposition in the first place. Because a death sentence necessarily forecloses the possibility of rehabilitation, *Gardner*, *supra,* 430 U.S. at 360, these purposes are limited to retribution and deterrence, *Atkins v. Virginia* (2002) 536 U.S. 304, 318-19, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (quoting *Gregg*, 428 U.S. at 183).

As the *Atkins* court made clear, retribution is only permissible to the extent that the defendant's culpability merits imposition of the death penalty. 536 U.S. at 319 (holding that because "the culpability of the average

murderer" cannot justify the death penalty, "lesser culpability ... surely does not merit that form of retribution"); accord *Simmons*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." (internal quotations omitted)). Absent consideration of mitigating circumstances, however, any culpability determination is unreliable. *Penry*, *supra,* 492 U.S. at 319 (explaining that it is only when the jury considers mitigating evidence that "we can be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence" (quoting *Woodson*, 428 U.S. at 304-05)). The fact that it was defendant who stood in the way of its admission does not change the calculus.

The deterrent effect of the death penalty is also highly questionable if it can be had for the asking. In fact, there are numerous documented cases of crimes being committed with the goal of receiving a death sentence. (John H. Blume, Killing the Willing: "Volunteers," Suicide and Competency, 103 Mich. L. Rev. 939, 948 n.51 (describing cases).) So-called "volunteerism" is a significant phenomenon regardless of its motivation. (*Id*.) (reporting that of the 885 executions since Gregg, 106 involved "volunteers"); C. Lee Harrington, "A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering," 25 L. & Soc. lNQ. 849, 850 (Summer 2000) ("Between 1977 and March 1998, 59 inmates had volunteered for execution compared to 382 executed unwillingly."); Ross E. Eisenberg (Fall 2001) "The Lawyer's Role When the Defendant Seeks Death," 14 CAP. DEF. J. 55, 69-73 (describing the cases of four volunteers from the State of Virginia alone, three from the last decade).

Finally, death-by-request undermines society's confidence in the criminal justice system by raising questions of the defendant's motive to seek death. See Carol J. Williams, Death Penalty Is Considered a Boon by Some California Inmates, L.A. Times, Nov. 11, 2009, available at http://www.latimes.com/news/local/la-me-deathrowl 1-2009novl l,0,597884.story (describing one criminal defendant's choice to seek the death penalty as motivated by the desire for better conditions of confinement and access to appeals). Such motivations impugn the entire capital sentencing system when viewed by those convicted of capital crimes as simply an opportunity for manipulation and a means of serving an "easier" sentence.

In sum, society has no interest in permitting a defendant's waiver of mitigating evidence. To do so undermines the reliability of the verdict, results in a penalty unrelated to the defendant's individual culpability, hampers the jury's ability to make a moral, reasoned decision, and fails to promote deterrence while exceeding the permissible scope of the State's retributive powers.

In comparison, the corresponding interest in respecting the defendant's right to self-representation is not sufficiently strong to overcome the broader Eighth Amendment right to a reliable penalty determination. The Sixth Amendment "right to self-representation is not absolute." (*Martinez v. Court of Appeal of California, Fourth Appellate Dist*. (2000) 528 U.S. 152, 161, 120 S. Ct. 684, 145 L. Ed. 2d 597.) The right may be denied in a variety of circumstances, including when it is not clearly invoked, *Jackson v. Ylst* (9th Cir. 1990) 92l F.2d 882, 888-89, when it is not timely invoked, *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784, **or when it is invoked to manipulate the legal system**, *United States v. Frazier-El* (4th Cir. 2000) 204

F.3d 553, 568. Even when the accused manages a knowing and intelligent waiver permitting him or her to proceed pro se, the right can be terminated by the trial court. *Faretta v. California* (1975) 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."); (*United States v. Brock* (7th Cir. 1998) 159 F.3d 1077, 1081 (finding that defendant's right to self-representation was properly terminated when he refused to cooperate with the trial court's questions and orders).) It can also be denied if for some reason the accused is unable to follow the rules and procedures of the courtroom. (*Savage v. Estelle* (9th Cir. 1991) 924 F.2d 1459, 1466-1467 (holding that the right to self-representation was properly denied when the accused's speech impediment would have limited his ability to communicate with the jury and question witnesses), or if the accused lacks the mental competency to handle his own representation. (*Indiana v. Edwards* (2008)_ U.S._, 128 S. Ct. 2379, 2387-88, 171 L. Ed. 2d 345.) It also may be limited by the appointment of standby counsel, even over the defendant's objection. (*Faretta,* 422 U.S. at 834 n.46; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 187, 104 S. Ct. 944, 79 L. Ed. 2d 122.)

In sum, when "the government's interest in ensuring the integrity and efficiency of the trial ... outweighs the defendant's interest in acting as his own lawyer," the right to self-representation must give way. (*Martinez*, *supra,* 528 U.S. at 162.) Such is the case when the defendant's self-representation "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Edwards*, *supra,* 128 S. Ct. at 2387 (finding defendant's right to self-representation outweighed by the interest in a fair trial when defendant lacked the mental competency to represent himself); see

also *Sell v. United States* (2003) 539 U.S. 166, 180, 123 S. Ct. 2174, 156 L. Ed. 2d 197 ("[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.").

Because the total or partial waiver of a case in mitigation demonstrably impedes the integrity of a capital trial, the strength of the right to self-representation is in that context at its lowest ebb. It cannot reasonably justify allowing a defendant to be put to death regardless of his actual culpability. The balance of these competing interests -- the interest in fair trials and the interest in the defendant's autonomy -- is particularly unfavorable to the autonomy interest once a conviction has been secured. In drawing such lines, the Court has already narrowed the right of self representation to the trial context, reasoning that "the status of the accused, who retains a presumption of innocence throughout the trial context, changes dramatically when a jury returns a guilty verdict." (*Martinez*, 528 U.S. at 162-64.) That this reasoning applies equally to the capital sentencing phase as it does to the guilt phase and demonstrates yet another reason the right to self-representation cannot be used to trump Mr. Poore's right to a fair and reliable sentencing decision.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner, supra,* 430 U.S. at 358.) This central tenet of American death penalty jurisprudence applies with equal force whether it be the "caprice or emotion" of the judge, the jury, or of the defendant himself that causes a distortion of the factfinding process. It may be that when a defendant either waives or severely limits his case in mitigation, he is asking to die. But whether this desire stems from an acceptance of responsibility, frustration with the legal process, debilitating depression,

suicidal tendency, or the simple desire to avoid spending the rest of one's life in prison, such state assisted suicide -- abhorrent to the law in every other context -- is not consistent with the integrity of American justice. (See *Washington v. Glucksberg* (1977) 521 U.S. 702, 723, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (recognizing an "almost universal" conclusion that there is no right to assisted suicide, which contravenes "centuries of legal doctrine and practice," and "the considered policy choice of almost every State"); *Harrington, supra*, at 850 (listing various reasons that might motivate death penalty volunteerism).

A Capital Defendant Cannot Unilaterally Waive His Eighth and Fourteenth Amendment Right to Have the Jury Consider Mitigating Evidence

Because mitigating evidence is essential to the reliability of any death sentence -- not only for the defendant's protection, but also that of society's interests in retribution and deterrence -- it follows that a capital defendant cannot unilaterally waive his Eighth and Fourteenth Amendment right to have the jury consider mitigating evidence. (*Lenhard v. Wolff* (1979) 444 U.S. 807, 811, 100 S. Ct. 29, 62 L. Ed. 2d 20 (Marshall, J., dissenting) ("Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by defendant's purported waiver."); *Silber v. United States* (1962) 370 U.S. 717, 718, 82 S. Ct. 1287, 8 L. Ed. 2d 798 (holding that a waiver by a criminal defendant can be overridden in the public interest). To do so places the jury in a position to condemn a fellow citizen to die even though his culpability is not of the type for which society reserves the death penalty. (*Atkins v. Virginia*, *supra,* 536 U.S. at 319 (reasoning that "the culpability of the average murderer is

insufficient to justify the most extreme sanction available to the State"); *Woodson*, *supra,* 428 U.S. at 296 ("[U]nder contemporary standards of decency, death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.").

A brief look at California's 1992 capital sentencing statute, which is illustrative of many state schemes, serves to demonstrate the dilemma. In California, a jury considers whether there is a special circumstance justifying consideration of the death penalty. (Cal Pen. Code§ 190.2 (West 1992).) Felony murder- for which Mr. Poore was charged and convicted- is such a circumstance. (*Id*. § 190.2(a)(l 7).) The jury is then asked to consider aggravating evidence and mitigating evidence. (*Id*. § 190.3.) Aggravating evidence includes the existence of the special circumstance and requires no additional evidence than what was required to establish the underlying conviction. (*Id*. § 190.3(a); see also *Zant v. Stephens* (1983) 462 U.S. 862, 874, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (finding a sentencing scheme in which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion" constitutionally adequate). The jury is then asked to consider whether the mitigating evidence outweighs the aggravating evidence. (Cal. Pen. Code § 190.3.) If there is no mitigating evidence -- as there will not be when defendants are permitted to waive its presentation -- the jury's job at sentencing becomes a mere formality. "No evidence" cannot possibly outweigh aggravating evidence. In such a case, only one sentence is legally possible, and that is death. (*Id*. § 190.3 ("[T]he trier of fact ... **shall** impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.") (emphasis added). The only alternative is in effect an

"illegal" sentence -- one in which jurors break their oath to follow the law, and instead find that no aggravating circumstance exists -- even when the facts required to establish the aggravating circumstance are established by the conviction itself. Such a result contravenes decades of clearly established Eighth Amendment jurisprudence. (*Woodson*, *supra,* 428 U.S. at 303 (reasoning that capital sentencing scheme that "rest[s] the penalty determination on the particular jury's willingness to act lawlessly" was unconstitutional); *Beck*, *supra,* 447 U.S. at 642-43 (holding that sentencing scheme which prevented juries from considering lesser included offenses was unconstitutional because it encouraged jurors to convict or acquit for impermissible reasons thus "introduc[ing] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case"); *Roberts*, *supra,* 428 U.S. at 335 ("There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions.").

In this circumstance, a jury is doubly burdened by the necessity of sitting through what is essentially a second trial -- serving days of extra service, exposed to a duplicative presentation of what can be gruesome and disturbing evidence of the crime, as well as emotionally draining victim impact evidence -- while robbed of any discretion or purpose in the actual sentencing determination. To ask of jurors this level of sacrifice for the sake of their rubber stamp on the death verdict is certainly to ask too much. Our system cannot charge jurors with responsibility for the life and death of a fellow human being while at the same time taking away all their discretion. (*Witherspoon v. Illinois*, *supra,* 391 U.S. 510, 521, 88 S. Ct. 1770, 20 L. Ed.

2d 776 ("[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.")

Instead, a capital sentencing jury must be permitted to "recognize[] the gravity of its task and proceed[] with the appropriate awareness of its 'truly awesome responsibility.'" (*Caldwell v. Mississippi*, *supra,*472 U.S. 320, 341, 105 S. Ct. 2633, 86 L. Ed. 25.)

The Jury's Inability to Consider All Mitigating Evidence in Mr. Poore's Case Rendered Mr. Poore's Sentence Unreliable

In Mr. Poore's case, none of the available mitigating evidence was presented to the jury. Had the jury been given the opportunity to hear mitigating evidence, "there is a reasonable probability that at least one juror would have struck a different balance." (*Wiggins v. Smith* (2003) 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (reversing the sentence of a habeas petitioner when counsel failed to present petitioner's history of sexual and physical abuse and neglect, experience in foster care and homelessness); see also *Williams v. Taylor* (2000) 529 U.S. 362, 395, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (reversing the sentence of a habeas petitioner when counsel failed to present evidence of petitioner's history of abuse and neglect, borderline mental retardation, limited education, and positive experiences in the prison environment); *Rompilla v. Beard* (2005) 545 U.S. 374, 391-93, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (reversing the sentence of a habeas petitioner when counsel failed to present petitioner's history of abuse and neglect, alcoholism, and organic brain damage); *Abdul-Kabir*, *supra,* 550 U.S. at 241-42 (reversing the sentence of a habeas petitioner when the jury was not allowed to give effect to evidence of petitioner's mental retardation and child abuse); *Brewer v. Quarterman* (2007) 550 U.S. 286, 289-90, 127 S. Ct. 1706, 167 L.

Ed. 2d 622 (reversing the sentence of a habeas petitioner when the jury was not allowed to give effect to evidence of petitioner's mental illness, childhood abuse and substance abuse).)

It is no answer to this egregious constitutional error to argue that Mr. Poore essentially represented himself on the point, and must thus be held responsible for any failure to present additional mitigating evidence. Under well-established principles, a tactical decision to forego further mitigating evidence can only be made once a thorough investigation of the ·available mitigating evidence has been undertaken. (*Wiggins*, *supra,* 539 U.S. at 527.) Assuming that investigation was unnecessary on the basis of Mr. Poore's first-hand knowledge assumes too much. (See *Rompilla*, *supra,* 545 U.S. at 379-80 (reversing sentence when counsel's failure to investigate was based on the assurances of the defendant and his family that no mitigating evidence existed). Having lived the life he did, Mr. Poore was ill-positioned to understand either the impact of his background on his culpability or how it would be received by a jury. To be sure, from the defendant's point of view, such a history might be too shameful to face, much less to present to a judge and jury.

Finally, in permitting mitigating evidence to go unconsidered, the reliability of Mr. Mr. Poore's sentence is twice-compromised, both in the initial decision and in leaving a deficient record on appeal. Although "meaningful judicial review [is] another safeguard that improves the reliability of the sentencing process," (*California v. Brown* (1987) 479 U.S. 538, 543, 107 S. Ct. 837, 93 L. Ed. 2d 934), it cannot perform its function of ensuring that the death penalty has been imposed in a "consistent and rational manner," *Lockett*, *supra,* 438 U.S. at 601, in the absence of a complete record.

The Absence of Available Mitigating Evidence Is a Structural Error Entitling Mr. Poore to a New Sentence

Errors not subject to quantitative measurement are structural. (*United States v. Gonzales-Lopez, supra,* 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (explaining that structural errors are those which are "necessarily unquantifiable and indeterminate").) The United States Supreme Court has never applied a harmless error analysis to error involving the omission of substantial mitigating evidence. (*Penry*, 492 U.S. at 302, 328, 109 S. Ct. 2934, 106 L. Ed. 2d 256; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-99, 107 S. Ct. 1821, 95 L. Ed. 2d 347; *Skipper*, 476 U.S. at 8-9; *Eddings*, 455 U.S. at 116-17; *Lockett*, 438 U.S. at 604, 608-09; see, e.g., *Bryson v. Ward* (10th Cir. 1999) 187 F.3d 1193, 1205 ("The [United States Supreme] Court ... has never specifically addressed whether the erroneous exclusion of mitigating evidence can ever be harmless."). In fact, the Court has itself declined to characterize "the question whether mitigating evidence could have been adequately considered by the jury [a]s a matter purely of quantity, degree, or immutability." (*Brewer*, 550 U.S. at 294; cf *Arizona v. Fulminante*, *supra*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (describing harmless error as error that may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt").)

Mitigating evidence plays a unique role in sentencing. Because the imposition of the death penalty is a **normative** decision, imposing such a penalty requires a jury to engage in a qualitative balancing of the reasons for and against the imposition of the death penalty. This balancing enables the

jury to "express the conscience of the community on the ultimate question of life or death," (*Witherspoon*, *supra,* 391 U.S. at 519), and to make a "reasoned moral response to the defendant's background, character, and crime," (*Brown*, 479 U.S. at 545 (O'Connor, J., concurring).) Moreover, because this normative decision expresses the conscience of the community, "predict[ing] the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 262, 108 S.Ct. 1792, 100 L. Ed. 2d 284 (Marshall, J., dissenting).) It is therefore inappropriate, in this proceeding, to conclude that the jury's inability to hear the totality of the available mitigating evidence undermined the credibility of the verdict, yet nevertheless find the error was harmless.

Moreover, unlike a guilty plea where the defendant can admit that the facts fulfill all the legal requirements for a conviction, because a death sentence is a normative decision, a defendant's failure to present mitigating evidence cannot support a conclusion that the aggravating facts fully express the conscience of the community. The jury, not the prosecution expresses the conscience of the community concerning whether the death penalty is appropriate.

However, even assuming the harmless error doctrine applies to this claim, the foregoing constitutional violations so infected the integrity of the proceedings that the error cannot be deemed harmless. Without any evidence of record to compare with the aggravating evidence, a reviewing court cannot demonstrate that the jury would have imposed the death penalty regardless of the mitigating evidence. The foregoing violation of Mr. Poore's rights had a substantial and injurious effect or influence on Mr. Poore's sentence,

rendering it fundamentally unfair and resulting in a miscarriage of justice. This error so infected the integrity of the proceedings that the State cannot meet its burden to prove the error harmless beyond reasonable doubt.

V.

THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT

Although a federal district court made headlines in 2014 by declaring California's death penalty scheme unconstitutional as presently administered (*Jones v. Chappell* (C.D. Cal 2014) 31 F.Supp.3d 1050, overruled on procedural grounds in *Jones v Davis*, 806 F.3d 538, 543 (9th Cir. 2015) the support for that decision is of long standing and broader than the district court decision reports and allows this Court as well as other state courts to dispose of the matter without further encouragement from lower federal courts.

The United States Supreme Court has long insisted that the death penalty be imposed "fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,*455 U.S. 104, 112.) Appellant submits that California's death penalty has not been, and cannot be, administered or executed fairly with reasonable consistency. The backlog of over 730 cases in federal and state courts proves that California's death penalty has not been administered with reasonable consistency so far. That backlog also prevents California from achieving fair and reasonably consistent administration of the death penalty going forward. Thus, under existing federal law as determined by the high court, this Court can and should hold that California cannot

impose the death penalty at all without violating the Eighth Amendment.

Interpreters of the Constitution who focus on the intent of the Framers can support this Court in abolishing California's death penalty because of the large and growing backlog of cases still under review and the long hiatus in executions in this state.[45] Those who adhere strictly to "originalism" will note: "Under the common law ideology that formed the basis for the Cruel and Unusual Punishments Clause, practices that fall out of usage for a significant period of time lose their place in the tradition and become 'unusual. '" (Stinneford, The Illusory Eighth Amendment (20l3) 65 Am. U.L. Rev. 437, 493, emphasis added, citing *James v. Commonwealth*, 12 Sergo & Rawle 220, 228 (Pa. 1825) ("The long disuetude of any law amounts to its repeal. "); Edward Coke, The Compleat Copyholder § 33 (1630) ("Custome ... lose[s its] being, if usage faile."), reprinted in 2 The Selected Writings and Speeches of Sir Edward Coke 563, 564 (*Steve Sheppard* ed., 2003) (Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation (2008) 1 02 Nw. U. L. Rev. 1739, 18l3.)

Additionally, those who interpret the constitution more liberally will support this Court in striking down California's death penalty because the state's failure to administer its death penalty with consistency has forced an

[45] At the time of this writing, no executions have occurred in California since 2006, when federal courts declared the state's previous lethal injection procedure violative of the Eighth Amendment. Since then, state courts have blocked executions in California because the state failed to proceed to properly adopt a new execution protocol in compliance California's Administrative Procedures Act. (*Sims V. Department of Corrections and Rehabilitation* (20l3) 216 Cal.App.4th 1059.)

unprecedented number of people to languish for decades on death row. Justices Breyer and Stevens have repeatedly called for courts high and low to consider the constitutionality of death sentences that the state was unable to execute in a timely manner. (See, e.g., *Johnson v. Bredesen* (2009) 558 U.S. 1067 [Breyer and Stevens, JJ., dissenting from denial of certiorari]; *Allen v. Ornoski* (2006) 546 U.S. 1136 [Breyer, J., dissenting from denial of certiorari]; *Lackey v. Texas* (1995) 514 U.S. 1045 [Stevens, J, respecting denial of certiorari].) *Glossip v. Gross* (2015) 576 U. S. __, 135 S.CT 2526 (Breyer, J., dissenting) Indeed, as late as 2016, Justice Breyer specifically denounced **California's** "costly 'administration of the death penalty'" because it suffers from three seminal Eighth Amendment defects; serious unreliability, arbitrariness in application, and unconscionably long delays that undermine the death penalty's penological purpose. (*Boyer v. Davis* (2016) ____US ___ 136 S.Ct. 1446 [Breyer, J., dissenting from denial of certiorari].)

In oral argument, Justice Kennedy pointedly questioned whether Florida, another state with multi-decade delays in executing death sentences, was administering its death penalty scheme consistently with the sound administration of justice and with the purposes that the death penalty is designed to serve. (See March 3, 2014 Oral Arg. Transcript at 46:4-20, *Hall v. Florida*, United States Supreme Court Case No. 12-10882.[46]) In *Hall*, the question on which the court granted certiorari was the constitutionality of a

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[46] <http://www. supremecourt. gov/oral_ arguments/ argument_ tra nscriptsI12-10882_7758.pdf> The high court's subsequent decision in the case of *Hall v. Florida*, filed May 27,2014 is at 134 S. Ct. 1986; 188 L. Ed. 2d 1007; 2014 U.S. LEXIS 3615; 82 U.S.L.W. 4373; 24 Fla. L. Weekly Fed. S 779.

Florida rule deeming an IQ test score of 70 or above to disqualify a capital defendant from being deemed mentally retarded for purposes of capital punishment. After oral argument, a reporter wrote:

> Late in the argument, Kennedy brought up something that he and his clerks must have turned up in preparing for this case. The last ten people Florida had executed, Kennedy said, had been on death row for an average of 24.9 years. He wondered if that was consistent with the Constitution and with the orderly administration of a death-sentencing scheme. Winsor seemed caught off-guard, saying only that he thought this was consistent with death penalty law.
>
> Justice Scalia intervened to try to help out Winsor, noting that most of the delays for people on death row had resulted from the complexity that the Supreme Court itself had caused in the process.
>
> Kennedy's skepticism was entirely shared by Justices Kagan, Stephen G. Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. Chief Justice John G. Roberts, Jr., played only a minor role in the hearing. Justice Clarence Thomas, as is his custom, remained silent.[47]

The situation in California differs from that in Florida principally in that California lacks reasonable consistency in executing the death penalty, as well as a record of doing so in a timely manner. California has executed only 13 men since reinstating the penalty in 1977. Those 13 men served an average of 210.7 months (17.5 years) on death row. (California Department of Corrections and Rehabilitation [hereafter, "CDCR"] (March 4, 2014)

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[47] Denniston, When simplicity won't do, SCOTUSblog (Mar. 3, 2014,)<http://www. scotusblog. coml20 14/03/argument-analysis-wh en -simplicity-wont-dol> [as of March 31,2014.]

Inmates Executed, 1978 to Present<http://www.cdcr.ca.gov/Capital Punishment/Inmates Executed. html. >.) The inmates who are now first in line for execution in California have been on death row for well over 25 years. If executions resume, the average number of years of incarceration of all those executed will increase substantially with each new execution.

Backlogs aside, the impossibility of making a death penalty scheme work fairly, and with reasonable consistency, was well described by former Supreme Court Justice Blackmun, who voted to sustain the death penalty during most of his judicial career, but came to conclude that the high court's death penalty case law was unworkable. In his dissent from the denial of certiorari review in *Callins v. Collins* (1994) 510 U.S. 1141, Justice Blackmun wrote:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia*, and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.
> This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form.
>
> Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, can never be achieved without compromising an equally essential

> component of fundamental fairness-individualized sentencing. (*Callins v. Collins, supra*, 510 U.S. at pp. 1143-1144.)

In his own concurring opinion on the denial of certiorari in *Callins*, Justice Scalia pointed out that he and Justice Thomas had previously "acknowledged the incompatibility" of the high court's death penalty jurisprudence and again argued for the court to eliminate the constitutional requirement of discretion and the broad presentation of mitigating evidence. (*Callins v. Collins, supra*, 510 U.S. at p. 1141.) The idea of doing away with those requirements has not held sway. On the contrary, since 1994 the high court has shown increased regard for the importance of ensuring that capital defendants can present, and that sentencing entities can act upon, evidence militating in favor of sparing an individual life.

Former Supreme Court Justices Souter and Stevens have expressed additional concerns about the high court's continued acceptance of death penalty schemes. In *Kansas v. Marsh* (2006) 548 U.S. 163, 207-208, Justice Souter, in dissent, questioned the fairness and reliability of America's death penalty schemes, particularly in light of the danger of executing an innocent person. In *Baze v. Rees* (2008) 553 U.S. 35, Justice Stevens wrote a concurring opinion concluding that those schemes persisted only as "the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty. (*ld*., at p. 78.) Further, he explained:

> In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909,

> 49 L. Ed. 2d 859 (1976), we explained that unless a criminal sanction serves a legitimate penological function, it constitutes "gratuitous infliction of suffering" in violation of the Eighth Amendment. We then identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. See *id*., at 183, and n 28, 96 S. Ct. 2909, 49 L. Ed. 2d 859 Joint opinion of Stewart, Powell, and Stevens, JJ.). In the past three decades, however, each of these rationales has been called into question. (*Baze v. Rees, supra*, 553 U.S. 35, 78, Stevens, J. conc.)

After explaining how each of the societal purposes for which the death penalty was previously deemed appropriate had been negated by subsequent developments, Justice Stevens concluded that:

> "the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.' *Furman v. Georgia* [1972] 408 U.S. [238] at 312, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (White, J., concurring)." (*Baze v. Rees, supra*, 553 U.S. at p. 86 (dis. opn. Of Stevens, J.].)

In California, backlogs in the post-conviction process exacerbate and augment the more widespread problems identified by Justices Breyer, Stevens, Souter, and Blackmun. At least three judges of the Ninth Circuit Court of Appeals have written about the causes and the undesirable results of administering the death penalty while a large backlog of cases exists. Their opinions are instructive.

First, in *Jeffers v. Lewis* (9th Cir 1994) 38 F.3d 411, 425-427, Judge Noonan wrote a dissenting opinion noting that in Arizona average stays on

death row exceeded two decades, and death penalty cases were backlogged in federal and state courts. "On the face of these facts it appears that the administration of the death penalty in Arizona is so arbitrary as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States as made applicable to the state of Arizona by the Fourteenth Amendment."

As explained by Judge Noonan, "To sentence many and execute almost none is to engage 'in a gruesome charade.' *Franklin E. Zimring and Gordon Hawkins*, Capital Punishment and the American Agenda (1980) 95." Further, he noted:

> . .. It is one thing to preserve an inanimate object such as the flag as a symbol yet another thing to take a human life as a symbol. To take a human life as a symbol suggests human sacrifice as a custom of the state; no rational modern society believes in such a custom. . . .
>
> [A] sentence to live under a sentence of death is not a penalty prescribed by Arizona law; mock death cannot 'be substituted for the real thing .... *(Jeffers v. Lewis, supra*, 38 F.3d 411, 424 (dis. opn. of Noonan, J.).)

In 1995, former Chief Judge Kozinski of the Ninth Circuit Court of Appeals and Sean Gallagher wrote that:

> "we have little more than an illusion of a death penalty in this country." (*Kozinski & Gallagher*, Death: the Ultimate Run-On Sentence (1995) 46 Case W. Res. L. Rev. 1, 3, hereafter, Kozinski.) Further, "we have endless and massively costly reviews by the state and federal courts; and we do have a small number of people executed each year. But the number of executions compared to the number of people who have been sentenced to death is minuscule, and the gap is widening every

> year.
> Whatever purposes the death penalty is said to serve--deterrence, retribution, assuaging the pain suffered by victims' families--these purposes are not served by the system as it now operates." (*Kozinski, supra*, 46 Case W. Res. L. Rev. at p. 4.)

The authors suggested that the solution to the "impasse on the death penalty" would be to decrease the number of crimes punishable by death and the circumstances under which death may be imposed so that we only convict "the number of people we truly have the means and the will to execute." (*Kozinski, supra*, at p. 31.) "This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (*Ibid*.,fn. omitted)).

Twelve years after the publication of Death: the Ultimate Run On Sentence, Senior Ninth Circuit Judge Alarcon published an article focused on the California situation. (Remedies for California's Death Row Deadlock (2007) 80 S. Cal. L. Rev. 697, hereafter Remedies.) Citing former Chief Justice Ronald M. George's statement that California's death penalty had become "dysfunctional" because the California Legislature has failed "to adequately fund capital punishment" while "death row inmates languish[] for decades at San Quentin State Prison" (*id*., at p. 698.) Judge Alarcon wrote:

> The unconscionable delay in the disposition of appeals and habeas corpus proceedings filed on behalf of California's death row inmates continues to increase at an alarming rate. It is now almost double the national average. Procedural changes must be made to the manner in which death penalty judgments are reviewed to avoid imprisoning a death penalty inmate for decades before the condemned prisoner's constitutional claims are finally

resolved.

> This Article identifies the woeful inefficiencies of the current procedures that have led to inexcusable delays in arriving at just results in death penalty cases and describes how California came to fmd itself in this untenable condition. It also recommends structural and procedural changes designed to reduce delay and promote fairness. (*Id*., at pp. 697-698.)

Judge Alarcon offered a series of recommendations, including increasing compensation of appointed counsel in capital appeals and state habeas corpus proceedings. He also observed that "[i]n the twelve years that have elapsed since Judge Kozinski's article was published, the Legislature had not taken his suggestion" to "decrease the number of crimes punishable by death and the circumstances under which death may be imposed 'so that we only convict the number of people we truly have the means and the will to execute.' In fact, the list of special circumstances accompanying frrst degree murder that qualify an individual for the death penalty has been expanded on several occasions." (*Id.*, at p. 699.)

One year later, the California Commission on the Fair Administration of Justice, Final Report (June 30, 2008) noted that "the elapsed time between judgment and execution in California exceeds that of every other death penalty state." (California Commission on the Fair Administration of Justice Final Report (June 30, 2008) [hereafter "Final Report"] at p. 2.41) The Final Report recommended that the legislature increase funding for the Habeas Corpus Resource Center and the Office of the State Public Defender, and for appointed counsel. The Final Report concluded that funding for the two state

agencies should be increased by 500% and 33%, respectively. (*Id*. at pp.6-8.)

Two years later, in *In re Morgan* (2010) 50 Cal.4th 932, this Court published a decision acknowledging its inability to recruit enough capital habeas counsel to represent the inmates whose cases have been affIrmed on direct appeal:

> [O]ur task of recruiting counsel has been made difficult by a serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case. Quite few in number are the attorneys who meet this Court's standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas corpus petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney.
>
> Many criminal law practitioners possess one of these skills, but few have both. Second, the need for qualified habeas corpus counsel has increased dramatically in the past 20 years: The number of inmates on California's death row has increased from 203 in 1987 to 670 in 2007. (Cal. Com. on the Fair Admin. of Justice, Final Rep. (2008) p. 121 (California Commission Final Report).) (*In re Morgan, supra*, 50 Cal.4th 932,938.)

Citing Judge Alarcon's 2007 Remedies article, this Court in *Morgan* noted that the "number of cases the HCRC can accept is limited both by a statutory cap on the number of attorneys it may hire and by available fiscal resources." (Alarcon, Remedies at p. 739.) (*In re Morgan*, *supra,* 50 Cal. 4th 932, 938.)

That same year, Judge Alarcon and Loyola Law School Adjunct Professor Paula Mitchell wrote a second article addressing California's

situation: Executing the Will of the Voters?: a Roadmap to Mend or End the California Legislature's Multi-billion-dollar Death Penalty Debacle (2010) 44 Loy. L.A L. Rev. 41 (hereafter, Executing). It began:

> Despite numerous warnings of the deterioration of California's death penalty system over the last 25 years, and more recent signs of its imminent collapse, the Legislature and the Governor's office have failed to respond to this developing crisis. The net effect of this failure to act has been the perpetration of a multibillion-dollar fraud on California taxpayers.
>
> California voters have been led to believe that the capital punishment scheme they have been financing for the last 32 years would execute those murderers guilty of committing "the worst of crimes." This has not occurred. Instead, billions of taxpayer dollars have been spent to create a bloated system, in which condemned inmates languish on death row for decades before dying of natural causes and in which executions rarely take place.
>
> By failing to provide the funds necessary to appoint competent counsel to represent capital prisoners in their automatic appeals and state habeas corpus proceedings, the state has ensured that, on average, death row inmates are warehoused in the costly condemned inmate facility at San Quentin for as many as 10 years before the California Supreme Court reviews their convictions and sentences on direct appeal. For the first four or five years of that period, condemned inmates simply sit awaiting the appointment of counsel. If the conviction and sentence are affirmed on direct appeal, the condemned inmate waits an additional three or more years before state habeas corpus counsel is appointed, only to find that the California Legislature has not provided sufficient funds to permit counsel to conduct an adequate investigation into the merits of his or her claims of state and federal constitutional violations. Finally, because the California Legislature fails to provide adequate funds to state habeas corpus counsel, federal courts are compelled to ensure that appointed federal habeas corpus counsel is sufficiently funded to investigate claims of constitutional violations that should have been, but were not,

investigated during the state habeas corpus proceeding. Under the current system, the cost to federal taxpayers to litigate the federal constitutional claims of those prisoners sentenced to death since 1978 will total approximately three-quarters of a billion dollars. (Executing, supra, 44 Loy.(L.A). L. Rev. 41, 42-43.)

Other writers, including one retired California Superior Court judge, called for repeal of California's Death Penalty Law, noting, among other things, the cruelty it visits upon the families of the victims. Judge James Gray wrote:

> [N]ot only does the death penalty not bring closure, it actually keeps the families of the victims on an emotional roller coaster. Because of the appeals and occasional re-trials, the families are forced for years to relive the grisly details of their loved one's death - over and over again. In many ways, this is actually using the grieving families as bit players in a long-continuing political drama. And when it comes down to it, many of the families discover that it does not furnish much satisfaction to see the object of one's hatred simply go to sleep when hooked up to a needle. For all of these reasons, what we are doing is actually the opposite of closure for the victims' families. (*Gray*, Facing Facts on the Death Penalty (2010) 44 Loy. (L.A) L. Rev. 255,256-257, emphasis added.)

Of course, imposing and affirming on direct appeal many more death sentences than can be finally reviewed and executed in a timely manner is also cruel to the condemned inmates, and to their families. (See, e.g., Sullivan, Efforts to Improve the Illinois Capital Punishment System: Worth the Cost? (2007) 41 U. Rich. L. Rev. 935, 967 [noting "the psychological and often the financial injuries inflicted on victims' families," upon the defendant's family, and upon the defendants themselves]; *Lanier & Acker*, Capital Punishment, The Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death

Penalty Cases (2004) 10 Psych. Pub. Pol. & L. 577, 603 [discussing the "host of secondary victims" affected by capital punishment].)

Although this Court has repeatedly rejected appellate arguments based on inmates' mental states and prison conditions endured by the condemned inmates themselves (see e.g. *People v. Carter* (2005) 36 Cal.4th 1114, 1213, and *People v. Barnett* (1998) 17 Ca1.4th 1044, 1182-1183) this Court has not yet considered the impact of a death sentence on the families of those killed, or on the children of the condemned defendant. Both are worthy of this Court's consideration. If appellant's death sentence is executed five, ten or twenty years from now, his family will suffer from the renewed publicity that will be given to this crime. Like the grieving families of the person appellant was convicted of killing, his family will have done nothing to deserve the punishment inherent in the sporadic re-emergence of individual cases in a grossly underfunded, inconsistently utilized death penalty scheme.

Appellant acknowledges that this Court has held that delays inherent in the appellate process "do not constitute cruel and unusual punishment because they resulted from the 'desire of our courts, state and federal, to get it right, to explore .. , any argument that might save someone's life.' [Citations.]" (*People v. McDowell* (2012) 54 Cal.4th 395, 412.) This court has also held that the "the slow pace of executions in California, which defendant contends is similar to the conditions condemned by Judge Noonan in his dissenting opinion in *Jeffers v. Lewis, supra*, 38 F.3d 411, 425-427, does not render our system unconstitutionally arbitrary. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 654.)

Appellant's claim differs significantly from those previously rejected claims. In addition to noting the historical meaning of the cruel and unusual

punishment clause of the Eighth Amendment, and the backlog of un-executed death sentences and unresolved cases, appellant brings his own history as evidence that the California death penalty scheme is unconstitutional as applied to him. As the appellate record shows, appellant has been on death row for over sixteen years without habeas counsel. Like most condemned prisoners in California, he had to wait five and a half years for appointment of appellate counsel. Four and half years after that, his first appointed counsel had to withdraw before drafting the opening brief and his current appellate counsel was appointed. As the issues in this brief explain, he has had solid grounds to attack his conviction.

Moreover, appellant raises claims that expose a systemic problem in the administration of California's death penalty law in which the delay in his state appellate process, the lack of habeas counsel, the conditions of life on death row, and the lack of recent executions are not the only symptoms of an Eighth Amendment violation.

Appellant asks that this Court consider the large and ever-growing number of un-executed death sentences in California, and the prospects for any court system to secure enough funding to review that many cases in the foreseeable future. Even if all cases pending in this Court were transferred to lower courts of appeal completing review of all the capital cases in this Court would be expensive, and fruitless, given the backlog of capital cases in the federal courts in our circuit.

In 2008, the California Commission on the Fair Administration of Justice reported that "the backlog is now so severe that California would have to execute five prisoners per month for the next twelve years just to carry out the sentences of those currently on death row." (Final Report, pp. 20-21.)

The backlog is now worse. In 2008, there were 670 people living on death row in California. (*ld*., at p. 2.) As of March 30, 2017, the number had grown to 749. (California Department of Corrections and Rehabilitation, Condemned Inmate List.)

California's death penalty has not been executed with the "reasonable consistency" that the Supreme Court has long demanded. *(Eddings v. Oklahoma, supra*, 455 U.S. 104, 112 ["fairly, and with reasonable consistency, or not at all."]') Moreover, even after the passage of Proposition 66, the California legislature has not provided funding to expedite the state appellate process as recommended by its own investigative commission.

Likewise, Congress has not, and likely will not, provide funding to expedite review in the federal courts. There is too little consensus on the wisdom of doing so. And there are too many good reasons to believe that fair and reasonably consistent administration of the death penalty is not possible. As Justice Blackmun wrote:

> In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution. (*Callins v. Collins, supra*, 510 U.S. 1141, 1157 [Blackmun, J., dissenting from denial of certiorari].)

For reasons beyond the control of this Court, appellant, his family, or the families of the victims, execution in California has become "unusual" and the death penalty "cruel" as those terms were understood by the Framers of the Eighth Amendment. Insofar as this Court cannot make the administration of the death penalty fair and reasonably consistent, it must declare

California's death penalty violative of the Eighth Amendment to the United States Constitution and set aside the conviction and sentence imposed upon appellant under the current system.

VI.

CALIFORNIA'S FAILURE TO TIMELY PROVIDE CONDEMNED DEFENDANTS WITH HABEAS COUNSEL OFFENDS THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND CALI FORNIA CONSTITUTIONS AND REQUIRES REVERSAL OF APPELLANT'S CAPITAL CONVICTION AND SENTENCE

Appellant has been on death row since 2002 for crimes committed in 1999. Counsel of record is appointed only for his direct appeal to this Court. He has no habeas counsel, and no reason to believe he will be appointed a habeas counsel as soon as this brief is filed. His right to counsel, confrontation, reliability in proceedings to determine sentence, an impartial jury, and to appear on the charges and defend against them, and other elements of due process as guaranteed by the federal and state constitutions, have been effectively suspended by the state legislature. (See U.S. Const., amends. 5, 6, 8, 14, and state constitutional corollaries.)

In 2008, the California Commission on the Fair Administration of Justice reported that "[t]he average wait to have habeas counsel appointed [by the California Supreme Court] is eight to ten years after the imposition of [a death] sentence." (Final Report, pp. 50-51.)[48] As described in the previous argument, the Commission's report explained the role of inadequate funding

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[48] As noted above, appellant has ALREADY been on death row for 15 years. That is 50% longer than the average wait for habeas counsel in 2008!

of public agency and private habeas counsel in delaying appointment of counsel, and the risk that failure to appoint habeas counsel while direct appeal proceedings are pending can foreclose presentation of meritorious claims in state and federal courts. (Final Report, pp. 47-55.) As of the time of this writing in 2017, the state legislature has not yet seen fit to provide that funding. It is unlikely to do so in the foreseeable future as it has had plenty of opportunity to do so in the nine years since the report issued, and has made only token changes in compensation formulas.

Appellant acknowledges that this Court rejected as "speculative" a similar claim in *People v. Williams* (2013) 56 Ca1.4th 165, 202. That position should not be taken in the present case. No speculation is necessary at this time. The essential facts are settled.

The state legislature's failure to fully fund the agencies and court appointed counsel as recommended in the Commission's Final Report, how long appellant waited for appointment of appellate counsel, and appellant's present lack of habeas counsel, are matters of history, and will continue to be a matter of record at the time this direct appeal is decided. It is now even more clear that condemned defendants have a constitutional right to the assistance of counsel in presenting a post-conviction claim based on ineffective assistance of counsel at trial on habeas corpus, as required by state law. (*Trevino v. Thaler* (2013) _ U.S. _, 133 S. Ct. 1911, 1921.) It is also well settled that condemned defendants have a broader right to have meaningful access to the courts that California does not ensure through alternative means. (*Murray v. Giarratano* (1989) 492 U.S. 1, 14-15 [controlling opinion of Justice Kennedy concurring in the judgment

rejecting a claimed right to appointed habeas counsel where "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. "].)

Because appellant is being denied counsel, as well as other means to access the courts in a critical stage of the proceedings, no proof of prejudice is required. (See *People v. Hernandez* (2012) 53 Cal.4th 1095, 1104 [acknowledging high court precedents requiring reversal "without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."].) Based on the facts presented here, this court should reverse appellant's conviction and sentence.

VII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. In *People v. Schmeck* (2005) 37 Ca1.4th 240, 303-304, this Court held that "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." In light of this Court's directive in

Schmeck, appellant briefly presents the following challenges in order to urge this Court's reconsideration, to preserve these claims for federal review, and to provide a basis for this Court's grant of relief upon reconsideration of each claim in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh*, *supra,* 126 S.Ct. 2516, 2527, fn. 6.)[49] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a

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[49]In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional because such a safeguard might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. The "special circumstances" section of Penal Code § 190.2 purports to narrow the class of first degree murderers to those most deserving of death, but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all.

Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses to impose the ultimate sanction on

only a few offenders among the thousands of murderers in California.

A. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.*

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make **all** murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant, the death penalty statute contained thirty special circumstances[50] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the

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[50]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See Section E. of this Argument, *post*).

B. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.*

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[51] Nevertheless, this Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[52] or having had a "hatred of religion,"[53] or having threatened witnesses after his arrest,[54] or disposed of the victim's body in a manner that precluded its recovery.[55] It also is the basis for

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[51]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[52]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[53]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[54]*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[55]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid*.) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v.*

Georgia (1980) 446 U.S. 420].) Viewing section 190.3 in the context of how it is actually used, one sees that every fact that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. *California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.*

As explained above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental

components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. *Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.*

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. ___ [166 L. Ed. 2d 856, 127 S. Ct.

856], [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id*. at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id*., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id*., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. **Any** factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range based on a finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid*.) The

supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id*. at 313.)

In reaching this holding, the U.S, Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id*. at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly

rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

2. *In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[56] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its severity or enormity*

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[56] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[57] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[58]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow,*

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[57] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id*., 59 P.3d at p. 460.)

[58] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

supra, 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[59] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id*., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and

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[59] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

found beyond a reasonable doubt.' [citation omitted]." *(Cunningham*, *supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id*., p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors

during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th 226 at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[60] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

This argument overlooks *Apprendi*'s instruction that "The relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348.

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[60] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid*.; see 200 Ariz., at 279, 25 P.3d, at 1151." (*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, *supra*, the high court made it clear that, as Justice Breyer complained in dissent that, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id*., 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's

applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

3. *Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.*

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (AZ 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State, supra,* 59 P.3d 450.[61])

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[61] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[62] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the

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sentence of death).

[62] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] (1981) 451 U.S.430 at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

U.S. Constitution.

4. *The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.*

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be

beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer*, *supra*, 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra,* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable

> doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . .

they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that not only are the factual bases for its decision true, but that death is the appropriate sentence.

5. *California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.*

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. 538 at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39

Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id*., 11 Cal.3d at p. 267.)[63] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957 at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897

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[63]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland, supra,* 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetroulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require, in writing, an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) California's failure to require written findings thus violates not only federal due process and the Eighth Amendment, but also the right to trial by jury

guaranteed by the Sixth Amendment.

6. *California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree

murders that can *not be charged* with a "special circumstance" a rarity.

That greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), the reach of the statute renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173 at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review violates the Eighth Amendment.

7. *The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.*

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant including assaults on inmates that occurred during prior incarcerations.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury before it could be considered or relied upon in imposing death. Appellant's jury was not instructed on the need for such an unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

8. *The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.*

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, (1988) 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

9. *The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction*.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert

mitigating evidence into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*." (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id*., 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid*.) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence

upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra,* 38 Cal.3d 762, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable

consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

10. *The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants.*

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without

showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification must be more strict, and any purported justification by the State of the discrepant treatment must be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[64] as in *Snow*,[65] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Penal

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[64] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another*." (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[65] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another*." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

Code sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[66]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. Additionally, unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[67] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct.

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[66] In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[67] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

11. *California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Violates the Eighth and Fourteenth Amendments to the United States Constitution.*

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied

from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113 at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra,* 536 U.S. 304 at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, because the law of nations now recognizes the impropriety of capital punishment as a regular punishment, it is unconstitutional in this

country since international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other countries' cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides (such as here). See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[68] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, for the reasons set forth above, the very broad death scheme in California and death's use as regular punishment violates both international law and the Eighth and Fourteenth Amendments. Therefore, appellant's death sentence should be set aside.

VIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and

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[68] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

warrants reversal of the judgment of conviction and sentence of death.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"); see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 at pp. 642-643 (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"); *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *(Chapman*, 386 U.S. at 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 (applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors).)

The cumulative effect of the guilt phase errors raised here so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ("even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"); see also *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-76 (reversing heroin convictions for cumulative error); *People v. Hill* (1998) 17 Cal.4th 800, 844-45 (reversal based on cumulative prosecutorial misconduct); *People v. Holt* (1984) 37 Cal.3d 436, 459 (reversing capital murder

conviction for cumulative error).)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 (court considers guilt phase error in assessing prejudice in the penalty phase).) In this context, this Court has recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown*, *supra*, 46 Cal.3d 432, 463 (error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the error affected the jury's verdict); *In re Marquez* (1992) 1 Cal.4th 584, 605 (an error may be harmless at the guilt phase but prejudicial at the penalty phase).)

The errors complained of here undermined the reliability of the death judgment in this case. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger, supra,* 481 U.S. 393, 399 (reversal required in absence of showing that the error was harmless or had no effect on the jury's verdict); *Skipper v. South Carolina, supra,* 476 U.S. 1, 8 (error may have affected the jury's decision to impose death); *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341(penalty reversed because Court could not say that the error had no effect on the verdict).)

CONCLUSION

For the reasons set forth herein, appellant's convictions and sentence to death must be set aside.

Respectfully submitted,

R. Clayton Seaman, Jr.
Attorney for Appellant
Christopher E. Poore

CERTIFICATE OF WORD COUNT

I am the attorney for appellant Christopher Poore. Based upon the word-count of the Word Perfect 12.0 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 72,011 words. (California Rules of Court, rule 8.630 (b)(1)(A).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date:

R. Clayton Seaman, Jr
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304
CA State Bar # 126315

S104665 PROOF OF SERVICE

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, R. Clayton Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 12008 Prescott, AZ 86304. On February 28, 2018, I served the within

APPELLANT CHRISTOPHER POORE'S OPENING BRIEF

on each of the following by mail or by electronic service:

Riverside County District Attorney
3960 Orange St.
Riverside CA 92501

Riverside County Superior Court
Criminal Department
Attn. Hon. Randall White
4100 Main Street
Riverside, CA 92501-3626

Mr. Christopher E. Poore E-06437
CSP - San Quentin
1 EB 49
San Quentin CA 94974

Office of the Attorney General
Attn: Anthony Da Silva
sdag.docketing@doj.ca.gov

California Appellate Project
Attn: Aundre Herron Esq.
filing@capsf.org
aherron@ capsf.org

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on February 28, 2018, at Prescott, AZ.

____
R. Clayton Seaman Jr.