IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. **DEWEY JOE DUFF,** Defendant/Appellant.	Case No. S105097 **CAPITAL CASE**

Automatic Appeal From the Superior Court of the State of California
County of Sacramento (Case No. 98F01583)

The Honorable Thomas M. Cecil, Judge

APPELLANT'S OPENING BRIEF

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	Case No. S105097
Plaintiff/Respondent,	
vs.	
DEWEY JOE DUFF,	
Defendant/Appellant.	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

On February 23, 1998, at about 3:30 in the afternoon, a drug dealer named Roscoe Riley and his associate Brandon Hagen were killed outside of a Sacramento bar. (12 R.T. 4268 et seq., 4355 et seq.) Dewey Joe aka "Joe Joe" Duff, a mentally challenged long-time methamphetamine user, was arrested. (14 R.T. 4918 et seq.)

On September 16, 1998, Mr. Duff was accused, in a Consolidated Information filed in the Sacramento Superior Court, of capital murders and other felony offenses. The Consolidated Information charged:

COUNTS	CHARGES
One	Murder of Roscoe Riley (Penal Code §187, subdivision (a)); Personal use of a handgun (Penal Code §12022.53, subdivision (b).)
Two	Murder of Brandon Hagen (Penal Code §187, subdivision (a)); Personal use of a handgun (Penal Code §12022.53, subdivision (b).)
Three	Robbery of Roscoe Riley (Penal Code §211); Personal use of a handgun (Penal Code §12022.53, subdivision (b).)
Four	Possession of a handgun notwithstanding a prior felony conviction (Penal Code §12021, subdivision (a).)
Five	Possession of "reloadable" ammunition notwithstanding a prior felony conviction (Penal Code §12316, subdivision (b)(1).) Multiple murder (Penal Code §190.2, subdivision (a)(3)) special circumstances were alleged as to counts one and two. Felony murder special circumstances were alleged as to counts one and two since the murders were committed during a robbery (Penal Code §190.2, subdivision (a)(17).) A prior serious felony conviction "strike" for an assault with a semi-automatic rifle was also alleged (Penal Code §§245, subdivision (b), 667, subdivisions (a)-(i), and 1170.12.) (1 C.T. 47-51.)

A defense Trombetta-Youngblood motion, based upon the destruction of the decedents' car as well as other physical evidence by investigating law enforcement agencies, was denied. (4 C.T. 963 et seq.; 10 R.T. 3644 et seq.)

A defense motion to suppress Mr. Duff's post-arrest statements, on the grounds that they were extracted in violation

of his Miranda rights and were involuntary, was denied. (1 C.T. 251 et seq., 4 C.T. 980; 10 R.T. 3762 et seq. and 11 R.T. 4147 et seq.)

Jury selection commenced on September 11, 2001, and continued until October 22, 2001, when a jury was impaneled. (1 C.T. 20 et seq., 4 C.T. 979-980.)

At the conclusion of the guilt phase trial, the trial court refused to instruct the jury on the lesser included offenses of second degree murder and voluntary manslaughter. (4 C.T. 1059-1060; 16 R.T. 5641 et seq.)

On November 16, 2001, the jury returned verdicts finding Mr. Duff guilty of murdering Mr. Riley and Mr. Hagen, robbing Riley, and using and possessing a handgun during the commission of these offenses. The jurors further found the multiple murder and felony murder special circumstances allegations true. (4 C.T. 1069-1077; 18 R.T. 6103 et. seq.)[1]

On December 18, 2001, at the conclusion of the penalty phase trial, the jury imposed death. (4 C.T. 1181; 25 R.T. 8068.)

On March 8, 2002, the trial court, having denied defense motions for a new trial and for modification of the death verdict (Penal Code §§1181 and 190.4, subdivision (e)), sentenced Mr. Duff to death for the special circumstances murders. (1 C.T. 28-29, and 5 C.T. 1274 et seq.; 25 R.T. 8146 et seq.)

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[1] The possession of "reloadable" ammunition charge was dismissed pursuant to the prosecution's request. (1 R.T. 1115.)

Additional procedural facts are set forth hereinbelow in the Argument section of this brief as necessary to understand the issues presented by this appeal.

STATEMENT OF APPEALABILITY

Defendant Duff's appeal to this Court is automatic. (Penal Code §1239, subdivision (b).)

STATEMENT OF FACTS

I.

GUILT PHASE EVIDENCE

Rosco Riley was a Sacramento drug dealer. Dewey Joe aka "Joe Joe" Duff was one of his customers. In January 1998, according to Cynthia Fernando (Joe Joe's long-time "Road Dog" companion), Ronald Greathouse (Joe Joe's methamphetamine user companion), Lloyd Dunham (a friend of Joe Joe's brother Lloyd "Pumpkin" Duff), Lloyd "Cottontop" Duff (Joe Joe's nephew), and Tessa Trimble (Roscoe's some-time girlfriend), Joe Joe was angry because he felt that Roscoe had cheated him in a gun - drug deal. Joe Joe had stated that he intended to get even with Roscoe, and rob and/or kill him. Victoria Brooks, one of Joe Joe's neighbors, saw him practicing with a gun in the back yard. (12 R.T. 4450 et seq., 4462 et seq., 4493 et seq., 13 R.T. 4504-4516, 4710 et seq., 4743 et seq., 4756-4766, 14 R.T. 4866 et seq., 15 R.T. 5336 et seq., 5351-5368.)

On the afternoon of February 23, 1998, Joe Joe, Roscoe, and an associate of Roscoe's named Brandon Hagen, drove together to the Taylor's Corner Bar. The evidence concerning what occurred there is conflicting.

According to bartender Diana Flint and customer Filomeno Julian Lujan, Joe Joe went into the bar to use the bathroom while Roscoe and Brandon remained in the car. Joe Joe came out of the bathroom 5-to-10 minutes later and walked out of the bar. About five minutes after that Diana and Julian heard gunshots, and saw

Joe Joe standing next to the passenger's side of the car, with his arms extended, shooting at Roscoe and Brandon. They saw Joe Joe walk around the car, engage in some type of "struggle," shove the driver out of the way, climb into the driver's seat, and drive off. (12 R.T. 4268 et seq., 4355 et seq.)[2] A moment later both Diana and Julian heard another gunshot. (12 R.T. 4280, 4341.)

According to Joe Joe's post-arrest interrogation statements, which were admitted into evidence over defense objections that they were extracted in violation of his Miranda rights and were involuntary, this was a case of self-defense. Joe Joe did not plan to murder Roscoe. He met Roscoe and his associate Brandon at his sister's house to discuss another gun-drug deal. During the drive from the sister's house to Taylor's Corner Bar Roscoe and Brandon became increasingly angry because Joe Joe did not have the $500 purchase price. Joe Joe went into the bar, said hello to Ms. Flint, used the bathroom and returned to the car. Roscoe and Brandon were still very angry. Joe Joe decided to leave, saying that that he did not want any problems. However Roscoe and Brandon pulled out their guns and began shooting. Joe Joe pulled out his .38 and fired back. There was an eerie silence. Joe Joe walked around to the driver's side, climbed into the car, and drove off. (15 R.T. 5222-5236, 5275 et seq.; People's Exhibits 58-A and 58-A-1 [interrogation tapes] and 59 and 59-A [interrogation transcripts], pages 113-136, 150-175.)

Joe Joe drove the car, with the now deceased Roscoe and

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[2] It is unclear whether or not Julian ever actually used the word "struggle." (16 R.T. 5542 et seq.)

Brandon still inside, to a muddy field behind the home of his friends Walter and Sheri Payne. He took some jewelry and a .357 and Tek .9 gun, left about $200 in cash in Roscoe's pocket, and went into the house. He told Cindy Fernando and a number of other friends that he had "done it," and asked them to clean and dispose of the guns and stolen jewelry, and various "packages," took a shower, changed his clothes, and spent the rest of the afternoon and evening at Ronnie Greathouse's house. (12 R.T. 4426-4431, 4454-4460, 13 R.T. 4522-4557, 4631, 4653 et seq., 4676 et seq., 14 R.T. 4840, 4859, 15 R.T. 5315 et seq.)

At about midnight Joe Joe was walking towards his mother's home when he was spotted by two police officers. While the officers were actually looking for someone else, Joe Joe assumed that they were seeking to arrest him. He fled, but was apprehended and arrested. (13 R.T. 4557, 4612, 14 R.T. 4918-4922, 4938 et seq., 4947-4956, 4958-4964, 4969.)

The next day the police received a telephone call from Joe Joe's former sister-in-law informing them of the car in the muddy field. She told the police that Joe Joe was the perpetrator of the homicides and that he and his friends were going to torch the car in order to destroy the evidence. The police found and moved the car, with the bodies still inside, to a crime laboratory where Sacramento County Police Criminalist Faye Springer analyzed the available evidence. She concluded that (a) the decedents had been shot at close range in the back of the head execution style, and (b) the position of the bodies (Brandon Hagen's legs were

crossed and he had a pair of dice in his lap indicating he was relaxed and unprepared for any gun battle) were inconsistent with a struggle or self-defense. She prepared a chart showing the possible trajectories of the bullets fired. She did not know at the time that Julian Lujan had told the police that he had witnessed some kind of struggle between Joe Joe and one of the decedents or that another shot had been fired after Joe Joe had driven away from the Taylor's Corner Bar. She later admitted that she had no way of knowing the positions of the decedents at the time they were shot, did not consider Joe Joe's post-arrest interrogation statements, and never tested Roscoe's or Brandon's hands for gun shot residue. Her analysis was based entirely upon the positions of the decedents' bodies as she found them, a coroner's autopsy report, the location of the bullet wounds, bullet fragments found in the car, and her general knowledge of ballistics. Ms. Springer acknowledged that other trajectories, different from those she hypothesized, were entirely possible. (15 R.T. 5066-5142, 5154-5252, 16 R.T. 5372-5441, 5458-5537.)

The police searched the area where Joe Joe was apprehended, Lloyd Dunham's house and back yard, and Walter and Sheri Payne's residence, and recovered the various guns, some of the stolen jewelry and Roscoe's cell phone and Zippo lighter. Faye Springer test fired Joe Joe's .38. It was missing an ejector screw, but was nonetheless operable if cocked, carefully tilted, and held with both hands. (13 R.T. 4688-4693, 4729, 14 R.T. 4894-4908, 4923, 4969-4978, 15 R.T. 5315 et seq., 16 R.T. 5421 et seq.)

II.

PENALTY PHASE EVIDENCE

The prosecution presented Penal Code section 190.3, subdivisions (b) and (c) evidence that Joe Joe had previously committed and/or been convicted of various felonies. In 1978 he was convicted inter alia of falsely imprisoning a 16 year old girl named Julie Frey after, according to her, he dragged her into an alley and sexually assaulted her. In 1990 he was convicted of assaulting police officer Steve Reed. In 1994 he was convicted of assaulting Timothy Ritchey with a semi-automatic riffle. He had also been convicted of possessing methamphetamine, stealing a car, and possessing a bayonet or dagger. (18 R.T. 6243 et seq., 19 R.T. 6261 et seq., 6273 et seq., 6278, 6284-6293, 6294-6305, 6319 et seq., 6326-6345, 6350 et seq., 6356 et seq., 6365 et seq., 6411-6416, 6489 et seq., 6517-6530.) Cynthia Fernando testified that the night before the homicides Joe Joe had beaten her up, and Walter and Sheri Payne's neighbor Victoria Brooks told the jury that she had witnessed this incident. Cindy also testified that, about a month earlier, Joe Joe had shot at Ronnie Greathouse. (20 R.T. 6665-6676.)[3]

The prosecution also presented victim impact evidence. Marie Correa, the mother of Roscoe Riley's two daughters, who had arranged and paid for his funeral, testified that it had been very difficult for her to tell her children that their father had

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[3] A more detailed summary of the factor (b) evidence is set forth in Argument XI post.

been killed. (20 R.T. 6699 et seq.) Mikala Tiller, Brandon Hagen's best friend, testified that she had fainted when informed by telephone of his death, told the jury about Brandon's cremation, and produced a photograph of a bedroom bookshelf dedicated to Brandon's memory. (20 R.T. 6702-6705.)

A defense motion to rebut this evidence, and to introduce "reverse victim impact evidence," was denied. As a result the jury never heard about Roscoe's and Brandon's extensive criminal histories or their failure to support their families. (4 C.T. 1082-1097; 19 R.T. 6531 et seq., 20 R.T. 6677-6684.)

The defense presented factor (k) evidence. Joe Joe had been raised in a dysfunctional family by a criminal, drug addicted, alcoholic negligent mother. The mother, Alvira, was married five or six times, impregnated 13 times by different men, bore six children and lost seven by miscarriage. She used her children, including eight year old Joe Joe, to play badger games (i.e. picking up men in bars, luring them to her home in anticipation of enjoying her sexual favors, and then robbing them). Alvira was so disturbed that on one occasion she shot one of her husbands merely because he asked her to make dinner when she was in a bad mood. Joe Joe and his siblings were so neglected, poor and hungry that they had to steal food from dumpsters and clothing from stores. (20 R.T. 6774-6860, 21 R.T. 6894-6934, 6950-6953, 7011 et seq., 7040 et seq., 7084 et seq.)

Two of Joe Joe's former teachers, Robert Malugani and Robert Erickson, testified concerning Joe Joe's poor performance in

school, and his school records were introduced into evidence. Joe Joe had rarely spoken, was unable to write a sentence, and had been placed in special education classes. (20 R.T. 6973 et seq.)

Psychiatrist John Wicks testified that a brain electrical activity mapping (BEAM) scan had revealed brain damage in both the frontal and temporal lobes. (21 R.T. 7126, 22 R.T. 7339.) Both Wicks and psychiatrist Albert Globus, after reviewing relevant records, the electro-encephalograms (EEGs) and BEAM study, Joe Joe's.I.Q. tests (Defense Exhibit MM) and documents indicating that his mother had suffered from fetal alcohol syndrome, and that Joe Joe had suffered significant head injuries caused by a fall from his crib as an infant and a 1996 motorcycle accident, opined that Joe Joe was brain damaged. Furthermore, Joe Joe's I.Q. tests indicated that, while his full scale intelligence quotient (FSIQ) was about 85, his auditory immediate memory score was only 62, and that he was mildly retarded. (21 R.T. 7126 et seq., 23 R.T. 7539 et seq. and 7583 et seq.) The homicides in the instant case were the result of a combination of factors including brain damage, lack of social judgment, and powerful psycho-active drugs known to produce unwarranted and unjustified aggression (including methamphetamine, PCP and LSD). (23 R.T. 7632-7636.)

Dr. Globus further opined that, since prison would remove a lot of the stress Joe Joe had experienced throughout his life, and he would not have to exercise a great deal of judgment and

could rely on others to tell him how to behave, his chances of a successful adjustment, should his life be spared, were relatively good. (23 R.T. 7681-7694.)

However, Albert Adelberg, a neurologist, who never spoke with Joe Joe, conducted no tests, and did not speak to any of his family members, disagreed with Dr. Wicks' conclusion that Joe Joe had brain damage (even though he might be suffering from mild brain impairment). (24 R.T. 7747 et seq.)

James Esten, a retired California Department of Corrections Consultant, testified that Joe Joe had adjusted well during his prior incarcerations, was not a disciplinary problem in prison, and would not pose a risk for either prison staff or other inmates if his life were spared. Joe Joe was an above average prison inmate even though he had demonstrated his inability to be a law abiding citizen in the outside world. On cross-examination, the prosecutor elicited that Joe Joe had been "written up" for making a disparaging remark about an African American inmate, spitting on another inmate's cell window, allegedly trying to force another inmate to have sex with him, and helping another inmate escape. However Mr. Esten opined that there was insufficient evidence to support any of these allegations. (22 R.T. 7230-7259.)

ARGUMENT

JURY SELECTION ARGUMENTS

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND VIOLATED DEFENDANT DUFF'S RIGHT TO A FAIR TRIAL, IMPARTIAL JURY AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS - - BY SUMMARILY EXCUSING SEVERAL PROSPECTIVE JURORS FOR CAUSE EVEN THOUGH THEY STATED ON THEIR QUESTIONNAIRES THAT THEY WERE WILLING TO CONSIDER IMPOSING THE DEATH PENALTY

A. PROCEEDINGS BELOW

At the commencement of the trial, each of the prospective jurors completed a written juror questionnaire, which included several questions concerning his or her views on the death penalty, pursuant to Code of Civil Procedure section 223. (5 C.T. 1329; 19 C.T. 5649.)

Prospective juror C.L. stated that she would follow the law as explained by the Judge regardless of her personal views, that she had a neutral attitude concerning the death penalty, that she felt that the death penalty might be better than life in prison, that the frequency with which the death penalty was imposed in California was "about right," that she was not a member of any organization that had taken a position concerning the death penalty, that whether or not the death penalty should be imposed depended upon the facts of any particular case, and that she had no strong feelings concerning the death penalty which would cause her to automatically refuse to find the defendant guilty of special circumstances murder or vote for life without the possibility of parole regardless of the evidence presented. (5

C.T. 1388, 1393-1394, Questionnaire Responses 58, 94-107.)

Prospective juror S.K. stated on her questionnaire that she could follow the law as explained by the Judge, was neutral in regard to the death penalty although she had never really thought about it, that the position of her Russian Orthodox Church was that generally it was God's right to give life or to take it, but that she did not feel obligated to agree with that position, and would not refuse to find the defendant guilty of first degree special circumstances murder or automatically vote against the death penalty regardless of the evidence presented. She stated that she was opened minded about what the penalty should be, that she would listen to all of the evidence as well as the Judge's instructions on the law, and that she would honestly consider both death and life without possibility of parole before reaching a decision concerning the appropriate penalty. (6 C.T. 1557, 1562-1564; Questionnaire Responses 58, 94-109.)

Prospective juror D.L. stated in his questionnaire responses that he could follow the law as explained by the Judge, was neutral concerning the death penalty, felt that the frequency with which the ultimate penalty was imposed in California was "about right," and had no strong feelings which would cause him to refuse to find the defendant guilty of first degree special circumstances murder, or automatically vote against the imposition of the ultimate penalty regardless of the evidence. (9 C.T. 2613, 2618-2620; Questionnaire Responses 58, 94-112.)

Nonetheless, the trial court and counsel for the parties,

after reviewing the written questionnaires, stipulated to excuse all of the above jurors without any further inquiry.

Juror C.L. was removed pursuant to an agreement between counsel based solely upon the answers that she had provided in her questionnaire since the court felt that this decision was somehow appropriate "without spending a lot of time talking to . . . [her]." She was obviously puzzled, commented "no kidding," but acquiesced. (6 R.T. 2480-2482.)

Juror S.K. was questioned only briefly by the trial court. She assured the court that the terrorist attacks of September 11th a few days earlier would not influence her ability to serve as a juror - - even though as a citizen she was upset - - , and reassured the court that she would keep an open mind concerning the appropriate penalty should the defendant be found guilty as charged. Nonetheless counsel - - without asking a single question - - stipulated to excuse S.K., and the court removed her. (6 R.T. 2521-2524.)

Prospective juror D.L. was excused by stipulation of counsel because the court felt that his "answers and the positions that. . . [he] articulate[d], or the circumstances that. . . [he] . . . [found himself] in led us to be able to reach a conclusion without interviewing. . . [him] any further." (7 R.T. 2776-2777.) The record provides no clue as to the "positions" or "circumstances" of juror D.L. which formed the basis of his excusal.

B. DISCUSSION

The trial court committed Witt-Witherspoon error in excusing prospective jurors C.L., K.S., and D.L. based solely upon their checked answers and brief written comments concerning capital punishment on their juror questionnaires. The questionnaires did not elicit sufficient information from which the court could properly determine whether these prospective jurors suffered from a disqualifying bias for or against the death penalty. (People v. Stewart (2004) 33 Cal.4th 425.) Counsel's failure to object and acquiescence in the excusals did not constitute a waiver of defendant Duff's right to raise this issue on appeal. (Wainwright v. Witt (1985) 469 U.S. 412, at 434-435; People v. Schmeck (2005) 37 Cal.4th 240, 262.) Since the improper exclusion of even one prospective juror under the Witt-Witherspoon standard is reversible penalty phase error per se, the death sentence must be set aside. (Davis v. Georgia (1976) 429 U.S. 122, 123; Gray v. Mississippi (1987) 481 U.S. 648; People v. Stewart, supra, 33 Cal.4th at 454.)

1. The Trial Court Erred

The United States Supreme Court held in Wainwright v. Witt, supra, that state courts may exclude from capital sentencing juries prospective jurors only if their views would "prevent or substantially impair the performance of . . . [their] duties as a juror in accordance with . . . [their] instructions and . . . [their] oath." Witt clarified the rule previously announced in Witherspoon, supra, and has recently been reaffirmed by the High

Court in Uttecht v. Brown (2007) 551 U.S. 1. This Court has continuously applied the Witt-Witherspoon rule in determining the propriety of the excusal of prospective jurors for cause on appeal. (People v. Cunningham (2001) 25 Cal.4th 976, 975; People v. Richardson (2008) 43 Cal.4th 959, 986.)

Recent decisions of this Court have emphasized the importance of meaningful death-qualifying voir dire. This Court has stressed the trial court's duty to know and follow proper procedure, and to devote sufficient time and effort to the process. Thus, in People v. Cash (2002) 28 Cal.4th 703, the death judgment was over-turned for failure to allow sufficient inquiry into jurors' attitudes about particular facts that could cause some jurors invariably to vote for the death penalty regardless of the strength of the mitigating circumstances. (Cash, supra, 28 Cal.4th 721.) In People v. Heard (2003) 31 Cal.4th 946, the judgment was reversed because the trial court erroneously excused a prospective juror for cause based upon his isolated answers on a juror questionnaire which had been lost or destroyed and ambiguous answers to questions posed during an inadequate oral examination. (Heard, supra, 31 Cal.4th at 964-966.) In People v. Stewart, supra, this Court reversed because the trial judge had erroneously excused five prospective jurors for cause, based solely upon their written answers to a jury questionnaire concerning their views relating to the death penalty without any follow-up questioning by the court and counsel which might have been able to clarify the responses and determine whether, in

fact, the prospective jurors were disqualified from service. (Stewart, supra, 33 Cal.4th at 440.) At bottom, both the trial court and counsel "must have sufficient information regarding the prospective jurors' state of mind to permit a reliable determination as to whether the jurors' views [on capital punishment] would 'prevent or substantially impair' the performance of his or her duties." (People v. Stewart, supra, 33 Cal.4th at 445.)

There are of course cases where the jurors' written questionnaire responses make it unmistakenly clear that they would always vote against death and it may be appropriate to excuse them without any further inquiry. (See e.g. People v. Richardson (2008) 43 Cal.4th 959, at 986 [six prospective jurors stated that they would always vote against death and were summarily excused without any further oral voir dire]; accord People v. Wilson (2008) 44 Cal.4th 758 [excusal of prospective jurors for cause based upon written questionaire responses making clear that jurors are unwilling to set aside personal beliefs and follow the law held permissible]). However, in cases where the jurors' written responses do not indicate an inability to fairly consider imposing the death penalty, it is reversible error to excuse them without any further inquiry. (People v. Stewart and People v. Heard, both cited supra.)

In this case, just as in Stewart, the trial court erred in excusing three prospective jurors, based solely on their checked answers and brief written comments concerning capital punishment

on juror questionnaires. All three jurors expressly stated that they would not automatically vote against the death penalty in the event that defendant Duff were found guilty of first degree special circumstances murder, and would determine the appropriate penalty based solely upon the court's instructions regarding the applicable law and the evidence. In fact the trial court's error in the instant case was - - if anything - - even more egregious than the error committed by the trial court in Stewart. In Stewart a number of the prospective jurors were excused based upon their personal opposition to the death penalty notwithstanding their assurances that they would nonetheless follow the law. However, in our case at least two of the three jurors in question (jurors C.L. and D.L.) were completely neutral concerning the death penalty and had no personal opinions or feelings to overcome. The third juror, juror K.S., is slightly more akin to the jurors excused in Stewart since she acknowledged that her Russian Orthodox Church might be opposed to the death penalty. However, since she also indicated that she did not feel obligated to follow her church's teachings on this subject and was not personally opposed to the death penalty, her summary excusal was also impermissible.

In summary, in the absence of any real concerns about these jurors' checked answers and brief questionnaire responses, and in the absence of any further oral inquiry, none of them were even arguably excusable for cause under Witt-Witherspoon.

2. The Issue Has Not Been Waived

The failure of defense counsel to object to the excusal of the jurors does not forfeit his client's right to raise this issue on appeal. (Witt, supra, 469 U.S. at 434-435; Schmeck, supra, 37 Cal.4th 262.) In some cases the failure to object, although not forfeiting the right to raise the issue on appeal, may suggest that counsel concurred in the assessment that the juror was excusable or declined to object because he was glad to get rid of the juror in question. For example, in Uttecht, defense counsel must have thanked his lucky stars when the prosecutor bumped juror Z since Z had described himself as being pro-death penalty. (See also People v. Ervin (2000) 22 Cal.4th 48 at 73 noting that defense counsel's stipulated excusals of numerous prospective jurors weeded out inter alia many who would automatically vote for death.) However, defense counsel's stipulated excusals of jurors C.L., K.S., and D.L. in our case cannot possibly be construed as an implied acknowledgment that any of these jurors were in fact excusable for cause or that their removal from the panel was to defendant Duff's benefit. All three jurors were neutral concerning the death penalty and open to the possibility of a sentence of life without the possibility of parole. They were simply not excusable and defense counsel had no reason to want to get rid of them.

3. The Death Sentence Must be Reversed

The improper exclusion of even a single juror under the Witt-Witherspoon standard is reversible penalty phase error per

se even if the prosecutor could have gotten rid of the juror anyway by using one of his unexhausted peremptory challenges. (Davis v. Georgia, Gray v. Mississippi, People v. Stewart, People v. Heard, all cited supra.)

Here, three completely impartial prospective jurors were improperly excused.

Defendant Duff's rights to an impartial jury, due process of law, and a reliable penalty determination under the Sixth, Eighth, and Fourteenth Amendments, were violated.

Therefore, the death sentence must be reversed and the case remanded for a new penalty trial.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND VIOLATED DEFENDANT DUFF'S RIGHT TO A FAIR TRIAL, IMPARTIAL JURY, AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS - - BY EXCUSING A PROSPECTIVE JUROR FOR CAUSE BASED SOLELY ON HER PERSONAL RELIGIOUS BELIEFS EVEN THOUGH HER ABILITY TO IMPOSE THE DEATH PENALTY WAS NOT SUBSTANTIALLY IMPAIRED

A. RELEVANT PROCEEDINGS

As noted ante, the prospective jurors completed a lengthy written questionnaire designed to determine inter alia whether they could fairly determine the appropriate penalty, based solely upon the court's instructions and the evidence presented, in the event that the defendant were convicted of special circumstances murders.

Prospective juror S.L. stated that she could decide the case based solely on the evidence presented in court. She stated that as a Catholic she would find it difficult to send someone to their death, that she needed to be more than reasonably sure of the defendant's guilt in a death penalty case, but nonetheless felt that the death penalty was necessary as a deterrent. Thus, despite her Catholic anti-death penalty beliefs, she was not really opposed to the death penalty. Furthermore, she did not feel obligated to accept the Catholic Church's position regarding the death penalty. As a citizen juror, she would never refuse to find the defendant guilty of special circumstances murder regardless of the evidence or "do anything to throw a case." She would follow the law and determine the appropriate penalty - -

death or life without possibility of parole - - based upon the evidence even though she had her doubts about whether she could live with her decision. Thus, while she might lean more towards life in prison because of her religious beliefs, she would follow the law if it directed otherwise. While she would personally prefer not to serve as a juror in a death penalty case, she was willing to do so if selected and do her civic duty. (9 C.T. 2434-2454; Responses 3, 58, 94-111, 122, 127.)

Juror S.L. was questioned at some length by the trial court and counsel. She candidly admitted that her personal religious belief was that it was wrong to kill another human being. However, if selected as a juror, she would do her best to follow the law, to be opened minded, and to impose the appropriate penalty based upon the evidence. She stated at one point that, while she had been raised as a Catholic and her church was against the death penalty, she would have to adhere to the law as a juror one-hundred percent. (7 R.T. 2757-2769.)

The prosecutor moved to excuse juror S.L. for cause. He acknowledged that she had obviously struggled hard with her answers in this case, but argued that she was substantially impaired in her ability to be fair since she could not "truly be opened minded in this case [as] to both penalties. . . even though she would want to. . . ." The prosecutor commended juror S.L. as being a "very honest person" who would "try" to do her duty as a juror and follow the law, but argued that she was simply "not capable" of doing this in a death penalty case. (7

R.T. 2770.)

Defense counsel, on the other hand, emphasized that when he had "asked her point blank would you be able to vote for the death penalty if you came to that. . . she said she would. . . it would be a difficult choice for her, but she said she could do that." (7 R.T. 2770-2771.)

The trial court, while expressing admiration for juror S.L.'s thoughtfulness and candor, found that her ability to impose the death penalty was "substantially impaired" and excused her. The trial court stated:

> "It's fairly rare that we get somebody who is as thoughtful and candid as. . . [juror S.L.] is.
>
> Notwithstanding all of that it is clear to me that she is extremely conflicted. She has her religious beliefs, her moral beliefs, and she has her citizen beliefs. She has made clear in her responses to [Deputy District Attorney] Sawtelle that she is not opened minded. She has been very candid about that. She has made it very clear that she is religiously and philosophically opposed to the death penalty both in writing and orally. She has articulated her belief that she might be able to do it. But she doesn't know how she could live with that decision. She has articulated that this is not something that she should do.
>
> And although. . . [she] can articulate till the cows come home that she is willing to weigh [the aggravating verses the mitigating circumstances] I think what she expressed very eloquently is that we need to understand that her weighing process is not on an equal playing field by any means. She is willing to consider factors which in her particular philosophy tilt substantially in favor of life without the possibility of parole.

> And for all of those reasons I find that she is indeed substantially impaired and unable to participate in this proceeding appropriately.
>
> And she is about to be excused. (7 R.T. 2770-2772.)

The trial court then thanked juror S.L. for both her candor and the time she had taken to respond to the questions posed to her in depth, as well as her patience in explaining the extremely difficult position she was in. The court had little doubt as to her belief in fulfilling her obligations under the law as a citizen, but nonetheless excused her since the conflict between those obligations and her religious beliefs would substantially impair her ability to be a fair and impartial juror during a penalty phase trial. (7 R.T. 2772-2773.)

B. DISCUSSION

1. This Issue Has Not Been Waived

Since defense counsel opposed the prosecutor's motion to excuse juror S.L. in the trial court, this issue has been preserved for this Court's appellate review, and must be analyzed on its merits.

2. The Trial Court Erred

As noted ante, state courts may exclude from capital sentencing juries prospective jurors only if their views would prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and their oath. (Wainwright v. Witt, supra, Uttecht v. Brown, supra; People v. Blair (2005) 36 Cal.4th 686, 741; People v. Wilson, supra.)

The mere fact that a prospective juror has expressed a personal opposition to the death penalty does not permit the court to automatically disqualify him or her from the jury. A prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under Wainwright v. Witt. As the High Court observed in Lockhart v. McCree (1986) 476 U.S. 162, at 176 "not all those that oppose the death penalty are subject for 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 clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Similarly, in People v. Kaurish (1990) 52 Cal.3d

648, at 699, this Court observed: "Neither Witherspoon nor Witt . . . nor any of our cases requires that jurors be automatically excused if they merely express personal opposition to the death penalty. . . . 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 towards 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."; See also People v. Stewart, supra, 33 Cal.4th at 446 quoting and reaffirming Kaurish; People v. Wilson, supra, 44 Cal.4th at p.785.)

Exclusion of prospective jurors based upon their religious **affiliation** violates the Equal Protection Clause of the Fourteenth Amendment. While prospective jurors may be questioned about religious **beliefs** which may influence their views of the death penalty, they may not be excluded if they are willing to set aside those beliefs temporarily and follow the law. (In re Freeman (2006) 38 Cal.4th 630, at 643; People v. Williams (2006) 4 Cal.4th 287, at 308; People v. Catlin (2001) 26 Cal.4th 81, at 118; Lockhart v. McCree, supra.) Mere speculation that religious jurors, who expressly state that they will follow the court's instruction and impose the ultimate penalty based solely on the law and the evidence if appropriate, **might** be unable to do so cannot - - without more - - constitute a legitimate reason for

excusing them.

While the analysis of the several federal courts which have struggled with this issue is by no means uniform (Cf. United States v. Brown (2d Cir. 2003) 352 F.3d 654, at 668-669; United States v. Stafford (7th Cir. 1998) 136 F.3d 1109, at 1114; Davis v. Minnesota (1994) 511 U.S. 115, 117, Thomas, J. dissenting from denial of certiorari), at least one of those courts, the Stafford court, appears to be in accord with defendant Duff's position. The Stafford court opined that, while it might be proper to strike a prospective juror on the basis of a religious belief that would prevent him or her from basing his or her decision on the evidence and instructions (for example a juror whose religion taught that the punishment for crimes should be left entirely to the justice of God), it did not necessarily follow that a juror whose religious outlook **might** make him or her unusually reluctant or unusually eager to convict a defendant or vote for the death penalty could be similarly excluded. (Stafford, supra, 136 F.3d at 114.)[4]

In any event, if this Court were to permit excusals of prospective jurors for cause based solely on their religious beliefs, despite their repeated assurances that they could set those beliefs aside, follow the law, and impose the death penalty if appropriate, based upon speculation that those beliefs **might**

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[4] The Stafford Court declined to decide this issue since the defendant failed to cite religion as the basis for his Batson challenge to the prosecutor's peremptory strike in that case, and it could not be said that the trial court had committed "plain error."

make it impossible for the jurors to be fair to the prosecution during penalty phase deliberations, then any distinction between impermissible excusals for religious affiliation verses permissible excusals based upon religious beliefs becomes, for all practical purposes, a distinction without a difference. This simply cannot be the law.

Turning to the instant case, it is clear that the trial court erred in excusing juror S.L. This juror was a devout Catholic whose personal religious views were anti-death penalty. However, she stated that as a citizen she had difficulty justifying those views. More fundamentally, she expressly stated several times in both her written and oral responses that, if chosen as a juror, she would decide the appropriate penalty based upon the court's instructions and the evidence presented, and set her personal religious beliefs aside. Since the trial court was convinced of her sincerity, the fact that she was "conflicted" or **might** be unable to do this did not mean that her ability to serve in a capital case was "substantially impaired," and did not justify excusing her for cause.

The Attorney General may argue, relying upon the High Court's recent decision in Uttecht v. Brown, supra, that juror S.L. was properly excused for cause based upon ambiguities in her statements that she would be willing to impose the death penalty even though she never made this "unmistakably clear."

However, this argument is unpersuasive for at least two reasons.

First, the High Court in Uttecht did not overrule its previous holding in Gray v. Mississippi (1987) 481 U.S. 648 that it is impermissible to excuse for cause a juror who appears confused and who at times seems to equivocate, but eventually acknowledges that she could consider the death penalty in an appropriate case. (Id., at 653.) Since juror S.L. in our case - - notwithstanding some equivocation - - stated that she would follow the law and impose the death penalty if appropriate, she was improperly excused.

Second, Uttecht is easily distinguishable from the instant case in a number of respects. In Uttecht the issue was whether a juror Z had been improperly excused. The High Court held 5-4 that he had not been since the trial judge acted within his discretion in finding that this juror's ability to impose the ultimate penalty had been substantially impaired. Justice Kennedy emphasized (A) defense counsel's failure to object despite his numerous objections to the excusals of other prospective jurors and challenges for cause and (B) that the Court could not say that the state appellate courts' decisions were not only erroneous, but an unreasonable application of clearly established federal law and thus grant habeas corpus relief under the Anti-Terrorism and Effective Death Penalty Act. (28 U.S.C.§2254, subdivision (d).) Had the High Court been confronted with a case like Duff's on direct appeal, involving the excusal of a prospective juror for cause over defense counsel's objections, the decision would almost certainly have

been in the defendant's favor.

Thus, Uttecht notwithstanding, the excusal for cause of juror S.L. in the instant case was federal constitutional error.

3. The Death Sentence Must Be Reversed

Since, as noted ante, the improper exclusion of even one juror under the Witt-Witherspoon standard is reversible penalty phase error per se even assuming that the prosecutor could have gotten rid of the juror anyway by using one of his unexhausted peremptory challenges (Gray v. Mississippi, People v. Stewart, supra), the judgment cannot stand.

Defendant Duff's rights to an impartial jury, due process of law, and a reliable penalty determination, under the Sixth, Eighth, and Fourteenth Amendments, were violated by the excusal of juror S.L.

Therefore, the death sentence must be vacated and the case remanded for a new penalty trial.

III.

THE DENIAL OF DEFENDANT DUFF'S BATSON-WHEELER MOTION - - DESPITE THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES AGAINST THREE AFRICAN-AMERICAN JURORS - - VIOLATED THE REPRESENTATIVE CROSS-SAMPLE GUARANTEE OF THE CALIFORNIA CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. PROCEEDINGS BELOW

Dewey Joe Duff, a Caucasian-American, was accused of murdering Rosoe Riley, an African-American, and his associate Brandon Hagen, a Caucasian-American. (1 C.T. 47 et seq.) Only eight of the 180 prospective jurors - - less than five percent - - identified themselves as African-American. (See Responses of Jurors M.M., T.M., S.R., L.T., T.T., S.T., L.W., and B.W. to question No. 10 of Juror Questionnaire; 15 C.T. 4404, 12 C.T. 3324, 10 C.T. 2892, 12 C.T. 3444, 12 C.T. 3492, 17 C.T. 4956, 16 C.T. 4548, 18 C.T. 5220.) Approximately half of the prospective jurors - - including all but three of the African-Americans - - were excused for hardship, for cause, or as "not needed."

The prosecutor exercised peremptory challenges against **all** of the remaining African-Americans.

Prospective African-American juror T.M., a housewife and mother, stated in her written questionnaire responses that she could set aside anything she may have heard and decide the case based solely on the evidence. No members of her immediate family had been convicted of anything more serious than driving under the influence, and she felt that they had been fairly treated.

She had no moral, philosophical or religious beliefs which might make it difficult for her to sit in judgment of another human being. She did not believe that the prosecution's burden of proof should be higher than proof beyond a reasonable doubt in murder cases. While she had seen cases of racial profiling, police brutality and unfair treatment of African-Americans, she did not have any personal feelings about persons of other races which would interfere with her ability to be impartial. She was "neutral" concerning the death penalty which she had "never confronted" before. She thought that the frequency with which the death penalty was imposed in California was "about right." She was willing to consider both death and life without parole should Defendant Duff be found guilty of first degree special circumstances murder, had no family or friends with strong feelings about the death penalty, and was willing to carefully weigh both victim impact aggravating and factor (k) mitigating evidence. (Questionnaire Responses 3, 36, 51, 58, 61, 62, 94-111, 125; 12 C.T. 3323-3342.)

Juror T.M. stated, in response to the trial court's verbal inquiry, that she was simply an average working citizen, wife and mother, who had never encountered anything like this before, that she had not experienced any change of heart in light of the then recent September 11th terrorist attacks, and that she remained convinced that she could serve as a fair and impartial juror. The prosecutor asked her no questions and did not challenge her for cause. (8 R.T. 3041-3043.)

When jury selection resumed, following a hiatus of almost a month, T.M. did not appear in court. She informed the clerk that her baby-sitter had mistakenly believed that she was going to be on vacation, gotten confused about the dates, and did not show up at T.M.'s home to care for T.M.'s five children (including a 10 month old infant). (11 R.T. 4086, 4130.)

The prosecutor, even though he admitted that juror T.M. seemed to be neutral, excused her by way of peremptory challenge without bothering to wait for her return or asking her a single question. (11 R.T. 4113, 4126.)

Prospective African-American juror L.T., a computer engineer, stated in his written responses that he had never heard anything about the Duff case. He had been convicted of driving on a suspended license seven years earlier, and was not happy about having to pay a fine and losing his car, but felt that his experience was a "good thing in the long run" and had no negative feelings about the criminal justice system. He had no moral, philosophical, or religious beliefs which might make it difficult for him to sit in judgment on another human being. He did not believe that African-Americans or any other race were treated unfairly by the criminal justice system. He felt that the "death penalty should be evaluated on a case by case basis." There were "too many variables" to apply any "hard rule" across the board "in all cases." He thought that the frequency with which the death penalty was imposed in California was "about right." He would not automatically refuse to convict Duff of special

circumstances first degree murder or automatically vote against death in the event that the case proceeded to a penalty phase. He would base his penalty determination, if selected as a juror, on the court's instructions and the evidence. (Questionnaire Responses 3, 24, 34, 36-38, 94-111, 125; 12 C.T. 3443-3510.)

L.T. stated, during the oral voir dire examination, that he would consider all of the aggravating and mitigating evidence presented during the penalty phase trial "with an open mind" and "be fair to both sides." He told the trial court that he had been looking forward to serving as a juror. He had wanted to be a juror for some time now and this was the first time he might "get to really get involved in and understand the legal system a little more. . . [and he] welcome[d] the chance." The prosecutor, after briefly questioning L.T. about his written comment that lawyers make too much money, passed for cause. (8 R.T. 3084-3092.)

However, when jury selection resumed, the prosecutor exercised one of his peremptory challenges against L.T. (4 C.T. 976.)

Prospective African-American juror T.T., an auditor for the University of California, stated in his written responses that he did not recall seeing or hearing anything about the Duff case and felt that he could be fair and opened minded. He had experienced both sides of the criminal justice system, having been the victim of an assault perpetrated by his wife's ex-lover and having a brother who had spent six years in prison and been recently

released. He felt that justice was served in both cases, and that his brother deserved to be punished for what he had done. His experiences did not leave him with any negative feelings about the system which would impair his ability to be fair. He did not believe that African-Americans or any other race were singled out for unfair treatment. He was "kinda scared" at the possibility of having to impose the death penalty, but recognized that it was "needed as a deterrent" and that unfortunately it might be "the only option" in some cases. Overall he was "neutral" about the death penalty, had no opinion about whether or not it was imposed in California frequently enough, and would not refuse to convict Mr. Duff of special circumstances murder or automatically vote against death. He felt that both death and life without possibility of parole were legitimate punishments for someone convicted of first degree special circumstances murder depending upon the circumstances. (Questionnaire Responses 1, 3, 24, 34, 36, 61, 94-111, 125; 12 C.T. 3442-3462.)

T.T. stated, during the oral voir dire examination, that he would consider all of the aggravating and mitigating factors - - including but not limited to factor (k) and victim impact evidence - - in making his penalty determination. He had never served on a jury before, and was a little nervous about being a juror in a capital case, but did not believe that this was something which he would be unable to do. He again stated that the appropriate penalty - - death or life without possibility of parole - - depended upon all of the circumstances. The

prosecutor passed for cause without asking this juror a single question. (8 R.T. 3071-3079.)

Nonetheless, when jury selection resumed, the prosecutor exercised a peremptory challenge against T.T.

The defense, noting that the prosecutor had exercised his 15th, 16th, and 17th peremptories against African-Americans, made a Batson-Wheeler motion. The court ruled that the defense had not established a prima facie case even though the court was "acutely aware of the fact that three African-American prospective jurors in a row had been peremptorily challenged by the People." The court nonetheless invited the prosecutor to elaborate upon his reasons for excusing juror T.M. (11 R.T. 4120-4123.)

The prosecutor stated that, although he had peremptorily excused three African-Americans in a row, this "was essentially just a coincidental luck of the draw." He agreed that juror T.M. had "come across" as "somewhat neutral." However, he felt that he needed to excuse her because "the defense obviously wanted. . . [her] on this jury" and "did not exercise a peremptory." (11 R.T. 4126.)

The prosecutor also stated that T.M.'s written comments about racial profiling, brutality and unfair treatment towards African-Americans might cause her to be susceptible to a possible defense argument that Mr. Duff had been "brutalized" or "hurt" by the police officers who arrested him. (11 R.T. 4186-4128.) Defense counsel pointed out that "the call of the question was

about races being treated unfairly," that "Mr. Duff. . . [was] obviously white," and that it was difficult to understand how the prosecutor could "worry about. . . [a feeling that blacks were brutalized by the police] being transferred to Mr. Duff who is white." The prosecutor did not respond. (11 R.T. 4129 et seq.)

The prosecutor stated that he was concerned about T.M.'s written questionnaire response that she believed that people generally are products of their environment, even though he did not want to make a "big deal" of this and recognized that many other prospective jurors had written similar responses, since this might make her more responsive to defense factor (k) evidence that Duff had had a "bad childhood." (11 R.T. 4128-4129.) Defense counsel pointed out that "close to 90%" of the prospective jurors had given similar answers regarding the impact of an individual's background as something to be considered in determining the appropriate penalty. Once again, the prosecutor did not respond. (Id.)

Finally, the prosecutor expressed his concern that T.M. had not appeared in court that morning. Defense counsel pointed out that the failure of T.M., a mother of five (including a 10 month old infant) to appear was due to a baby-sitting emergency. However, the prosecutor, as well as the court, opined that she had not shown the proper degree of "responsibility." (11 R.T. 4129-4130.)

The prosecutor justified his peremptory strike of juror L.T. in part on his being late to court one day by about 30 minutes

even though he acknowledged that several other jurors had also arrived late on the day in question. (11 R.T. 4125-4126.)

The prosecutor also commented that L.T. thought that lawyers made too much money, but never explained why this would cause this juror to be partial or biased against the prosecution. (Id.)

The prosecutor was concerned that L.T. "welcomed the chance to be on this jury," and stated that this had "always bother[ed] [him]." However precisely why the prosecutor was bothered by this was left unexplained. (Id.)

Finally, the prosecutor was concerned that L.T. had "lots of questions." According to the prosecutor, L.T.'s desire to find out more about the legal system would be "an annoyance" and make him "potentially a big problem on. . . [the] jury." (Id.)

The prosecutor offered, as a race-neutral reason for excusing juror T.T., the fact that T.T.'s brother had been in prison for several years and had recently been released. However, he failed to explain why this was a concern in view of T.T.'s comments during voir dire that he felt that his brother had gotten what he deserved. (11 R.T. 4124.)

The prosecutor was also concerned because T.T. had what the prosecutor characterized as "an issue" inasmuch as he was unsure about the applicable burden of proof in a murder case. However, he failed to explain why this was a concern since T.T. had simply stated that he did not know what the applicable burden of proof was and was willing to follow the court's instructions. (Id.)

The prosecutor, while acknowledging that T.T. had stated in

his questionnaire response that he was "neutral" on the death penalty, was concerned about his "incredibly timid" body language and his statement that he was "kinda scared" at the thought of putting another individual to death. The prosecutor felt that, even though T.T. had stated during the oral examination that he could impose the death penalty, he might not be "strong" enough to make the necessary "tough decision." (11 R.T. 4125.)

Finally, the prosecutor expressed some concern that - - on a single occasion during the lengthy jury selection process - - he had seen T.T. "stretched out on [one of] the benches" in the courtroom hallway apparently "snoozing." The prosecutor acknowledged that "people do it occasionally," but nonetheless found this to be "a little bit unusual" and something which might affect T.T.'s ability to fit in with the rest of the jurors." (Id.)

The trial court apparently accepted the prosecutor's justifications at face value, did not ask the prosecutor to elaborate further, and denied the Batson-Wheeler motion. (11 R.T. 4130.)

The result, as the trial court later stated, was that no African-Americans served on the jury which ultimately found Mr. Duff guilty and imposed the death penalty. (14 R.T. 4964.)

B. DISCUSSION

The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by both the California and United States Constitutions. (Batson v. Kentucky (1986) 476 U.S. 79, 89; People v. Wheeler (1978) 22 Cal.3d 258, 276-277; People v. Silva (2001) 25 Cal.4th 345, 384-386.) The Batson-Wheeler rule has now been codified:

"A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased because of his or her race, color, religion. . ., or similar grounds." (California Code of Civil Procedure, §231.5.)

A party may challenge systematic exclusion of members of a cognizable racial group even though the party is not a member of that group. (Powers v. Ohio (1991) 499 U.S. 400, 402; People v. Farnam (2002) 28 Cal.4th 107, 135.)

Thus, in the instant case, defendant Duff was entitled to challenge the systematic exclusion of prospective African-American jurors via the prosecutor's peremptory challenges even though Duff was Caucasian.

Resolution of a Batson-Wheeler motion requires a three step process. "Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then

decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." (Purkett v. Elem (1995) 514 U.S. 765, 767; People v. Silva, supra, 25 Cal.4th at 384.)

In the instant case the trial court erred in (1) finding that a prima facie case of systematic exclusion of African-American jurors had not been made and (2) allowing African-American jurors to be excluded based upon allegedly race-neutral reasons that were both irrelevant and pretextual.

1. The Defense Established a Prima Facie Case

The defense clearly stated a prima facie case of racial discrimination, and the trial court's contrary finding was clearly erroneous.

In Johnson v. California (2005) 545 U.S. 162, the United States Supreme Court held that, in order to establish a prima facie case, the moving party need only show an "inference" of racial bias.

Here, less than 5% - - 8 out of 180 prospective jurors - - were African-Americans. Five of these were excused by stipulation for hardship, for cause, or for other reasons. The prosecutor then used three peremptory challenges in a row to remove all three remaining African-Americans.

These bare facts present a statistical disparity which, in and of itself, establishes a prima facie case. (Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083, at 1091; Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, at 1077-1080; Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, at 812; Williams v. Runnels (9th Cir.

2006) 432 F.3d 1102.)

Furthermore, the trial court's failure to articulate the standard utilized in making its prima facie ruling - - in this case tried before the United States Supreme Court decided Johnson v. California, supra - - requires that this Court assume that defendant Duff did satisfy the first or prima facie step of Batson and Wheeler. In Johnson, the High Court made clear that the California rule requiring the opponent of a peremptory challenge to demonstrate that purposeful discrimination was more likely than not was too demanding for federal constitutional purposes. Under Batson, the Court said, the prima facie burden is simply to produce evidence sufficient to permit a trial judge to draw an inference that discrimination has occurred. (Johnson v. California, supra, 545 U.S. 162, 170.) Thus, in a pre-Johnson case where this Court cannot be sure that the trial court applied the correct standard, deference to the trial court's prima facie ruling is inappropriate. Unless this Court can be satisfied based upon its independent review of the record that the defendant produced insufficient evidence at the outset to permit even a bare inference of discrimination, the Court must assume that the defendant did indeed satisfy the first or prima facie step of Batson and Wheeler. (People v. Zambrano (2007) 41 Cal.4th 1082, 1105-1106 [assuming without deciding that the defendant established a prima facie case based upon the prosecutor's use of five of 15 peremptory challenges to excuse from the regular jury the only African-Americans called to the box]; People v. Salcido

(2008) 44 Cal.4th 93, at 136-137 [assuming that the defendant established a prima facie case by pointing out that the prosecutor employed 1/2 of his first 16 peremptory challenges to excuse prospective minority - group jurors].) Here, similarly this Court should assume that defendant Duff by pointing out that the prosecutor had used three peremptory challenges in a row to excuse all of the remaining African-American jurors made the requisite prima facie showing.

2. The Prosecutor's Proffered "Race-Neutral" Reasons Were Pretextual

Since a prima facie showing of racial discrimination was made (or at least must be assumed), and since the trial court elicited the prosecutor's reasons for his peremptory challenges, this Court may simply proceed to the third step of the Batson analysis and, specifically, to defendant Duff's claim that the prosecutor's justifications were pretextual. (Hernandez v. New York (1991) 500 U.S. 352, 359; People v. Schmeck, supra, 37 Cal.4th at p. 267; People v. Salcido, supra, 44 Cal.4th at 137.)

This Court must determine not only whether the reasons stated by the prosecutor were race-neutral, but whether they were relevant to the case, and whether those stated reasons were the prosecutor's genuine reasons for exercising his peremptory challenges rather than mere pretext invented to hide purposeful discrimination. (Batson, supra, 476 U.S. at 93, 95; Green v. LaMarque (9th Cir. 2008) 532 F.3d 1028.) All relevant circumstantial and direct evidence of intent must be considered. (Id at 93.)

The evidence needed for this inquiry may include a comparative analysis of the jury voir dire and the jury questionnaires of all venire members, not just those venire members stricken. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise - similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. (Miller-El v. Dretke (2005) 545 U.S. 231, 241; Snyder v. Louisiana (2008) 552 U.S. ___, [128 S.Ct. at 1211-1212]; Green v. LaMarque, supra; People v. Salcido, supra, 44 Cal.4th at 141 et seq; People v. Lenix (2008) 44 Cal.4th 602, at 621 et seq.)

The prosecutor's allegedly race-neutral reasons for peremptorily challenging juror T.M. cannot possibly withstand this Court's appellate scrutiny. Certainly the fact that the defense had not exercised a peremptory challenge against this juror, whom the prosecutor himself admitted had "come across" as "somewhat neutral," could not have caused the prosecutor any legitimate concern. Furthermore, by way of comparative analysis, the prosecutor's failure to challenge **any** of the 12 non-African-American jurors selected to try this case, after the defense failed to exercise peremptory challenges against them, demonstrates that this purported race-neutral reason for excusing juror T.M. was pretextual.

The prosecutor's purported race-neutral reason for excusing T.M. based upon her comments about racial profiling, brutality

and unfair treatment of African-Americans and her alleged fear that she might be susceptible to a possible defense argument that Duff had been brutalized by the police officers who arrested him was also pretextual.

Had this case involved a black defendant and black jurors who felt that the police singled out blacks unfairly and abused and falsely arrested them, one might be inclined to accept the prosecutor's explanation at face value. People v. Johnson (1989) 47 Cal.3d 1194 was such a case. The defendant in that capital murder case was black, the defense was alibi and misidentification, it appeared that some of the eye witness identifications may have been influenced by police suggestions, and the three black jurors peremptorily challenged by the prosecutor were extremely hostile towards the police. One of these jurors, a Miss S., had an ex-husband who had been a policeman and seemed to hate all policemen in general. A second juror, a Miss T. did not trust the prosecutor. A third, a Mr. F.S. had been arrested numerous times, had been in and out of jail and court many times as a defendant, and talked about police officers abusing people and treating blacks differently. A five member majority of this Court concluded that the prosecutor had not been guilty of racial discrimination and that the trial court had properly denied the defendant's Batson-Wheeler motion. (People v. Johnson, supra, 47 Cal.3d at 1215-1222; But Cf. Justice Mosk's dissent at 47 Cal.3d 1254 et seq.)

However, as Batson teaches, and as noted ante, peremptory

challenges must be justified by a "neutral explanation **related to the particular case to be tried.**" (Batson v. Kentucky, supra, 476 U.S. at 98.) Here, we have a case involving a **white** defendant. One of the murder victims was black. Juror T.M.'s comments related solely to racial profiling, brutality and unfair treatment of **blacks**. The prosecutor could not possibly have had any legitimate apprehension concerning her susceptibility to any possible defense argument that Duff should not be convicted of murder or given the death penalty merely because he may have been injured while fleeing from the police.

The prosecutor's next purported race-neutral reason for excusing T.M. was her statement about people generally being products of their environment. However, as the prosecutor himself recognized, many other prospective jurors whom he had not challenged had made similar comments. While juror T.M. stated that she would consider factor (k) evidence relating to Duff's "bad childhood" - - as she was obligated to under the law - - nothing in her voir dire responses suggested that she would give this factor undue weight in determining the appropriate penalty.

Finally, the prosecutor's purported concern that T.M.'s failure to appear in court on a single occasion during a lengthy jury selection process due to a baby-sitting emergency somehow bespoke a lack of responsibility could not have been genuine. T.M. had promptly informed the court of this unanticipated emergency, and there was no reason to believe that the problem would reoccur.

In summary, the prosecutor simply had no legitimate race-neutral reasons for excusing African-American juror T.M.

The prosecutor justified his peremptory strike of juror L.T. on his being late to court one day by about 30 minutes. However, the prosecutor, by way of comparative analysis, himself acknowledged that several other jurors whom he had **not** excused had also arrived late on the day in question. The only thing that distinguished juror L.T. from these other jurors was that L.T. was black.

Perhaps the most outlandish race-neutral reason proffered by the prosecutor for excusing L.T. was L.T.'s joking comments about lawyers - - both prosecutors **and defense attorneys** - - making too much money. How this could give the prosecutor any legitimate concern about L.T.'s ability to be fair to the People remains a mystery.

The prosecutor's statement that he was "bothered" by L.T.'s eagerness to serve as a juror and learn more about the legal system is also difficult to accept. It has become increasingly difficult to find citizens who are not only willing - - but actually wanting - - to do their duty as citizens by taking months out of their lives to sit as jurors in capital cases. Given this, as well as the absence of anything in this record which would suggest that L.T. had some hidden agenda or would be biased in favor of the defense, a truely race neutral prosecutor should have welcomed him with open arms.

Moreover, the prosecutor's purported reason for wanting to

excuse L.T. for being over eager to get on a jury appears inconsistent with his willingness to excuse other jurors who were doing everything they could to evade their civic obligations. For example the prosecutor stipulated to excuse prospective juror A.S. who was correctly described by the trial court as someone who would literally say anything to avoid being a juror. (11 R.T. 3937-3964.)

Moreover, the prosecutor's justification for striking L.T. for being too eager to serve as a juror was inconsistent with his justification for striking juror T.T. as being too timid and scared and reluctant to serve as a juror. Simple logic dictates that both of these justifications could not be true.

While the prosecutor's primary reason for excusing juror T.T. - - that his brother had been in prison for several years and been only recently released - - appears more understandable at first blush, first impressions can be deceiving. This is not a case like People v. Cummings (1993) 4 Cal.4th 1233 in which this Court held that the prosecutor had properly excused a prospective juror because the juror's brother had been convicted of a crime, may have been prosecuted by another deputy in the same office, and the juror had doubts about his brother's guilt and even went so far as to show his resentment by giving the prosecutor "dirty looks." (Cummings, supra, at 4 Cal.4th 1282.) Here, in contrast, we have a juror who stated that he believed that his brother had been justly punished for crimes which he committed and manifested no resentment towards the prosecutor

whatsoever. Moreover, as noted ante, T.T. - - unlike the juror in the Cummings case - - had himself been a victim of a criminal assault and was actually grateful that the system had given his assailant his comeupence. In the absence of a further explanation by the prosecutor, it is difficult to accept that this purportedly race-neutral reason for excusing T.T. was genuine.

The fact that T.T. was unsure about the applicable burden of proof in a murder case, since he had never encountered this issue before, should not have come as any surprise to the prosecutor. Almost all jurors are unsure of the law until it is explained to them by a judge. This is to be expected and should not be viewed as a legitimate reason for excusing them.

While the prosecutor seized upon T.T.'s candid admission that he was "kinda scared" at the thought of putting another individual to death and his "incredibly timid" body language as a legitimate non-racial reason for excusing him, this is difficult to accept. A juror's views about the death penalty in a capital case may constitute grounds for a peremptory challenge even though they do not make the juror excusable for cause. (People v. McDermott (2002) 28 Cal.4th 946, 969.) However, as the prosecutor himself acknowledged, T.T. had stated in his written responses that he was not opposed to the death penalty and stated during his oral examination that he would be able to impose it based on the law and the evidence if appropriate. Any juror other than a complete fool would be "kinda scared" about assuming

the awesome responsibility of deciding whether another human being should live or die. However, this simply does not translate into a genuine prosecutorial concern that a juror would not be "strong" enough to impose the ultimate penalty when push came to shove.

Moreover, as noted ante, this justification - - that T.T. was afraid or reluctant to serve as a juror in a capital case - - was completely inconsistent with the prosecutor's purported justification for challenging L.T. as being over eager. This inconsistency shows that the prosecutor's real concern had nothing to do with these two black jurors being either too eager or too reluctant, and everything to do with the color of their skin.

The prosecutor's last purported race-neutral reason for excusing T.T. - - that he had seen him stretched out on one of the benches in the courtroom hallway apparently snoozing on a single occasion during the lengthy jury selection process can be easily disposed of. The prosecutor himself acknowledged that he had seen other people do this. Since at least some of these other people presumably included jurors or prospective jurors, there was no reason for the prosecutor to believe that T.T.'s "unusual" behavior would make it difficult for him to "fit in" with the other jurors. Had T.T. been "snoozing" in court, the prosecutor may very well have had a valid reason for excusing him since this would indicate an inability to focus on the evidence (see People v. Gutierrez (2002) 28 Cal.4th 1083, at 1124.) But

merely stretching out on a bench in the courtroom hallway during a recess or while waiting to be called into court is obviously not the same thing.

Thus, none of the prosecutor's supposed race-neutral reason for getting rid of literally all of the remaining black jurors was valid. And, the very fact that the prosecutor succeeded in excusing **all** of the blacks and that **none** of them served on the jury is in and of itself compelling circumstantial evidence that excluding blacks merely because of their race was the prosecutor's goal from the outset.

Even assuming arguendo that some of the reasons advanced by the prosecutor were accepted bases for the exercise of a peremptory challenge (e.g. appearance and body language; see Purkett v. Elem, supra), most were not. Since racism was at least one of the components of the prosecutor's challenges, Mr. Duff's federal constitutional rights were necessarily violated.

While this Court has never actually held that a Batson-Wheeler motion may be denied where the prosecutor's motives for his peremptory challenges are mixed (i.e. some racist and some genuine), certain language has unfortunately been misinterpreted as suggesting this. (People v. Montiel (1993) 5 Cal.4th 877, at 910, f.n. 9 ["to rebut a race - or group - bias challenge, counsel need only give a **non-discriminatory** reason which, under all the circumstances, including logical relevance to the case, appears **genuine** and thus supports the conclusion that race or group prejudice **alone** was not the basis for excusing the juror

(citations omitted)", emphases in original]; People v. Alvarez (1996) 14 Cal.4th 155, at 197 ["we do not mean to assert that prohibited intent may not coexist with permissible intent. But, unless we indulge in speculation, we cannot say that it did so here."].)

The above language is entirely inconsistent with other statements by this Court that behavior motivated even in part by race bias is intolerable. (See In re Sassounian (1995) 9 Cal.4th 535, 549, f.n. 11 [to satisfy national origin special circumstance, Penal Code §190.2, subdivision (a)(16), a killing need not have been committed **solely** because of the victim's "nationality or country of origin"]; In re M.S. (1995) 10 Cal.4th 698, 716 [the words "because of" construed as found in the similarly worded statutes, Penal Code §§422.6 and 422.7, require only that the prohibited bias be a **substantial** factor in the commission of the crime].) If behavior motivated even partially by race-bias is intolerable, it is difficult to understand how such behavior can be tolerated in a prosecutor representing the People of the State of California.

In any event, as the United States Supreme Court has stated, "it is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." (Georgia v. McCollum (1992) 505 U.S. 42 at 57.) Since the prosecutor's excusals of the African-American jurors in this case were clearly motivated - - at least in substantial part - - by racism, the fact that he may also have had some

genuine non-racist concerns is irrelevant. The unfortunate language in some of this Court's opinions which could be misinterpreted as suggesting the contrary should be disavowed once and for all.

3. The Judgment Must Be Reversed

The exclusion by peremptory challenge of even a single juror on the basis of race is an error of constitutional magnitude requiring reversal. (People v. Silva, supra 25 Cal.4th at 386.) Here three African Americans were peremptorily removed because of their race. Accordingly, the entire judgment must be reversed.

GUILT PHASE ARGUMENTS

IV.

THE DESTRUCTION OF THE AUTOMOBILE AND THE EVIDENCE CONTAINED THEREIN DEPRIVED DEFENDANT DUFF OF EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 1998, drug dealer Roscoe Riley and his associate Brandon Hagen were killed. (12 R.T. 4268 et seq.)

On February 24, the police received a telephone call from Joe Joe Duff's former sister-in-law informing them that a car containing the decedents' bodies could be found in a muddy field. The police found and moved the car, with the bodies still inside, to a crime laboratory where Sacramento County Police Criminalist Faye Springer analyzed the evidence. (15 R.T. 5066 et seq.)

The car was photographed and video-taped. However, on March 16 or 17, the police decided that the car itself would have to be destroyed - - and could not be released to the owner - - since they had used carcinogenic chemicals in conducting their forensic analysis. The car was towed to a "Pick and Pull" junk yard and ultimately destroyed. (10 R.T. 3688 et seq.)

Some months later Robert Venkus, a forensic analyst retained by defense counsel, sought to examine the car since the video tape and photographs taken by the police were of such poor quality that they were virtually useless. Mr. Venkus wanted to determine if the bullet trajectories and blood spatter patterns were consistent with Defendant Duff's post-arrest statements that he killed Riley and Hagen in self-defense during a gun battle.

However, since the car had been destroyed, Venkus had to rely entirely upon evidence developed by the police to be used in court against Duff. While Venkus was ultimately able to come up with a plausible scenario and prepare a video demonstrating that Joe Joe's version of the events **might** have been accurate, his presentation was not as strong as it might have been due to his inability to examine the car for additional exculpatory evidence. (10 R.T. 3646-3676, 3709-3712.)

The defense moved for sanctions pursuant to California v. Trombetta (1984) 467 U.S. 479, and the prosecution filed an Opposition. (4 C.T. 963-964, 966-969.) The trial court, following a hearing, denied the defense motion.

The court noted that, under Trombetta and Arizona v. Youngblood (1988) 488 U.S. 51, it was extremely difficult for the defense to succeed. Indeed the court noted that lawyers and judges had commented that the motion would not be granted unless the defense could prove that law enforcement destroyed the evidence, laughing and mocking the defendant on video tape and shouting out their bad faith. Since there was no evidence that the State had destroyed the car in bad faith, since defense expert Venkus had been able to interpret the physical evidence as consistent with Duff's post-interrogation statements without examining the car, and since the defense had not shown that anything of material exculpatory value had been lost or destroyed, there was no basis for imposing sanctions. (10 R.T. 3759 et seq.)

B. DISCUSSION

On appeal, Defendant Duff renews his argument that the State, by destroying the car and the evidence contained therein before it could be examined by the defense forensic analyst, deprived him of material exculpatory evidence. The failure of the trial court to impose any sanctions whatsoever, despite the loss and destruction of this evidence, mandates a reversal of the judgment.

The prosecution does not have a duty to collect evidence that might be beneficial to the defense. However, once collected, Due Process imposes on the prosecution a duty to preserve material exculpatory evidence. (California v. Trombetta, and Arizona v. Youngblood, supra.) A defendant who can establish that the prosecution acted in bad faith in destroying or failing to preserve evidence is entitled to sanctions if he can show that the lost or destroyed evidence **might** have exonerated him. (Arizona v. Youngblood, supra; Illinois v. Fisher (2004) 540 U.S. 544; People v. Memro (1995) 11 Cal.4th 786.) Alternatively, even assuming that the defendant cannot establish actual bad faith, he is entitled to relief if he can show that the lost or destroyed evidence was material and exculpatory. (Trombetta, supra.) Evidence is by definition both material and exculpatory if it should have been apparent to the prosecution or the police that it might play a significant role in a suspect's defense and that the defendant cannot obtain comparable evidence by other reasonably available means. (Trombetta and Youngblood, supra;

People v. Frye (1998) 18 Cal.4th 894, 942.)

This Court has held in several recent cases that, in the absence of bad faith, the failure to preserve evidentiary material is not a denial of due process where the sole basis of the challenge is that the evidence could have been subjected to tests, the results of which might have exonerated the defendant. (People v. Carter (2005) 36 Cal.4th 1215, 1246; People v. Cook (2007) 40 Cal.4th 1334, 1348; People v. De Priest (2007) 42 Cal.4th 1, 40-42.)

De Priest - - this Court's most recent pronouncement - - bears a superficial relationship to the instant case since in both cases the victims' car were released by the police before they could be examined by a defense expert. However, the two cases are very different.

Timothy Lee De Priest was found in Missouri in possession of the victim's automobile,her stolen credit card and the murder weapon several weeks after she was murdered in California. The police conducted a thorough examination and lifted De Priest's fingerprints from the car. There was no evidence that anyone other than the victim and De Priest had been in the vehicle. The police released the car and it ultimately "disappeared" before a defense fingerprint expert could examine it. A defense expert analyzed the fingerprint specimens lifted from the car and testified that they were De Priest's. Nonetheless the defense claimed that exculpatory evidence had been destroyed because the automobile contained three unidentified fingerprints that might

have been made by "Denny" - - the person whom the defense speculated had killed the victim and stolen her car. This Court held that, since there was no basis on which to conclude that material exculpatory evidence had been lost or suppressed or that the police had acted in bad faith, a defense Trombetta sanctions motion was properly denied.

However, Joe Joe Duff's case is very different. Unlike De Priest this is not a "who done it" but rather a "what is it" case. Here, the defense never disputed that Duff was involved in a fatal shootout with Riley and Hagen. Indeed Joe Joe Duff acknowledged as much during his interrogation. However, Duff insisted that he had killed the two drug dealers only in self-defense. Knowing this, the police analysis of the decedents' automobile focused on bullet trajectories, blood splatter patterns, and other evidence which went to the critical issue of whether this was a case of murder or self-defense. It was clearly apparent to the police, when they released the car several weeks later, that it likely contained relevant evidence which the defense could use to bolster Duff's self-defense claim. And, in fact, defense forensic analyst Venkus expressly opined that this was almost certainly the case. And yet, the police - - without even bothering to inform the defense - - released the automobile and allowed it to be destroyed.

It is true that the police provided video tapes and photographs of the decedents' automobile to the defense. However, as Venkus testified, the video and photographs were of

such poor quality that they were virtually useless for purposes of his analysis. While Venkus did the best he could and managed to prepare a video presentation consistent with Duff's version of the events, he specifically testified that his presentation was hampered by his inability to examine the automobile.

Each case must be examined in the context of the relevant facts. The loss of three **unidentified** fingerprints found in the murder victim's stolen car in the defendant's possession may not have constituted the destruction of material exculpatory evidence simply because the defense speculated that the prints **could** have belonged to someone named "Denny" who **may** have been involved in the murder. However, in this case, where the destroyed automobile contained relevant ballistics, blood splatter, and other critical evidence that could have bolstered defendant's self-defense claim, a different conclusion is called for.

The police - - whether in bad faith or through simple negligence - - allowed material exculpatory evidence to be destroyed and the Trombetta sanctions motion should have been granted. At a minimum, the jury should have been instructed that they could draw inferences in favor of the defense because of the failure of the prosecution to preserve the vehicle. (See People v. Zamora (1980) 28 Cal.3d 88, at 96.)

Since the Trombetta-Youngblood error committed by the trial court in this case is federal constitutional error, and since the destruction of the above described critical material exculpatory evidence was not harmless beyond a reasonable doubt (Chapman v.

California (1967) 386 U.S. 18), the judgment must be reversed.

V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND VIOLATED DEFENDANT DUFF'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS - - BY ADMITTING POST-ARREST STATEMENTS WHICH WERE EXTRACTED IN VIOLATION OF MIRANDA AND WERE INVOLUNTARY

A. RELEVANT PROCEDURAL AND FACTUAL HISTORY

The defense filed a written pretrial motion to suppress post-arrest statements extracted from Mr. Duff on February 26, 1998 while he was in custody at the Sacramento Police Station. The defense argued that (1) Mr. Duff's Miranda rights were violated since the police continued to interrogate him after he invoked his right to counsel and to remain silent and (2) the statements were involuntary. (1 C.T. 251-254, 275-284.)

The prosecution argued in its written opposition that (1) Mr. Duff was properly advised of and impliedly waived his Miranda rights and (2) his statements were not coerced or given under duress. (1 C.T. 267-274.)

An Evidence Code section 402 hearing was held. The court considered transcripts of the post-arrest interrogation and a video tape, and also heard live witness testimony.

The relevant facts elicited during the hearing were as follows:

Mr. Duff had been arrested in the early morning hours of February 24th. He was initially held on charges of possessing "re-loadable" ammunition despite a prior felony conviction (Penal Code §12316). However two days later, on February 26, he was questioned by the police about the Roscoe Riley and Brandon Hagen

homicides. The police knew that Duff was a long-term methamphetamine ("crank") user of low intelligence and that he was still experiencing pain and discomfort due to injuries suffered in a scuffle with the arresting officers. (Exhibit 58, pages 12, 15-16, 24, 34, 66, 68, 80-81, 84.)

Sacramento Police Detective Toni Winfield informed Joe Joe, before commencing the interrogation, that she wished to speak with him about the Rosco Riley and Brandon Hagen homicides. She advised him of his Miranda rights including his right to remain silent and his right to counsel, and that he could refuse to answer her questions and stop the interrogation at any time. (Exhibit 58, pages 2-7; 1 R.T. 1024 et seq., 1033 et seq.) Joe Joe acknowledged that he understood these rights. However, when asked if he were willing to speak with Detective Winfield, he responded "I don't know, sometimes they say its better if I have a lawyer." Detective Winfield replied "yeah, yeah, but sometimes people want to talk" in order to explain their side of the story and again asked Joe Joe if he were willing to talk about where he was when Riley and Hagen were killed "and that kind of thing." While Winfield testified that Joe Joe eventually agreed to talk to her, the interrogation transcript indicates merely that he repeatedly stated "yeah" in answer to her questions and a portion of Joe Joe's response was "unintelligible" and not transcribed. (Exhibit 58, pages 8-9; 1 R.T. 1024 et seq.) Detective Winfield proceeded to ask Joe Joe about his prior criminal history, his drug use, his arrest, his possible parole violations, and his

activities and associates prior to the homicides. (Exhibit 58, pages 15-40.) She then asked Joe Joe a series of questions about what he had heard concerning the homicides and Joe Joe at one point appeared confused and asked "who is these bodies?" (Exhibit 58, pages 40 et seq.) Finally, Joe Joe indicated that his "fuckin brain" had "gone numb," that he could not think, and that he wanted to terminate the interrogation. He stated "you know what? The way I'm feeling right now, I think we ought to stop... this interview." He told Detective Winfield that he was "brain boggled" and did not want to say something that could get him in trouble." Detective Winfield attempted to question Joe Joe further. However, Joe Joe stated that his head felt "kinda numb," possibly "from being beat up" by the arresting officers, and that he was unable to "remember things." Detective Winfield then left the room, stating that she needed to complete some paperwork before returning to "finish up" her interrogation. (Exhibit 58, pages 51-52, 56-58; 1 R.T. 1024 et seq., 1048 et seq.)

As Detective Winfield was leaving, Joe Joe asked her if Detective Woods (who had interrogated him in previous cases) was "still here" and stated that he wished to talk to him. (Exhibit 58, page 58.) When Detective Woods entered the room Joe Joe reiterated that he could not remember or focus on Detective Winfield's questions, that his brain felt numb, and that he wanted to wait until at least the next day to "get my head thinking straight" before "answering questions." Detective Woods, without re-advising Joe Joe of his Miranda rights or

responding to these concerns in any way, simply resumed the interrogation. (Exhibit 58, pages 59 et seq.; 1 R.T. 1054 et seq.) The interrogation continued for seven hours interrupted only by short restroom breaks. (1 R.T. 1061 et seq.) Eventually the questions began to focus specifically on the Roscoe Riley and Brandon Hagen homicides. Detective Woods repeatedly told Joe Joe that the detective knew that he was involved, that he was in "some deep shit," and that he should "be honest" about what happened since the detective did not want to give his mother Alvira, his brother Pumpkin, or his road dog companion Cindy any "problems" or have to violate anyone's parole. (Exhibit 58, pages 119-121.)

Finally Joe Joe stated that he had never planned to murder either Roscoe Riley or Brandon Hagen. He had met them at his sister's house to discuss a gun-drug dealer and driven with them to Taylor's Corner Bar. During the drive Roscoe and Brandon had become increasingly angry because Joe Joe did not have the $500 purchase price. When Joe Joe tried to get out of the car and stated that he did not want any problems, Roscoe and Brandon pulled out their guns and began shooting. Joe Joe pulled out his .38 and fired in self-defense. (Exhibit 58, pages 122 et seq.; 15 R.T. 5222-5236, 5275 et seq.; 21 C.T. 6223 et seq.) Joe Joe stated at one point:

> "They was in their seats, and they was turning around. Pow, pow. They were shooting at me, and I was fuckin shootin back. Bam, bam. Like that. And then fuckin once I got out of the car, just fuckin, like - - Roscoe was still there. And he was fuckin. . . he says, 'you mother fucker,' like that, you know. And he was fuckin shootin. Bam, like that. And I was moving like this. and pow, pow. You know, and then. . . everything was,

> just like, real quiet. Nothing moved, I go, 'Oh, fuck, man. I better get the fuck out of here,' you know so I ran around the fuckin driver's seat. . . just pushed him over. . . [and drove away]." (Exhibit 58, pages 142-143.)

The court, after reviewing the above summarized evidence and hearing argument by counsel, denied the motion to suppress. The court stated inter alia that (1) Detective Winfield had adequately "clarified" Duff's "ambiguous" statements about whether Duff was in fact requesting counsel before proceeding with the interrogation, (2) Detective Woods was not required to re-advise Duff of his Miranda rights following a relatively short break since Duff had specifically asked to talk to Woods, (3) Woods' statements about not dragging Duff's family members into this matter could not be reasonably construed as an implied threat, and (4) the Miranda waiver and admissions were not involuntary despite Duff's long term drug use and physical injuries. (1 R.T. 1091 et seq.)

The issue was re-litigated during jury selection and the court heard further argument. However, the court's ruling was unchanged. (10 R.T. 3762-3771, 11 R.T. 4147 et seq.)

Consequently, Joe Joe's recorded admissions were played for the jury during the guilt phase trial and Detective Woods testified concerning the circumstances under which Joe Joe's statements had been made. (Exhibit 59; 21 C.T. 62232 et seq.; 15 R.T. 5222 et seq., 5270 et seq.)

The prosecutor, at the conclusion of the guilt phase trial, repeatedly emphasized in his closing arguments Joe Joe Duff's

admission that he had shot and killed drug dealers Riley and Hagen (17 R.T. 5795, 18 R.T. 6000.)

Defense counsel reiterated their arguments that the post-arrest statements should have been suppressed in their new trial motion to no avail. (4 C.T. 1182 et seq.; 25 R.T. 8114 et seq.)

B. DISCUSSION

1. This Issue Has Been Preserved For Appellate Review

Mr. Duff has preserved the issue of whether his post-arrest admissions were improperly introduced into evidence for this Court's appellate review.

This issue was extensively litigated by written pre-trial motion, in a vigorously contested Evidence Code section 402 hearing, during jury selection, and in a motion for a new trial. This was more than enough to preserve the issue. (People v. Crittenden (1994) 9 Cal.4th 83, 125-127.)

2. The Trial Court Erred in Refusing to Suppress the Post-Arrest Statements

In Miranda v.Arizona (1966) 384 U.S. 436, the United States Supreme Court held that a suspect may not be subjected to custodial interrogation unless he knowingly, intelligently and voluntarily waives the right to remain silent, to the presence of an attorney, and to appointed counsel in the event that he is indigent. (Dickerson v. United States (2000) 530 U.S. 428, 433-434; Miranda v. Arizona (1966) 384 U.S. at pp. 444-445, 473-474.)

Furthermore, once a suspect has invoked his right to counsel, he may not be subjected to further interrogation until counsel has been made available to him. (Edwards v. Arizona (1981) 451 U.S. 477, 484-485.) Once the suspect has clearly stated that he is willing to waive his Miranda rights, the police may proceed to question him. (Davis v. United States (1994) 512 U.S. 452, 464.) However the "clear statement" rule of Davis applies only in a post-waiver context. The invocation and waiver of Miranda rights are entirely distinct inquiries and the two must not be blurred by merging them together. (Smith v. Illinois (1984) 469 U.S. 91, 98.) In a pre-waiver context the police must clarify the meaning of an ambiguous or equivocal response to the Miranda warning before proceeding with general interrogation. (Michigan v. Mosley (1975) 423 U.S. 96, 104; Nelson v. McCarthy (9th Cir. 1981) 637 Fed.2d 1291, 1296; United States v. Rodriguez (9th Cir. 2008) 518 F.3d 1072.)

Additionally, the prosecution must prove by a preponderance of the evidence that the statements were voluntary. A statement is involuntary if it is not the product of a rational intellect and a free will (Mincey v. Arizona (1978) 437 U.S. 385, 398.) The court in making a voluntariness determination examines whether a defendant's will was overborne by the circumstances surrounding his post-arrest statement. (Dickerson, supra, 530 U.S. at 434.) The court must consider the totality of the circumstances. The suspect's low intelligence, his use of drugs

or alcohol, his physical condition, whether he has been threatened by the police, and the length of the interrogation are all factors which the court may consider in determining whether -- under the totality of the circumstances -- the defendant's statement was voluntary. (Blackburn v. Alabama (1960) 361 U.S. 199; People v. Cahill (1993) 5 Cal.4th 478, 509, f.n. 20; People v. Jimenez (1978) 21 Cal.3d 595, 611; People v. Neal (2003) 31 Cal.4th 63, 79.)

Even if a defendant has voluntarily waived his Miranda rights to remain silent and have counsel present and this initial waiver is deemed voluntary, the defendant may later revoke the waiver. In such a case, once the defendant has indicated an intent to assert his right to remain silent or to counsel, all further attempts at police interrogation must cease. (People v. Jennings (1988) 46 Cal.3d 963, 977.)

On appeal, this Court independently reviews the trial court's legal determinations of whether the defendant's waivers of his Miranda rights were knowingly, intelligently, and voluntarily made, and whether his statements were voluntary. (People v. Rundle (2008) 43 Cal.4th 76, 115) as well as whether his later actions constituted an invocation of his right to silence. (People v. Gonzalez (2005) 34 Cal.4th 1111, 1125; People v. Rundle, supra.) The trial court's factual findings -- in a case where the facts are disputed -- will be accepted if supported by substantial evidence. (Id.)

Applying the above recited legal principles to the facts in

the instant case, it must be concluded that Joe Joe Duff's post-arrest statements were extracted in violation of Miranda, that those statements were involuntary, and that the motion to suppress should have been granted.

First, the detectives, despite being on notice that Joe Joe Duff was considering invoking his right to counsel, never clarified whether or not he wished to invoke his Miranda rights and never obtained a clear, unambiguous, and unequivocal waiver before questioning him in violation of the Miranda-Edwards rule. Once Joe Joe told Detective Winfield at the commencement of the interview that he had been informed that it was better to have an attorney before answering police questions, the detectives were clearly on notice of the need to explore this issue further before interrogating him (as Detective Winfield acknowledged during the 402 hearing). Instead, Detective Winfield, after trying to talk Joe Joe out of seeking counsel and pointing out to him that despite what he had been told most people had decided to talk to her and tell their side of the story, simply proceeded with the interrogation. The prosecution and the police alleged that Joe Joe had waived his Miranda rights. However, the interrogation transcript merely reflects that Joe Joe repeatedly stated "yeah" in response to Detective Winfield's questions and that the balance of his alleged "waiver" was "unintelligible." (Exhibit 58, page 9, lines 11-15.) This is not a clear unambiguous waiver of Miranda rights by any stretch of the imagination.

Second, the post-arrest statements were involuntary under the totality of the circumstances. Here, as in People v. Neal, supra and unlike in People v. Richardson (2008) 43 Cal.4th 959, 985-986, the police clearly knew that they were dealing with a person of very low intelligence. Detective Woods had had repeated contacts with the mentally challenged Joe Joe Duff and his family over the years. While the police may not have known that Joe Joe's full scale intelligence quotient was only 85 or that his verbal I.Q. score was only 67 (see testimony of psychiatrist Albert Globus at 23 R.T. 7539-7628), they could not have been unaware that he was extremely "slow." Indeed no one who has listened to the interrogation tapes could have possibly failed to grasp this.

Moreover, the interrogation transcripts reflect that both of the detectives were clearly aware that Joe Joe had been convicted and served time in prison for various drug offenses, and that they knew that he was a long-term methamphetamine user who habitually shot-up "crank."

Additionally, the police knew that Joe Joe had been "beat-up" during the scuffle with the arresting officers. However, while Joe Joe repeatedly complained to both detectives about his injuries, his pain, and the lack of any medical attention or medication, they simply ignored this.

Finally, contrary to the trial court, it is impossible to fairly construe Detective Woods' repeated statements that he did not want to cause problems for Joe Joe's family, his mother, his

brother Pumpkin who was a parolee at large, and his road dog companion Cindy if they were not involved along with Joe Joe in the Roscoe Riley and Brandon Hagen homicides as anything other than an implied threat to do precisely this if Joe Joe were not "honest" about his own involvement.

In summary, it must be concluded, based upon an independent review of the record, that the statements were involuntary and should have been suppressed.

Third, even assuming that Joe Joe's initial "waiver" was valid and that his initial statements were voluntary, the police questioning should have ceased once he later clearly and unambiguously stated that he wanted to terminate the interrogation because he was too "brain boggled" to continue. While Joe Joe did shortly after this state that he wanted to speak with Detective Woods, he did not explicitly indicate that he wished to continue the interrogation. Moreover, unlike in People v. Bradford (1997) 14 Cal.4th 1005 at 1043-1046 and similar cases, the detective who resumed the interrogation did so without re-advising Joe Joe of his Miranda rights or even clarifying that he had changed his mind about wishing to continue in his "brain boggled" state. The trial court's conclusion that Detective Woods had no duty to re-advise Joe Joe of his rights before proceeding under these circumstances is both untenable and incredible.

The inescapable conclusion is that, for all of these reasons, the trial court erred in refusing to suppress the post-

arrest statements.

3. The Erroneous Admission of the Post-Arrest Statements Was Not Harmless Beyond a Reasonable Doubt and Compels a Reversal of the Judgment

Joe Joe Duff's illegal interrogation violated his Fifth Amendment right against self-incrimination (Michigan v. Mosely, supra, 423 U.S. at 106.) It also deprived him of a State-created liberty interest guaranteed by the Fourteenth Amendment (Hicks v. Oklahoma (1980) 447 U.S. 344, 346.) Because the illegal interrogation violated the federal constitution, the court's error in refusing to suppress the post-arrest statements requires reversal unless the State can establish beyond a reasonable doubt that it did not contribute to the jury's verdicts. (Arizona v. Fulminante (1991) 491 U.S. 279; People v. Cahill, supra, 5 Cal.4th at 510; People v. Jones (2003) 29 Cal.4th 1229, 1265.)

The State cannot satisfy this Court beyond a reasonable doubt that the evidence of Joe Joe Duff's admissions did not contribute to his conviction. The evidence concerning Joe Joe's involvement in the deaths of drug dealers Roscoe Riley and Brandon Hagen came from witnesses whom even the prosecutor described in his opening statement as being methamphetamine users with long criminal histories. Joe Joe's admissions were unarguably central to the State's case and the convictions. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most. . . damaging evidence that can be admitted against him." (Arizona v. Fulminante. supra, 499 U.S. at 296.) It simply cannot be said that words from Joe Joe

Duff's own mouth admitting that he fatally shot Roscoe Riley and Brandon Hagen did not contribute to the jury's willingness to believe the dubious prosecution witnesses. Since the State cannot show that Joe Joe's admissions did not contribute to his conviction beyond a reasonable doubt, the judgment must be reversed.

VI.

THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 - - AND DEPRIVED DEFENDANT DUFF OF DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT - - BY ADMITTING INFLAMMATORY, GRUESOME, CUMULATIVE, AND TOTALLY UNNECESSARY PHOTOGRAPHS OF THE DECEDENTS' BODIES

A. PROCEEDINGS BELOW

During the guilt phase trial, and immediately before the testimony of the prosecution's forensic pathologist, the defense objected to the introduction of a video tape and photographs depicting the decedents' bodies and the blood splattered interior of the automobile in which they were discovered. Defense counsel argued that the video tape and photographs were cumulative and unnessary since the prosecution could establish through expert testimony how Roscoe Riley and Brandon Hagen were killed. Furthermore any relevance which the video tape and photographs might have was substantially outweighed by the undue prejudice which the close-up views of the decedents' wounds would arose in the minds of the jurors. The trial court however agreed with the prosecution that the video and photographs were more probative than prejudicial. According to the court, the positioning of the decedents' bodies was highly relevant to the issue of whether or not Riley and Hagen were killed in self-defense and corroborative of the pathologist's anticipated testimony. Furthermore, although the bodies were not attractive, they were not crawling with maggots, bloated, or significantly decomposed when photographed. Therefore, since the probative value of this

evidence outweighed any prejudicial impact, the defense objections were overruled. (14 R.T. 5005-5008.)

The prosecutor used the video tape and photographs in conjunction with the testimony of various witnesses including the coroner and the investigating police officers and they were admitted into evidence. (15 R.T. 5066-5180.)[5]

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[5] The photographic exhibits at issue (People's Exhibits 36I, 36J, 36K, 36L, 36M, 37A, 37B, 37C, 37D, 37E, 37G, 37H, 37I, 45EE, 45FF, 45GG, 45HH, 45II, 45KK, 52V, 52X, 52Z, 52AA, 52BB, 52CC, 52DD) have been reproduced in the Clerks' Transcript at 21 C.T. 6003 et seq.) Defendant Duff will file an appropriate notice designating the original exhibits he wishes transmitted to this Court for review when this case is scheduled for oral argument.

B. DISCUSSION

Defendant Duff now renews his objections to the introduction of the video tape and photographs since the trial court abused its discretion and irreparably prejudiced his constitutional rights to a fair trial and due process by ruling as it did.

1. This Issue Has Been Properly Preserved For Appeal

Inasmuch as Defendant Duff made an appropriate objection to the introduction of the video tape and photographic evidence on the same grounds he now asserts on appeal, the issue has been preserved for appellate review. (Evidence Code §353.) The defense objections were made after the trial court had had an opportunity to review the evidence in question and had all of the information necessary to decide this question and prior to the testimony of the forensic pathologist and police investigators during which the photographs and video tape were introduced. (See People v. Morris (1991) 53 Cal.3d 152, 187-191.)

Even assuming arguendo that this Court were to conclude that defense counsel inadequately articulated the constitutional due process objection in the trial court, that issue would nonetheless be preserved for appellate review. The trial court's error in overruling the Evidence Code section 352 objection had the legal consequence of prejudicing the jurors through exposure to the inflammatory and gruesome video tape and photographic evidence of the decedents' wounds and surrounding crime scene, and thus denied the defendant a fundamentally fair trial and due process of law in violation of the Fourteenth Amendment. (People

v. Partida (2005) 37 Cal.4th 428, at 431-439.)

2. The Trial Court Abused Its Discretion and Violated Defendant Duff's Constitutional Rights

A determination on appeal of whether or not the trial court abused its discretion focuses on two factors: (1) whether the photographs were relevant; and (2) whether the trial court abused its discretion in finding that the probative value of this evidence outweighed its prejudicial effect. (People v. Hoyos (2007) 41 Cal.4th 872, 908; People v. Salcido (2008) 44 Cal.4th 93, 147-148.)

The trial court has broad discretion in the first instance to decide whether photographs of the deceased should be admitted and whether the probative value of such evidence outweighs any prejudicial impact under Evidence Code section 352. (People v. Carpenter (1997) 15 Cal.4th 312, 385; People v. Scheid (1997) 16 Cal.4th 1; People v. Staten (2000) 24 Cal.4th 434, 462-464; People v. Vieira (2005) 35 Cal.4th 264, 291-292.)

Nonetheless, this Court, as well as the Court of Appeal, has found in a number of previous cases that the trial court abused its discretion in allowing such evidence to be presented to the jury.

In People v Burns (1952) 109 Cal.App.2d 524, the Court of Appeal held that the trial judge abused his discretion in admitting into evidence enlarged or blown-up photographs of the victim of a homicide, taken after the autopsy, where it was obvious that the only purpose of exhibiting such photographs was

to inflame the jury's emotions against the defendant.

In People v Love (1960) 53 Cal.2d 843, this Court held that the trial judge abused his discretion in admitting a face-up photograph of the victim which tended to prove only that the victim died in unusual pain. This Court reasoned that the admission of such a photograph, coupled with the admission of a tape recording of her dying groans, was prejudicial error since this evidence served primarily to inflame the passions of the jurors in the penalty phase of a capital case.

In People v Smith (1973) 33 Cal.App.3d 51, at 69, the Court of Appeal, in condemning the admission of gruesome photographs of the two victims' bodies, stated:

> "[T]here were ample descriptions of the positions and appearances of those two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification . . . they supplied no more than a blatant appeal to the jury's emotions."

In People v Gibson (1976) 56 Cal.App.3d 119, at 134-135, the Court of Appeal similarly condemned the admission of certain gruesome photographs of the deceased. In that case the prosecutor argued that the photographs were relevant to illustrate the expected testimony of the coroner regarding the cause of death and the trial court admitted the photographs for this purpose. The Court of Appeal reversed the subsequent conviction. The court stated:

> "The two photographs, to which objection was made, are gruesome, revolting and

> shocking to ordinary sensibilities. In light of the many other photographs of the deceased victim used in connection with the testimony of Deputy Coroner Phillips, . . . [these photographs] represented cumulative evidence of slight relevancy. Their probative value was substantially outweighed by the danger of undue prejudice to defendant."

In People v Ramos (1982) 30 Cal.3d 553, the prosecutor sought to introduce a photograph of the victim while alive to show she was a human being and that she was alive one day and found dead the next. After offering to stipulate to these facts, defense counsel argued that, given the stipulation, the photograph was not relevant to any disputed fact in issue. This Court agreed, holding that the picture had been improperly admitted since it "had no bearing on any contested issue in the case." (Id. at page 578.)

In People v. Hendricks (1987) 43 Cal.3d 584, this Court found the introduction of a similar photograph erroneous because:

> "There was no dispute as to the identity of the person killed - evidentially the only issue on which the photograph was relevant - and therefore the photograph should have been excluded because it bore on no contested issue. (Id. at page 594.)

In People v Poggi (1988) 45 Cal.3d 306, at 322-323, this Court held that the trial judge had improperly admitted two photographs of the murder victim, one depicting the victim while still alive and a second autopsy photograph showing incisions that the surgeons made performing a tracheotomy, rather than revealing the stab wounds inflicted during the offense, after

defense counsel offered to stipulate that the victim was a human being, that she was alive before the attack, and that she died as a result of the attack. This Court stated:

> "The admission of the photographs was error. It is true, as the People argue, that the admissibility of photographs lies primarily in the discretion of the trial court . . . But it is also true that the court has no discretion to admit irrelevant evidence.
> . . . The photographs here are not relevant to any disputed material issue. The only matters on which they have probative value are the following: . . . [the victim] was a human being; she was alive before the attack, and she is now dead. In view of defense counsel's offer to stipulate, these issues were removed from the case as matters in dispute. When, as here, a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury . . ."

In the instant case the admission of the video tape and photographs depicting the decedents' wounded bodies and the surrounding blood splattered automobile was error for the same reasons as in the cases discussed above.

Even assuming arguendo that the photographs were relevant to the issue of whether or not Joe Joe Duff killed the decedents in self-defense (as the trial judge stated), they were merely cumulative to the testimony of the prosecution's expert pathologist, criminalist, and investigators and had no **additional** probative value. The testimony of the prosecution witnesses was quite clear and was illustrated by bullet trajectory charts and other evidence, and there was no real need to amplify or "corroborate" it with graphic photographs

of the kind admitted here.

Moreover, any probative value that these photographs might have had was substantially outweighed by their unduly prejudicial impact on the jury.

In this case the prosecutor showed the jury an entire series of photographs of the decedents' bloody wounds and some of the photos contained a "revolting portraiture" of their "horribly contorted facial expressions" over and over again in the most gruesome way and the way most likely to inflame the passions of the jurors and cause them to vote guilty regardless of the evidence. (People v. Scheid, supra at 16 Cal.4th 19; People v. Turner (1984) 37 Cal.3d 302, 320, 321 and f.n. 9.)

In summary, the probative value of these photographs was substantially outweighed by their prejudicial effect, and their admission denied Joe Joe Duff any real possibility of a fair trial. Therefore, the trial court abused its discretion under Evidence Code section 352, and violated Defendant Duff's due process rights under the Fourteenth Amendment, in admitting these photographs.

3. The Error Was Prejudicial

Since the error was of federal constitutional dimensions, a reversal is compelled unless the State can persuade this Court that the error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18.)

Alternatively, even viewed as state law evidentiary error, a reversal would be compelled if there is even a reasonable

probability that the defendant would have obtained a more favorable result - - i.e. an acquittal or a mistrial on any of the charges or special circumstances allegations - - had the jurors not been erroneously exposed to the inflammatory photographic evidence. (People v. Watson (1956) 46 Cal.2d 818; People v. Poggi, supra, at 45 Cal.3d 323.)

However, there is no need to discuss the appropriate standard of "prejudice" further since, under any standard, a reversal is required.

It was undisputed at trial that Joe Joe Duff killed Roscoe Riley and Brandon Hagen. However, it was hotly debated whether this was a case of first degree special circumstances murder as opposed to self-defense. The prosecution presented evidence that Joe Joe had planned to kill Riley and Hagen. However, Joe Joe told the police during his post-arrest interrogation that he had shot the two drug dealers in self-defense after they initiated a gun battle. In summary the evidence is not so overwhelming that at least some of the jurors could not have concluded, in the absence of the inflammatory photographs and video tape, that there was a reasonable doubt.

Thus, regardless of the "prejudice" standard, the judgment should be reversed, and this case should be remanded for a new trial.

VII.

THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 - - AND DEPRIVED DEFENDANT DUFF OF DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT - - BY EXCLUDING A RELEVANT PHOTOGRAPH OF DECEDENT ROSCOE RILEY'S GUN TATOO

A. PROCEEDINGS BELOW

During the guilt phase trial the prosecutor made an oral motion to exclude any reference, including any autopsy photos, of the decedent's tatoos (with the exception of certain tatoos on decedent Brandon Hagen's hands). The defense objected to the exclusion of a photograph of a gun tatoo on the right shoulder of decedent Roscoe Riley. The tatoo depicted the barrel of a gun pointing directly at the observer. The defense offer of proof was that the tatoo was relevant to the defendant's perception of Riley as being armed and dangerous, and hence to Duff's self-defense claim. While the tatoo may have been covered by clothing during the fatal encounter outside Taylor's Bar, defense counsel offered to establish through witness testimony that Duff had seen Riley on other occasions and was aware of his tatoo. The prosecutor objected that the tatoo was irrelevant propensity or bad character evidence, that it was cumulative and unnecessary since he intended to present evidence during his case in chief that Roscoe Riley was armed with a .357 and that Duff knew this, and that the tatoo was inherently prejudicial and likely to cause the jurors to have contempt for Riley. The trial court, following a rather extensive discussion, excluded the photograph. The court acknowledged that under the right circumstances the

photo might have evidentiary value. However, the Court just could not "see it at the moment" in view of the "concessions and the position" that the prosecutor had taken. The Court felt that, since the prosecutor would be presenting evidence that Roscoe Riley was armed with the .357 at the time he was killed, the tatoo was unnecessary to clear up any possible jury confusion about this issue. (12 R.T. 4169-4173, 4189-4199.)[6]

B. DISCUSSION

Defendant Duff now renews his objections to the exclusion of the photograph of decedent Riley's gun tatoo on both statutory and constitutional grounds.

1. This Issue Has Not Been Waived

Inasmuch as the admissibility of this photograph was extensively litigated, the defense made an offer of proof, and the trial court was fully aware of the defense theory of relevancy before making its evidentiary ruling, this issue has been preserved for appellate review. (Evidence Code §354, sudivisions (a) and (b).)

Moreover, even assuming arguendo that defense counsel inadequately articulated the constitutional due process basis for the admission of this evidence, this would make no difference since the court had previously granted the defense motion to deem all objections as being made under all applicable federal and

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[6] The photograph at issue was marked as defense Exhibit A. Defendant Duff will file an appropriate notice designating all of the photographic exhibits he wishes to transmit to this Court when this case has been scheduled for oral argument.

state constitutional grounds. (6 R.T. 2406.)

2. The Trial Abused Its Discretion and Violated Defendant Duff's Constitutional Rights

As noted ante, the issues on appeal are: (1) whether the photograph was relevant and (2) whether the trial court abused its discretion in weighing the probative value of this evidence against its prejudicial effect. (People v. Hoyos and People v. Salcido, both cited supra.)

The photograph was relevant (assuming that defense counsel could establish that Duff knew of Riley's gun tatoo) to the issues of Duff's knowledge that Riley was armed and dangerous and Duff's claim that he shot Riley in self-defense. The tatoo was also admissible to corroborate the testimony of the prosecution's witnessess that Riley was in fact armed with a .357 at the time of the fatal shoot-out.

Moreover - unlike the gruesome photographs of the decedents' bloody wounds which the prosecutor was allowed to parade before the jury ad nauseum - there was little likelihood that this single photograph of a gun tatoo would inflame the jury's emotions or be unduly prejudicial. This was not a gang tatoo and the prosecutor intended to present abundant evidence during his case in chief that Riley was an armed methamphetamine dealer.

The probative value of the gun tatoo photograph substantially outweighed any possible prejudicial effect and its exclusion denied Joe Joe Duff the right to fully present his self-defense claim and a fundamentally fair trial. Therefore, the trial court abused its discretion under Evidence Code section 352, and violated Defendant Duff's Due Process Rights under the Fourteenth

Amendment, in admitting these photographs.

The trial court's error in excluding the gun tatoo photograph, **while at the same time admitting numerous photographs of the victims' bloody wounds**, also violated Defendant Duff's Fourteenth Amendment rights. The Due Process and Equal Protection Clauses of the Fourteenth Amendment require a sense of balance and reciprocal parity between the prosecution and the defense in criminal cases. Both the United States Supreme Court and this Court have recognized the need for fairness between the defense and the prosecution. (Wardius v. Oregon (1973) 412 U.S. 470 [reciprocal discovery]; Izazaga v. Superior Court (1991) 54 Cal.3d 356, 372-77 [same]; Reagan v. United States (1895) 157 U.S. 301, 310 [impartiality in jury instructions]; People v. Moore (1954) 43 Cal.2d 517, 526-527 [same].) In Wardius, noting that the Due Process Clause "does speak to a balance of forces between the accused and his accuser," the High Court held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (Wardius, 412 U.S. at 474.) The Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (Ibid.; see also Lindsay v. Normet (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; Green v. Georgia (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; Webb v. Texas (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the

prosecution witnesses]; Washington v. Texas (1967) 388 U.S. 14, 22-23 [accomplice permitted to testify for the prosecution but not for the defense].) Since the gun tatoo photograph was at least as relevant as the bloody wounds photographs which the prosecution was allowed to parade before the jury and far less prejudicial, the trial court could not constitutionally admit the prosecution's photographs and simultaneously exclude the photo proffered by the defense.

3. The Error Was Prejudicial

Once again, since the error was of federal constitutional dimensions, a reversal is compelled unless the state can persuade this Court that the error in excluding the gun tatoo photograph was harmless beyond a reasonable doubt. (Chapman v. California, supra.)

And, once again, even viewed as state law evidentiary error, a reversal is compelled if there is even a reasonable probability that Defendant Duff would have obtained a more favorable result had the jurors been allowed to see decedent Riley's gun tatoo. (People v. Watson and People v. Poggi, supra.)

The critical issue in this case was whether Defendant Duff committed murder or shot the decedents in self-defense. The evidence on this issue, as noted ante, was conflicting. The prosecution's evidence was not so overwhelming that at least some of the jurors might not have concluded, had they viewed the gun tatoo photo, that there was a reasonable doubt.

Thus, for this reason as well, the judgment should be reversed, and this case should be remanded for a new trial.

VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND VIOLATED DEFENDANT DUFF'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL, RELIABLE PENALTY DETERMINATION, AND DOUBLE JEOPARDY AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS - - IN DISMISSING TWO SITTING JURORS OVER DEFENSE OBJECTIONS AND WITHOUT GOOD CAUSE

A. RELEVANT FACTUAL AND PROCEDURAL HISTORY

On October 22, 2001, a jury was impaneled. (4 C.T. 980.)

On October 24, 2001, the guilt phase trial commenced. (12 R.T. 4239.) Opening statements were heard and several witnesses - including Joe Joe Duff's long-time "road dog" companion Cynthia Fernando - testified for the prosecution. The prosecutor had not completed Cindy's direct examination at the end of that day and the proceedings were adjourned on the understanding that she would resume the witness stand the following morning. (12 R.T. 4416-4431.)

However, the following morning, October 25, the Court learned that Cindy had been assaulted during the night and was not in court. (12 R.T. 4432.)

Two other witnesses testified for the prosecution "out of order" before Cindy appeared, explained that she had had a problem with her boyfriend, and resumed her testimony. (13 R.T. 4504 et seq.)

On October 29, the prosecutor informed the court and defense counsel that his investigator had received a telephone call from a friend of Cindy's who stated that Cindy was unable to come to court that morning because she was in pain and had run out of

Vicodin tablets. The prosecutor stated that she had apparently been involved in an automobile accident. Once again other prosecution witnesses testified out of order. While defense counsel expressed some concern about Cindy's unavailability for cross-examination, the prosecutor assured counsel and the court that they were in contact with her and would be able to produce her despite her various problems. (13 R.T. 4587 et seq. and 4667-4672.)

The following morning, October 30, the trial court informed counsel that juror No. 6 had called in and left a voice mail indicating that she had the stomach flu and would not be able to be in court that day and possibly the following day. Defense counsel requested a one or two day continuance. However, the prosecutor persuaded the court to excuse the juror over defense objection. While Cindy Fernando was again in court, the prosecutor feared that she might fail to re-appear for cross-examination if the proceedings were continued and that this could result in a mistrial. Furthermore, the court had promised the jurors a week's holiday following the anticipated conclusion of the guilt phase trial in mid-November and, while the trial was so far "on schedule" and there was some "wiggle room," the court intended to keep that promise. Defense counsel suggested that if Cindy were really that "flaky" and unreliable, she could be jailed as a material witness and kept in the "Graybar Motel" for a day or two to insure that she would re-appear in court for cross-examination. Defense counsel also urged the court to at

least grant a one day continuance and see whether or not the juror could resume her duties the following day. Defense counsel argued that these alternatives were preferable to excusing the juror at this juncture since this would ensure that the defendant would be tried by the jury originally selected. However, these arguments failed to change the court's mind. Consequently, juror No. 6 was excused and replaced by an alternate. (14 R.T. 4778-4788.)

Cindy Fernando again took the witness stand, underwent both cross and redirect examination, and was excused. (14 R.T. 4792-4859.)

The trial judge, despite his unwillingness to continue the proceedings for a day or two to accommodate juror No. 6's illness, nonetheless saw no problem with accommodating juror No. 4's request to be excused early on November 16 in order that she might celebrate her birthday in San Francisco. (14 R.T. 4783, 16 R.T. 5444.)

Similarly, the trial judge, while unwilling to accommodate juror No. 6's illness, saw no problem with allowing juror No. 1 to leave court at 11:30 a.m. on November 16th for a doctor's appointment. (17 R.T. 5698.)

On November 16, 2001, at about 9:30 a.m., the jury found Defendant Duff guilty as charged and was excused for the extended Thanksgiving holiday. (4 C.T. 1069-1077; 18 R.T. 6103 et seq.)[7]

On November 28, 2001, following an 11 day break, most of the

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[7] See footnote 1 ante.

jurors returned to commence the penalty phase trial. However, juror No. 3 (who had unsuccessfully asked to be excused for health reasons during voir dire) telephoned and informed the Clerk that she had been taken ill on the 24th and been suffering from an apparent attack of stomach flu, but that she hoped to be able to resume her duties the following day. Defense counsel, noting that one of the original jurors had already been replaced and that the trial was on schedule, asked for a one day continuance. Defense counsel, having reviewed and compared juror No. 3's questionnaire with those of the alternate jurors who might replace her, indicated that they would prefer that she not be replaced. Furthermore defense counsel was concerned because juror No. 3 had not participated in the guilt phase deliberations which could very well influence the penalty phase determinations. Nonetheless, the prosecutor persuaded the court to deny a continuance since his office had incurred some expense in flying in prospective witnesses who were now available to testify and since it was uncertain precisely when juror No. 3 would be able to resume her duties. The trial judge stated that, while he understood counsel's "feelings" and was "not usually hell-bent" on adhering to schedules, there was a need to move forward. Consequently, despite the defense objections, juror No. 3 was excused and replaced with an alternate. (18 R.T. 6186-6191.)

On December 3, 2001 Cindy Fernando, who had last testified over a month earlier during the guilt phase trial, again appeared in court and testified for the prosecution. (20 R.T. 6665-6669.)

The penalty phase trial proceeded and, on December 18, 2001, the jury returned a death verdict. (4 C.T. 1181; 25 R.T. 8068.)

The defense argued in their motion for a new trial that the court had erred, inter alia, in excusing jurors Nos. 3 and 6. (4 C.T. 1182 et seq.) However, the court ruled that there was sufficient good cause for excusing the two jurors in question and denied the motion. (25 R.T. 8118 et seq.)

B. DISCUSSION

The Sixth Amendment to the United States Constitution, as well as the California Constitution and Article I, section 16 of the California Constitution guarantee the right to a trial by an impartial jury. This right derives from English common law and has been extended to the States through the Fourteenth Amendment's Due Process Clause. (Duncan v. Louisiana (1968) 391 U.S. 145.) Because the right to trial by jury is a cornerstone of our system of jurisprudence, it must be zealously guarded and the courts must resolve any doubts in favor of preserving and furthering this right. (Blanton v. WomenCare, Inc. (1985) 38 Cal.3d 396, 411; Byram v. Superior Court (1977) 74 Cal.App.3d 648, at 653.)

In addition, the Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment protects "the interest of an accused in retaining a chosen jury." (Crist v. Bretz (1979) 437 U.S. 25, 36.) A jury, once banded together, should not be discharged until it has completed its solemn task of announcing a verdict. (Crist v. Bretz, supra; People v. Hernandez (2003) 30 Cal.4th 1, 9.) Removing a sitting juror is therefore a serious matter since it implicates core constitutional protections. While a trial court may have discretion to remove a juror for cause, it should exercise that discretion with great care. (People v. Barnwell (2007) 41 Cal.4th 1038.)

Penal section 1089 permits the discharge of a sitting juror

only upon (1) the death of a juror, (2) the illness of a juror, (3) good cause showing that the juror is unable to perform his or her duties, or (4) the request of a juror for good cause. (People v. Hamilton (1963) 60 Cal.2d 105, 124, f.n. 5.) The enumerated bases for removal of a sitting juror must be strictly construed so as to avoid violating the defendant's fundamental constitutional rights. (In re Mendes (1979) 23 Cal.3d 847, 853; People v. Collins (1976) 17 Cal.3d 687, 691; People v. Hess (1951) 104 Cal.App.2d 642, 680.)

Accordingly, while the power to replace a sitting juror with an alternate lies within the sound discretion of the trial court, that discretion is strictly limited and must be based upon one of the specific causes for substitution enumerated in section 1089. This Court has repeatedly held that "the trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality." (People v. Collins, supra, 17 Cal.3d at 696; People v. Compton (1971) 6 Cal.3d 55, 60; People v. Barnwell, supra, 41 Cal.4th at 1038.)

Indeed this Court has recently made crystal clear that the excusal of a sitting juror will not be upheld merely because the lower court's decision to remove a juror is supported by "substantial evidence." The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the lower court as trier of fact **did** rely on evidence that, in light of the entire record, supports its conclusion that the juror was unable to perform his or her

duty. While a reviewing court does not reweigh the evidence, it must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. (People v. Barnwell, supra, 41 Cal.4th at 1052-1053.)

Moreover, the trial court's failure to conduct an adequate inquiry into allegations of juror misconduct or inability to perform is in and of itself reversible error. (People v. De La Mora (1996) 48 Cal.App.4th 1850, 1856.)

In the instant case the trial court removed two sitting jurors and replaced them with alternates over defense objections, without conducting an adequate inquiry or determining the facts, and without a good cause showing of the jurors' inability to perform their duties as a demonstrable reality. Neither juror No. 6 nor juror No. 3 had asked to be discharged. Indeed both jurors, while they had been taken ill with the stomach flu, were hopeful that they could resume their duties within a day or two. In fact, the trial court never actually made a finding that either juror was unable to perform her duties and conducted essentially no inquiry at all. The court, rather than speaking to the jurors, relied exclusively upon their voice mails and the clerk's multiple - hearsay understanding. The court did not even play the voice mail in open court or order it transcribed for the record. Consequently, the court failed to make a reliable or adequate record of what the facts were.

The court excused the jurors in question in large part merely as a matter of administrative convenience rather than

based upon any demonstrable reality that either juror could not continue to perform her duties. The court was concerned about keeping to a schedule and keeping its promise to the jury to allow them an extended Thanksgiving holiday following the anticipated conclusion of the guilt phase trial in the middle of November. However, even assuming arguendo that mere administrative convenience could constitute good cause for the dismissal of the jurors, the record simply does not show that the loss of a few days would have made any significant difference in the context of this trial. The trial was "on schedule" at the time that juror No. 6 was excused and (as the trial court itself acknowledged) there was sufficient "wiggle room" to grant a one or two day continuance without jeopardizing the jury's promised holiday break. Moreover, the jury had already enjoyed their holiday at the time of juror No. 3's unanticipated illness and a brief one or two day continuance would have caused at worst a slight delay in the commencement of the penalty phase trial.

While the prosecutor complained that he had incurred some expense in flying in witnesses, and would have to incur additional expense if the trial were continued, mere cost considerations cannot be allowed to trump a defendant's constitutional right to be tried by the jury he has selected.

Of course, as the prosecutor pointed out, there was no guarantee that either of these two jurors would recover and be able to resume their duties as quickly as they had hoped. However, the chances for a speedy recovery were relatively good.

Neither juror had had a heart attack or a stroke or come down with bubonic plague. They had simply experienced bouts of stomach flu. Under these circumstances it was unreasonable not to continue the trial for at least a day or two to see if the jurors would recover before employing the drastic remedy of removing them.

The prosecutor's concern that Cindy Fernando might disappear and be unavailable for cross-examination if the trial were continued to accommodate juror No. 6's illness, thus causing her testimony to be stricken or possibly even a mistrial, is somewhat more troubling. However, it was extremely unlikely that this would actually happen. Cindy may have been a "flaky" witness who had twice failed to appear in court to resume her testimony promptly as scheduled. However, she had been responsible enough to inform the court and the District Attorney on both occasions and did in fact appear as soon as she was able to testify. The brief delay may have been inconvenient to the prosecutor and resulted in his having to call witnesses out of order. However, the prosecution suffered no prejudice as a result and was extremely unlikely to be prejudiced had the trial been briefly continued to accommodate juror 6's illness. The fact that Cindy later testified during the penalty phase more than a month later and after the trial had been continued for ten days to accomodate the jurors' Thanksgiving holiday also demonstrates that the prosecutor's fear that Cindy might disappear if the trial were continued for one or two days pending the jurors' recovery from

stomach flu was unfounded. Moreover, as defense counsel pointed out, the prosecutor had the option, if he were really as concerned that Cindy might disappear as he purported to be, of housing her in the "Greybar Motel" as a material witness for a day or two until juror No. 6 was able to resume her duties.

Additionally, the trial court's insistence upon immediately removing these jurors rather than granting a short continuance until they could recover from their illness and resume their duties appears inconsistent with the court's willingness to continue the trial to accommodate other jurors with less pressing problems. After all, the court was willing to allow one juror to leave early to keep a doctor's appointment and another so that she could travel to San Francisco to celebrate her birthday early on November 16th, the very time it was anticipated that the guilt phase trial would be concluded and the jury would be in deliberations. This inconsistency is simply inexplicable and should completely undermine this Court's confidence that either juror No. 6 or juror No. 3 was unable to perform their duties as a demonstrable reality and had to be immediately removed.

The trial court clearly erred in removing these two jurors over defense objections.

The only remaining question is whether the court's error compels a reversal of the judgment. The answer to that question must be in the affirmative.

The improper dismissal of two sitting jurors without good cause and their replacement by alternates was necessarily

prejudicial error requiring reversal and retrial. (People v. Cleveland (2001) 25 Cal.4th 466, 486; People v. De La Mora, supra, 48 Cal.App.4th at 1855-1856.) Accordingly, reversal in this case is required.

Defense counsel indicated that they strongly preferred juror No. 3 to the available alternatives, and even a brief review of juror No. 6's voir dire responses suggests that she was a likely pro-defense juror and that her loss would be a blow to the defense. She indicated that she believed a person's childhood and background could affect the way they behave as an adult and had a stepson who grew up in unfortunate circumstances that caused him to go in a bad direction. She also felt that there was always a possibility that a particular individual did not necessarily deserve the death penalty and was willing to consider life without possibility of parole. (6 C.T. 1690 et seq.; 6 R.T. 2581-2585.) Because the defense intended to rely heavily on evidence of Joe Joe Duff's abused childhood and the unfortunate circumstances in which he grew up, the defense expected that juror No. 6 would be a powerful voice in the jury room during the penalty phase deliberations. Consequently, the court's unilateral decision to discharge her over defense objection must be deemed prejudicial under any standard and reversal is required.

IX.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND DEPRIVED DEFENDANT DUFF OF A RELIABLE VERDICT AND A JURY DETERMINATION OF CRITICAL MATERIAL ISSUES IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS - - BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF IMPERFECT SELF-DEFENSE AND HEAT OF PASSION VOLUNTARY MANSLAUGHTER

A. PROCEEDINGS BELOW

The prosecution's theory was that this was a case of first degree premeditated and felony murder. (See e.g. prosecutor's closing guilt phase argument at 17 R.T. 5776.)

However, Joe Joe Duff's post-arrest statements to Detective Woods suggest otherwise. As noted ante, Joe Joe stated that he had never planned to murder either Roscoe Riley or Brandon Hagen. He had met them at his sister's house to discuss a gun-drug deal and driven with them to Taylor's Corner Bar. During the drive Roscoe and Brandon had become increasingly angry because Joe Joe did not have the $500 purchase price. When Joe Joe tried to get out of the car and stated that he did not want any problems, Roscoe and Brandon pulled out their guns and began shooting. Joe Joe pulled out his .38 and fired in self-defense. (Exhibit 58, pages 122 et seq.; 15 R.T. 5222-5236, 5275 et seq.; 21 C.T. 6223 et seq.) Joe Joe stated at one point:

> "They was in their seats, and they was turning around. Pow, pow. They were shooting at me, and I was fuckin shootin back. Bam, bam. Like that. And then fuckin once I got out of the car, just fuckin, like - - Roscoe was still there. And he was fuckin. . . he says, 'you mother fucker,' like that, you know. And he was fuckin shootin. Bam, like that. And I was moving like this. and pow,

> pow. You know, and then. . . everything was, just like, real quiet. Nothing moved, I go, 'Oh, fuck, man. I better get the fuck out of here,' you know so I ran around the fuckin driver's seat. . . just pushed him over. . . [and drove away]." (Exhibit 58, pages 142-143.)

The trial court instructed the jury on first degree premeditated and felony murder and self-defense. (Penal Code §§187 and 189; CALJIC jury instructions Nos. 8.00, 8.10, 8.20, 8.21, 5.12, 5.13, 5.15, 5.52, and 5.53; 4 C.T. 1043-1046; 17 R.T. 5743-5747.)

However the court refused defense counsel's request to instruct on second degree murder or imperfect self-defense and heat of passion voluntary manslaughter. (Penal Code §192; CALJIC jury instructions Nos. 8.30, 8.31, 8.37, 8.40, 8.50; 4 C.T. 1059-1060; 16 R.T. 5613 et seq., 5641-5660, 5666 et seq.)

Thus, no lesser included offense instructions were given, and the jury was left to decide between the stark alternatives of convicting Joe Joe Duff of multiple first degree murders as charged or absolving him of responsibility for the killings by acquitting him.

B. DISCUSSION

1. The Trial Court's Duty to Instruct on Lesser Included Manslaughter Offenses Supported by Any Substantial Evidence in a Capital Case

In Beck v. Alabama (1980) 447 U.S. 625, the United States Supreme Court concluded that a state may not constitutionally impose a death sentence if the state prohibits a jury from considering a lesser non-capital offense necessarily included within the capital charge and supported by the evidence. The High Court noted the "value to the defendant of this procedural safeguard," as evidenced by "the nearly universal acceptance . . . in both state and federal courts" that a defendant is entitled to instructions on lesser included offenses warranted by the evidence. (Id.at 637.) Such protection, the Court reasoned, is "especially important" in a capital case, because the risk that a jury will convict of the charged offense as an alternative to complete acquittal when it believes the evidence shows only some lesser crime "cannot be tolerated in a case in which the defendant's life is at stake." (Id. at 637.) "Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case." (Ibid. at 638; quoted and discussed in People v. Breverman (1998) 19 Cal.4th 142, at 167.)

In Schad v. Arizona (1991) 501 U.S. 624, the Court held, consistent with its previous decision in Beck, supra, that a state may not constitutionally coerce a judgment of death

eligibility by preventing the jury from considering a lesser included non-capital charge as an alternative to a total acquittal. The capital jury must be given at least a single non-capital "third option" in order to satisfy Eighth Amendment concerns focused on the reliability of the capital verdict. In other words, where the jury could find from the evidence that the defendant is guilty of one or more lesser included offenses and not guilty of the greater charged offense, the jury must be instructed on at least one of these lesser offenses. (Id., at 646-648; discussed in People v. Breverman, supra at 19 Cal.4th 161, f.n. 8 and 167.)

The High Court's goal in Beck was to eliminate the distortion of the fact finding process that is created when the jury is forced into an all-or-nothing choice between finding the defendant guilty of a crime making him eligible for the death penalty and innocence. While it is sometimes asserted that Beck is implicated only in cases where the death penalty is required upon conviction of the capital crime and the sentencer has no other option (see People v. Wilson (2008) 43 Cal.4th 1, 18; People v. Waidla, supra, 22 Cal.4th at 736, f.n. 15), this is incorrect. Under the Alabama statute at issue in Beck the sentencing judge, following a conviction of a capital crime rendering the defendant death eligible, could refuse to impose the ultimate penalty and instead sentence the defendant to life without possibility of parole if he concluded that the mitigating circumstances outweighed those in aggravation. (Beck v. Alabama,

supra, 447 U.S. 628-629.) Thus, Beck is implicated in any case in which the jury is required to make an all-or-nothing choice between finding the defendant guilty of a crime which renders him death **eligible** and a complete acquittal. Hopkins v. Reeves (1998) 524 U.S. 88 (which is discussed in the above cited footnote in Waidla) is inapposite since that case merely held that Beck does not require instructions on "lesser related offenses" - - when no lesser included offense exists - - in capital cases. (Hopkins v. Reeves, supra, 524 U.S. at 96-97.)

This Court has held that a defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and that an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. (People v. Sedeno (1974) 10 Cal.3d 703, 720; People v. Breverman, supra at 19 Cal.4th 176; People v. Lewis (2001) 25 Cal.4th 610 at 645.)

This Court has further held that, as a matter of judicial policy, neither the defendant nor the state has any legitimate interest in presenting the jury with an unwarranted all or nothing choice and depriving the jury of a "third option" of conviction of less serious offenses based upon the evidence. (People v. Barton (1995) 12 Cal.4th 186, 196; People v. Breverman. supra, 19 Cal.4th at 155; People v. Lewis, supra.) Consequently, this Court has held that a trial court must instruct on **all** lesser included offenses supported by **any** substantial evidence **even in the absence of a request**. (People v.

Barton, People v. Breverman. and People v. Lewis, all cited supra.)

"Substantial evidence" means any evidence which might persuade the jury to find the defendant guilty of only the lesser included offense. The testimony of even a single witness can constitute substantial evidence requiring the trial court to instruct on its own initiative regardless of whether or not the trial court feels that the testimony is credible. (People v. Turner (1990) 50 Cal.3d 668, 689; People v. Breverman, supra, People v. Lewis, supra.)

Manslaughter is a lesser included offense of murder. (People v. Sedeno, supra, 10 Cal.3d at 719; People v. Barton, supra, 12 Cal.4th at 200-201; People v. Breverman, supra, 19 Cal.4th at 153-154; People v. Blakeley (2000) 23 Cal.4th 82; People v. Lewis, supra, 25 Cal.4th at 645.) The essential distinction between the two crimes is that murder generally requires an intent to kill, whereas manslaughter does not. Manslaughter is, instead, "the unlawful killing of a human being without malice." (Penal Code §192; People v. Lasko (2000) 23 Cal.4th 101; People v. Rios (2000) 23 Cal.4th 450, 460; People v. Cameron (1994) 30 Cal.App.4th 591, 604, 605; People v. Manriquez (2005) 37 Cal.4th 547, 587.)

Under the doctrine of imperfect self-defense, when the jury finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed

to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter. (In re Christan S. (1994) 7 Cal.4th 768, 771; People v. Manriquez, supra, 37 Cal.4th at 581.) Thus the trial court must instruct on this doctrine, whether or not instructions are requested by counsel, whenever there is evidence substantial enough to merit consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter. (People v. Barton, supra, 12 Cal.4th at pages 194, 201; People v. Manriquez, supra, 37 Cal.4th at 581.)

The imperfect self-defense manslaughter doctrine requires that the defendant must have had an actual belief in the need for self-defense. The defendant's fear must be of imminent danger to life or great bodily injury. An imminent peril is one that, from appearances, must be instantly dealt with. (People v. Manriquez, supra, 37 Cal.4th 581.)

A killing of a human being without malice, "upon a sudden quarrel or heat of passion," is also voluntary manslaughter. (Penal Code §192, subdivision (a); People v. Breverman, supra, 19 Cal.4th, 154.) An unlawful killing with malice is murder (Penal Code §187.) Nonetheless an intentional killing is reduced to voluntary manslaughter if other evidence negates malice. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion or sufficient provocation. (People v. Lee (1999) 20 Cal.4th 47, 58-59; People v. Manriquez, supra, 37 Cal.4th at 583.)

The factor which distinguishes the "heat of passion" form of

voluntary manslaughter is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim. The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. Heat of passion arises when, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment. (People v. Berry (1976) 18 Cal.3d 509, 515; People v. Barton, supra, 12 Cal.4th at 201; People v. Lee, supra, 20 Cal.4th at 59; People v. Manriquez, supra, at 37 Cal.4th 584.)

Thus, the heat of passion requirement for manslaughter has both an objective and subjective component. The defendant must actually, subjectively, kill under the heat of passion. But the circumstances giving rise to the heat of passion are also viewed objectively. The heat of passion must be such as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances. (People v. Wickersham (1982) 32 Cal.3d 307, 326-327; People v. Manriquez, supra, 37 Cal.4th at 584.)

To satisfy the objective or "reasonable person" element of this form of voluntary manslaughter, the accused's heat of passion must be due to sufficient provocation. (Id.)

A defendant is entitled to heat of passion manslaughter instructions, as well as to have the jury instructed on self-defense, even though the affirmative defense of self-defense may be inconsistent with the claim that the defendant killed in the heat of passion. (Mathews v. United States (1987) 485 U.S. 58, at 63-64.)

It follows from the above that a trial court has a constitutional duty to instruct the jury on lesser included voluntary manslaughter offenses in any capital case in which there is any substantial evidence that the defendant killed any of the victims in imperfect self-defense or in the heat of passion as defined hereinabove. The defendant's statements can constitute substantial evidence requiring the trial court to instruct on voluntary manslaughter regardless of whether or not the trial court feels that these statements are credible. (People v. Breverman, supra, People v. Lewis, supra.)

2. The Trial Court's Error in the Instant Case

On appeal, this Court applies a de novo standard of review. (People v. Waidla (2000) 22 Cal.4th 690, 733; People v. Manriquez, supra, 37 Cal.4th at 581.) In doing so, this Court must examine a record in the present case that contains substantial evidence that Joe Joe Duff killed Roscoe Riley and Brandon Hagen because he believed he had to act in self-defense in order to save his life. Roscoe Riley was a dangerous gun and drug dealer whom the prosecutor acknowledged was armed with a .357 and the evidence also suggests

that his associate Brandon Hagen was armed with a Tech 9 gun. Joe Joe on the other hand was armed only with a .38 that was missing an ejector screw and could only be fired if held with both hands according to the testimony of criminalist Faye Springer. According to Joe Joe's post-arrest statements to Detective Woods, Joe Joe believed that he had to kill Roscoe and Brandon because otherwise the two men were going to kill him. It was Roscoe and Brandon that initiated the gun battle by pulling out their weapons and opening fire whereas Joe Joe merely returned the fire in a desperate attempt to save his life. The trial court, as noted ante, recognized that the jury could find, based upon this evidence, that Joe Joe acted reasonably and killed Roscoe and Brandon in self-defense, and acquit him altogether, and the jury was instructed accordingly. Based upon this same evidence and the trial court's own logic the jury could also have found that Joe Joe - - a mentally challenged long-term crank user - - misperceived the situation and unreasonably believed he was in imminent danger of death when he fatally shot the decedents. If so, then the jury would have been compelled to conclude that Joe Joe was guilty only of the lesser included offense of imperfect self-defense manslaughter.

Joe Joe Duff was also entitled to heat of passion voluntary manslaughter instructions. Certainly, according to Joe Joe's version of the fatal encounter, there was adequate provocation since Roscoe and Brandon were waving their guns around and actually shot at him. There was no cooling off period or

opportunity for due deliberation or reflection.

Given the circumstances, an ordinary person in Joe Joe Duff's position would naturally be extremely fearful for his life and would have acted as he did since the only alternatives at that point were to kill or be killed.

The prosecutor argued during the jury instruction conference that, because this was a felony murder - robbery case and the decedents were killed during the course of a robbery, the jury's only alternatives were to either acquit Joe Joe altogether by reason of actual self-defense or find him guilty of felony murder.

However, this logic cannot withstand scrutiny. This was not a case prosecuted only on a felony murder theory. Instead, the state proceeded on **both** premeditation and felony murder theories. The jury was specifically instructed that they could return a verdict of first degree murder in this case based upon **either** theory and that it was not necessary that they agree as to whether this was a first degree premeditation and deliberation or felony murder case. (4 C.T. 1046.) Under these circumstances, the jury could find Joe Joe Duff guilty of first degree murder without even considering the felony murder rule.

Moreover, even assuming that the jury did consider felony murder while deliberating Joe Joe's guilt or innocence, there was substantial evidence from which they could have found that the felony murder doctrine was inapplicable. This was not a case like People v. Romero (2008) 44 Cal.4th 386 where the **only**

evidence at trial was that the defendant's sole motive in accosting the victims was to rob them, and that he demanded their property and fired the fatal shots after taking the victim's belongings. (Romero, supra, at 44 Cal.4th 401-404.) The prosecution's evidence in this case was that Joe Joe wanted revenge because Roscoe had cheated him in a previous gun-drug deal and intended to get even with Roscoe in a variety of ways which might or might **not** include robbing him. (See Statement of Facts, ante; 12 R.T. 4450 et seq., 4462 et seq., 4493 et seq., 13 R.T. 4504-4516, 4710 et seq., 4743 et seq., 4756-4766, 14 R.T. 4866 et seq., 15 R.T. 5336 et seq., 5351-5368.)

Additionally, there was evidence that this may have been a case of after-formed intent since the decedents were not deprived of their jewelry and guns until **after** the fatal wounds were inflicted and Joe Joe had driven the car with the decedents' bodies in it to a muddy field some distance away. (12 R.T. 4426-4431, 4454-4460, 13 R.T. 4522-4557, 4631, 4653 et seq., 14 R.T. 4840, 4859, 15 R.T. 5315 et seq.) Indeed the jury was instructed that "if the intent to take money or property does not arise until a fatal wound is inflicted, the killing cannot be murder in the perpetration of robbery, and therefore, the felony murder rule would not be applicable." (4 C.T. 1047.)

If the jury found the felony murder rule inapplicable, then they were not limited to the stark alternatives of finding Joe Joe Duff guilty of first degree felony murder or acquitting him altogether. Instead they could have concluded, if they believed

Duff's post-arrest statements, that he was guilty of only the lesser included offense of voluntary manslaughter.

None of the above means, of course, that there was not also evidence from which the jury might reach a contrary conclusion. It merely means that there was sufficient substantial evidence that this may have been a case of voluntary manslaughter rather than murder and that the jury should have been instructed accordingly.

Thus, the trial court erred.

3. The Judgment Must be Reversed

The trial court's instructional error requires a reversal of the murder convictions.

Under the United States Supreme Court's Eighth Amendment analysis in Beck and Schad, supra, a failure to instruct the jury on a lesser included manslaughter offense supported by substantial evidence may be deemed harmless **only** if the trial court instructs on some other non-capital offense supported by substantial evidence as a "third option."

In People v. Sedeno (1974) 10 Cal.3d 703, this Court held that reversal is required in all cases where the trial court erroneously omitted instructions on lesser included manslaughter offenses unless "the factual question posed by the omitted instructions was necessarily resolved adversely to the defendant under other, properly given instructions."

However, in People v. Breverman, supra, a majority of this Court concluded that, at least in a non-capital case, error in

failing to sua sponte instruct on lesser included manslaughter offenses supported by the evidence requires reversal of the convictions of the charged offense if "after an examination of the entire case, including the evidence," it appears "reasonably probable" that the defendant would have obtained a more favorable outcome had the error not occurred.

Here, the trial court's failure to instruct on **any** lesser included offense (i.e. either second degree murder or voluntary manslaughter) necessarily requires reversal under the High Court's decisions in Beck and Schad.

Nor can it be said that the trial court's failure to instruct on the lesser included voluntary manslaughter offenses was harmless under Breverman, supra since the jury would have convicted Defendant Duff of first degree murder under a felony murder theory regardless of whether further instructions were given on lesser included homicide offenses. (Cf. People v. Elliot (2005) 37 Cal.4th 453, at 475-476.) Here, since there were no special verdicts, we simply cannot know whether or not the jury's verdicts rested on a felony murder theory. It is therefore impossible for this Court to conclude that the instructional error was harmless because the jury necessarily resolved the murder verses manslaughter issue pursuant to the instructions given.

Therefore the murder convictions must be reversed.

X.

THE TRIAL COURT'S ERRORS COMMITTED DURING THE GUILT PHASE TRIAL, CONSIDERED COLLECTIVELY, WARRANT REVERSAL

Even assuming that the errors committed during the guilt phase trial are insufficient to compel a reversal when considered individually, the **cumulative** effect of **all** of these errors necessitates this result.

The cumulative effect of multiple errors may compel reversal even though any one error - -in and of itself - - does not warrant this. (People v. Buffum (1953) 40 Cal.2d 709, 726; People v. Cruz (1978) 83 Cal.App.3d 308, 334; People v. Guzman (1975) 48 Cal.App.3d 380, 388.)

Here, the combined effect of the admission of Mr. Duff's confession which was extracted in violated of his Miranda rights and involuntary, **and** the admission of gruesome photographs of the decedents' bodies and the surrounding blood soaked crime scene, **and** the denial of the defense Trombetta-Youngblood motion despite the state's destruction of relevant material evidence, **and** the trial court's refusal to instruct on lesser included manslaughter offenses which would have given the jury a third option between the stark alternatives of convicting Duff of capital murders or outright acquittal, **and** the trial court's insistence upon dismissing two of the jurors without good cause, was to deny Mr. Duff a fundamentally fair trial.

The cumulative effect of **all** of these serious errors, which were of federal constitutional dimension, thus mandates a reversal of the judgment.

PENALTY PHASE ARGUMENTS

XI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND DEPRIVED DEFENDANT DUFF OF A RELIABLE PENALTY DETERMINATION, DUE PROCESS AND A FUNDAMENTALLY FAIR PENALTY TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS - - BY ALLOWING THE JURY TO CONSIDER UNDULY PREJUDICIAL EVIDENCE OF OTHER CRIMES

A. RELEVANT PROCEDURAL HISTORY

The prosecutor served notice on defense counsel, prior to the commencement of the penalty phase trial, that he intended to introduce evidence of other crimes during the penalty phase pursuant to Penal Code section 190.3, subdivisions (b) and (c). The alleged other crimes included (1) an incident in July, 1978 wherein Joe Joe Duff dragged Julie Frey into an alleyway and sexually assaulted her, (2) an incident in September, 1978 in which Duff grabbed Renee Ribarski's breast, (3) an incident in October 1978 in which he exposed himself to Marcella Johnson, grabbed another girl's breasts, and masturbated, (4) an incident in January, 1990, in which he struck Sacramento Police Officer Steve Reed after Reed arrested him for possession of methamphetamine, (5) an incident in April, 1994, in which Duff pointed a cocked sawed-off .22 caliber rifle at Timothy Richie, (6) an incident which occurred on the same day as the Ritchey incident wherein Duff entered the home of Janet Martin while still armed with his .22 caliber rifle, and (7) an incident which occurred in January, 1996 when Joe Joe Duff dragged methamphetamine addict Kelly Zavatero behind a dumpster, held a knife to her throat, forced her to orally copulate him,

and raped and digitally penetrated her. The prosecutor also indicated that he intended to introduce various felony convictions arising out of these incidents as well as Duff's prior felony convictions for possession of methamphetamine and vehicle and habitual petty theft. (4 C.T. 923-934.)

The trial court conducted an evidentiary hearing regarding certain aspects of the other crimes evidence. (See People v. Phillips (1985) 41 Cal.3d 29, 72, f.n. 25; People v.Griffin (2004) 33 Cal.4th 536, 584.) The result was that the prosecutor was permitted to introduce essentially all of the above described other crimes evidence. (18 R.T. 6192-6212.)

Julie Frey testified during the penalty phase trial that, in July, 1978, she was walking down the street when a man grabbed her from behind and tried to drag her into an alley. She struggled and screamed for help and her assailant ran away. While she was unable to identify Joe Joe Duff in court as her assailant, she had previously testified in regard to this matter and identified someone. (19 R.T. 6284-6293.)

Renee Ribarski testified that on September 29, 1978, she and a friend were riding their bicycles. A man riding a bicycle began following them and grabbed her left breast before riding away. A few weeks later she identified Joe Joe Duff as her assailant during a photographic line-up. (19 R.T. 6273-6280.)

Marcella Millard testified that, in October, 1978, while she and her friend were eating at a Jack-in-the-Box restaurant, Joe Joe Duff rode up on his bicycle, unzipped his pants, and

masturbated. When two other young women came out of the restaurant, he rode up to them and grabbed their breasts. Joe Joe continued to ride his bike around the parking lot of the restaurant, rode up to the driver's side window of Marcella's automobile and stuck his erect penis through the window before fleeing. Marcella identified Joe Joe in a field identification show-up about an hour later. (18 R.T. 6243 et seq., 19 R.T. 6261 et seq.)

Sacramento Police Officer Steve Reed testified that, on January 4, 1990, during a routine vehicle stop, he arrested Joe Joe Duff. He attempted to handcuff Joe Joe. However Joe Joe was able to slip his left hand out of the cuff and punch the officer. During the struggle, the officer hit his head against a telephone pole. Joe Joe fled, but was apprehended a short distance away in a used car lot. (19 R.T. 6381 et seq.)

Timothy Ritchey testified that, on April 23, 1994, he was walking down the street with his friends when Joe Joe Duff approached them mumbling incoherently. He cocked and pointed a rifle at them and fled. Tanya Ruiz, who was with Ritchey at the time, gave similar testimony. (19 R.T. 6294-6322.) Janet Lietzke told the jury that, on the date in question, a man with a gun hanging out of his pants had suddenly appeared in her home. (19 R.T. 6326 et seq.) Several Sacramento police officers, who had responded to Mr. Ritchey's and Ms. Lietzke's 911 calls, told the jurors that they had been able to track Duff with the aid of a police dog, found him hiding in a crawl space, and arrested him.

(19 R.T. 6350-6375.)

Kelly Zavatero testified that on January 6, 1996, while she was using methamphetamine and roaming around stealing mail out of mail boxes, Joe Joe Duff drove up on a motorcycle and asked her if she wanted to "party" with him. She refused and rode away on her bicycle. However, a short while later, Joe Joe drove up behind her, assaulted her and knocked her off her bike, grabbed her, forced her to orally copulate him, and raped her. Ultimately, she persuaded him to let her go by pretending to like him, promising to go out with him, and kissing him good-bye. (19 R.T. 6387 et seq.) A police officer, responding to a radio dispatch call, spotted Duff on his motorcycle, and succeeded in arresting him after a high speed chase. Duff, when arrested, was carrying a "bayonet" or knife. He was identified by Ms. Zavatero in a field identification show-up. (19 R.T. 6517 et seq.)

Cynthia Fernando and Victoria Brooks testified that, the night before Riley and Hagen were killed, Joe Joe Duff had beaten-up Cindy. Cindy also told the jury that, about a month earlier, Joe Joe had shot at Ronnie Greathouse. (20 R.T. 6665-6676.)

The prosecutor, during his closing penalty phase argument, reminded the jurors of Duff's prior criminal record, emphasized the 1978 assaults, argued that Duff had failed to take advantage of numerous opportunities to reform, and urged the jurors to impose the death penalty on the theory that "enough is enough." (24 R.T. 7962 et seq.)

Defense counsel responded that Duff had been only 21 at the time of the 1978 incidents and that many of his previous offenses had been exaggerated. (24 R.T. 8033 et seq.)

The jury returned a death verdict.

B. DISCUSSION

Defendant Duff was deprived of a reliable penalty determination and a fundamentally fair penalty trial as the result of the admission of the above described other crimes evidence.

1. This Issue Has Not Been Forfeited

While trial defense counsel failed to object to the introduction of the above described other crimes evidence on Evidence Code section 352 or Due Process grounds below, this issue has not been forfeited.

A claim is not waived for failure to object where an objection would be futile. (People v. Hill (1998) 17 Cal.4th 800, 821 [failure to object to prosecutorial misconduct]; People v. Turner (1990) 50 Cal.3d 668, 703 [evidentiary challenges not forfeited by failure to object when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change].) Under these circumstances any objection would have been unavailing under prevailing precedent (Auto Equity Sales, Inc. v. Superior Court (1962) 54 Cal.2d 450, 455-456.) The law does not require idle acts. Consequently a failure to object may be excused where, at the time of trial, the law was so unsettled that reasonable minds could have differed over whether or not an objection would be proper. (People v. Hasto (1968) 69 Cal.2d 233, 356, f.n. 28; People v. Simms (1970) 10 Cal.App.3d 299, 310.)

Here, trial counsel's failure to object was excusable since, at the time this case was tried, any objection would have been futile in light of this Court's relevant precedents. The trial took place in 2000. This Court had previously held in People v. Karis (1988) 46 Cal.3d 612 that factor (b) other crimes evidence could not be excluded on Evidence Code section 352 or Due Process grounds. In Karis the defendant had contended that the trial court erred in failing to weigh the prejudicial impact against the probative value of prior crimes evidence, and in denying his motion to exclude that evidence. This Court stated unequivocally: "The short answer to this claim is that the evidence is expressly made admissible by factor (b) of section 190.3. The court is not given discretion under Evidence Code section 352 to exclude this evidence when offered at the penalty phase. . . ." (People v. Karis, supra, 46 Cal.3d at p. 641.) While this Court stated in a footnote that "particular items of evidence - - as opposed to 'all evidence of a capital defendant's commission. . . of a prior violent felony' might conceivably nonetheless be excluded" (People v. Karis, Id.f.n. 21), it was by no means clear what this meant. It was only in People v. Griffin (2004) 33 Cal.4th 536, a case decided four years **after** Mr. Duff was tried, that this Court made clear that factor (b) prior crimes evidence might be excluded as "unfairly persuasive" under Evidence Code section 352 if it were not sufficiently detailed or was internally inconsistent, or in conflict with other evidence. (People v. Griffin, supra, 33 Cal.4th 536, 588.)

Defendant Duff submits that, under these circumstances, this Court should - - as a matter of simple fairness - - consider this issue on appeal notwithstanding defense counsel's failure to raise it in the Superior Court.

2. The Admissibility of Prior Crimes Propensity Evidence During the Penalty Phase Pursuant to Penal Code Section 190.3, subdivision (b)

Penal Code section 190.3, subdivision (b) provides that the jury, in determining whether to impose the death penalty or life imprisonment, may consider a number of factors including ". . . criminal activity by the defendant which involves the use or attempted use of force or violence or the express or implied threat to use force or violence." This code section allows evidence of violent criminal acts committed at any time, whether adjudicated or not, to show the defendant's propensity for violence. (People v. Ray (1996) 13 Cal.4th 313, 349.)

The admissibility of other crimes propensity evidence, during the penalty phase of a capital trial, is constitutionally suspect. A reliable penalty determination, based solely on the jury's objective evaluation of relevant factors, is critical to a valid death judgment under the Eighth Amendment. (Woodson v. North Carolina (1976) 428 U.S. 280, 304-305; Gardner v. Florida (1977) 430 U.S. 349, 359-361.) Permitting a penalty jury to consider alleged other crimes undermines the reliability of the jury's penalty determination. The jury that "convicts" the defendant of the uncharged acts is not an impartial trier of fact. Rather, it is the jury that, by definition, has just

convicted the defendant of capital murder and special circumstances. In this situation, the penalty jury may well conclude that the defendant engaged in the alleged prior criminal conduct based on evidence that would not have convinced a neutral jury of his guilt at a separate trial. This in turn leads to a significant likelihood that the death penalty will be unfairly, erroneously and undeservingly imposed.

The danger of the penalty determination becoming skewed by the introduction of prior crimes propensity evidence is real and apparent. The jury, having just convicted the defendant of special circumstances murder, may feel justifiably punitive toward him, but not so punitive as to return the ultimate punishment of death. However, when the prosecution is permitted to introduce evidence of **additional** alleged violent crimes during the penalty phase trial, the jury is both much more likely to find that the prior crimes occurred because of their recent exposure to capital murders of which they have just found the defendant guilty, and also much more likely to impose the death penalty on the habitually violent defendant. In this situation the purported prior violent criminal conduct, having been established by an inherently unfair fact-finding process, provides the additional weight needed to tip the scales in favor of a death sentence which might not otherwise be imposed.

Incidents not deemed worthy of prosecution at the time they occurred are frequently dredged up to persuade the jury that the defendant is an incurably violent habitual offender who should be

sentenced to death. The inevitable consequence of permitting these alleged prior crimes to be introduced during the penalty phase of a capital trial is that the jury will be unable to remain neutral - - as to both the adjudication of the alleged prior offenses and the determination of an appropriate penalty for the current offenses - - thus substantially undermining the reliability of the penalty determination.

This danger is particularly great when the prosecution is permitted to introduce disparate alleged other criminal incidents spanning a period of many years, which could never be consolidated in a joint non-capital trial, en masse during the penalty phase.

Many courts which have considered this issue have concluded that the introduction of prior crimes evidence during the penalty phase renders the penalty determination so inherently unreliable as to be constitutionally impermissible under the Eighth and Fourteenth Amendments. (Commonwealth v. Hoss (1971) 455 Pa. 96, 113; State v. Barthollomew (1984) 1 Washington 2d 631; State v. McCormick (1979) 272 Indiana 272; Cook v. State (Alabama 1979) 369 So.2d 1251, 1257; Scott v. State (1983) 297 Md. 235, 245-247; Province v. State (Florida 1976) 337 So.2d 783, 786; Landry v. Lynaugh (5th Cir. 1988) 844 F.2d 1117, 1121.)

This Court, notwithstanding the above, has repeatedly upheld the constitutionality of Penal Code section 190.3, subdivision (b). (People v. Balderas (1985) 41 Cal.3d 144, 204; People v. Howard (1988) 44 Cal.3d 375, 425; People v. Cain (1995) 10

Cal.4th 1, 71; People v. Gurule (2002) 28 Cal.4th 557, 653; People v. Griffin, supra.)

However, this Court has limited the scope of evidence admissible in aggravation in the penalty phase of a capital trial to exclude criminal activity not involving violence, and criminal activity of which the defendant was acquitted. (People v. Boyd (1985) 38 Cal.3d 762, 772.)

Furthermore, this Court has made clear that the jury may only consider uncharged other criminal offenses in determining the appropriate penalty if they are convinced that the prior crimes have been proven beyond a reasonable doubt, and that this necessarily implies that the trial court must not permit the penalty jury to consider uncharged crimes as aggravating factors unless a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (People v. Boyd, supra, 38 Cal.3d 762, 778; People v. Griffin, supra, 33 Cal.4th at 584-585.)

Further, although a trial court may not categorically exclude evidence of other violent criminal activity on the grounds of undue prejudice, inasmuch as evidence of this sort is expressly made admissible by Penal Code section 190.3, subdivision (b), it may exclude "particular items of [such] evidence" on that ground insofar as any item might "unfairly persuade" the jury to find that the defendant engaged in the other violent criminal activity in question. (People v. Griffin, supra, 33 Cal.4th at 587-588.)

Griffin is, of course, in accord with Evidence Code section 352, as well as numerous other decisions by this Court and the federal courts condemning the introduction of unduly prejudicial other crimes evidence which has little probative value. (People v. Balcom (1994) 7 Cal.4th 414, 425 [unduly prejudicial but relevant other crimes evidence excludable under Evidence Code §§1101, subdivision (b) and 352]; People v. Ewoldt (1994) 7 Cal.4th 380, 403 [same]; People v. Castro (1985) 38 Cal.3d 301 [unduly prejudicial prior crimes impeachment evidence inadmissible]; People v. Falsetta (1999) 21 Cal.4th 903 [unduly prejudicial prior crimes propensity evidence excludable under Evidence Code §352 even though relevant and admissible under Evidence Code §1108]; People v. Partida (2005) 37 Cal.4th 428 [appellate court may determine whether the admission of unduly prejudicial gang evidence denied the defendant due process and a fundamentally fair trial even if he failed to object on due process grounds in the trial court]; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 [admission of unduly prejudicial prior crimes evidence inadmissible since it deprives the defendant of a fundamentally fair trial even if relevant]; United States v. LeMay (9th Cir. 2001) 260 F.3d 1018, at 1026 [same].)

3. The Other Crimes Propensity Evidence in the Instant Case Rendered the Penalty Determination Constitutionally Unreliable

Defendant Duff respectfully suggests that this Court should reconsider its holding in Balderas. The introduction of prior crimes evidence during the penalty phase of a capital trial is

per se violative of both the Eighth Amendment and Due Process Clause of the Fourteenth Amendment. The danger that the jury will base its penalty determination on the defendant's supposed violent propensities, rather than upon a careful evaluation of what he actually did in the instant case, is simply too great.

However, this Court need not go so far in order to conclude that the omission of Defendant Duff's priors in the instant case irreparably prejudiced his constitutional rights to a fair and reliable penalty determination.

First, at least two of the alleged prior crimes - - those involving beating up Cindy Fernando and shooting at Ronnie Greathouse - - never resulted in any formal criminal charges, where not included in the prosecutor's motion, and were simply added at the last minute in order to make Joe Joe Duff look bad in the eyes of the penalty phase jury.

Second, the numerous alleged prior incidents were lumped together and introduced en masse even though they took place over a period of more than 20 years (i.e. between 1978 and 2000), were largely unrelated to one another, and never would have been cross-admissible in a joint non-capital trial.

Third, as the prosecutor candidly admitted in his motion, Duff was never convicted of many of these charges.

While Julie Frey told the penalty phase jury that Duff had sexually assaulted her, and while he was initially charged with assault with intent to rape (Penal Code §220), he was found guilty only of false imprisonment (Penal Code §236; 4 C.T. 926.)

Similarly, the charges arising out of the Jack-in-the-Box incident were dismissed pursuant to a plea bargain. (4 C.T. 928.)

Joe Joe Duff was never convicted of burglary or any other charges as the result of his entering Janet Martin's home following his April 1994 encounter with Timothy Ritchey and his friends. (4 C.T. 930.)

Fourth, and most fundamentally, parading all of this other crimes evidence - - none of which had anything to do with the charged homicides of Roscoe Riley and Brandon Hagen - - in front of the jury was enormously prejudicial. Riley and Hagen were gun-toting drug dealers and there was evidence of victim provocation. Furthermore, there was considerable evidence that Joe Joe Duff was a pathetic "brain boggled" mentally retarded person who had been raised and repeatedly abused in an unbelievably dysfunctional family rather than a carefully calculating cold blooded murderer. Thus, in the absence of the extensive prior crimes evidence, the jury could easily have decided to spare Joe Joe's life. However, after hearing about all of the previous incidents ad nauseam, the jurors were likely to conclude - - and almost certainly did conclude - - that he deserved to die simply because he was a "bad" person.

While the jury was given the usual cautionary limiting instructions (CALJIC jury instructions Nos. 8.85 and 8.87; 4 C.T. 1149-1151), the instructional safeguards were illusory.

As Justice Jefferson wrote in People v. Gibson, supra, 56 Cal.App.3d at page 130, three decades ago:

> "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial [prior crimes] evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal principles with respect to the admissibility of other-crime evidence. . . , if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner." (People v. Gibson (1976) 56 Cal.App.3d 119, at p.130.)

In summary the erroneously admitted prior crimes evidence unfairly skewed the penalty determination, and deprived Joe Joe Duff of any possibility of the fair penalty trial and reliable penalty determination to which he was entitled under the Eighth and Fourteenth Amendments. Consequently the death sentence must be set aside and the case remanded for a new penalty trial.

XII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR - - AND DEPRIVED DEFENDANT DUFF OF A RELIABLE PENALTY DETERMINATION AND A FUNDAMENTALLY FAIR PENALTY TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS - - BY EXCLUDING RELEVANT "REVERSE VICTIM IMPACT" EVIDENCE

A. RELEVANT PROCEDURAL HISTORY

The defense, prior to the commencement of the penalty phase trial, filed a motion to rebut/allow reverse victim impact evidence. The District Attorney intended to introduce testimony from Roscoe Riley's common-law wife Maria Correa and Brandon Hagen's best friend Mikala Teller concerning the impact that the decedent's deaths had on their families. The defense sought to elicit - - on cross-examination, as well as through the testimony of rebuttal witnesses, and documentary evidence - - that decedents Riley and Hagen were anything but the loving "family men" the prosecution intended to portray them as. Both men had been repeatedly arrested for a variety of violent felonies and domestic violence offenses. Additionally "family man" Brandon Hagen had twice been taken to court for failing to pay child support. Attached to the defense motion was a report by private investigator Frank Huntington detailing decedent Roscoe Riley's criminal history. (4 C.T. 1082-1106.)

The court and counsel discussed the matter outside the presence of the jury. The court agreed with defense counsel that the prosecutor should not be allowed to present a false picture of the decedents' family bliss. Thus, if the prosecutor "opened the door" by eliciting such a portrayal, the defense was entitled

to present relevant rebuttal evidence. For example, if Maria Correa were to testify as to her sorrow and emotional pain at learning of Roscoe Riley's death, the defense could impeach her with her previous statement that when she learned of his death it was like a thousand pound weight had been lifted off her chest due to all of the pain which he had caused her during his life time. However, assuming that the prosecutor presented only limited victim impact evidence which did not falsely portray the victims as upstanding loving family men, the defense rebuttal evidence would not be allowed. (19 R.T. 6531-6544, 20 R.T. 6545-6554, 6615-6625, 6633-6635, 6677-6683.)

Ultimately the prosecutor agreed to limit and "pare down" his victim impact presentation. Maria Correa would testify only that she had had two children with Roscoe Riley, that she had arranged and paid for his funeral and cremated him, and that it had been very difficult for her to tell her daughters that their father had been killed. Mikala Teller would testify only that Brandon Hagen was her best friend, that several of his family members were attending the trial, that she had fainted when informed of his death, that Brandon had been cremated and that she had kept some of his ashes, and that she had dedicated a bookshelf in her bedroom containing personal mementos to Brandon. (20 R.T. 6678 et seq.)

The court ruled that, in view of the way that the prosecutor had limited and crafted his victim impact evidence presentation, no defense "reverse victim impact" evidence would be permitted.

(20 R.T. 6683.)

Ms. Correa and Ms. Teller testified in front of the jury in accordance with the prosecutor's pared down offer of proof. (20 R.T. 6699-6704.) The defense, in accordance with the court's ruling, did not cross-examine them or introduce any evidence of their extensive criminal histories or unhappy family relationships.

B. DISCUSSION

1. The Admissibility of Reverse Victim Impact Evidence

In Payne v. Tennessee (1991) 501 U.S. 808, the United States Supreme Court, reversing its earlier decision in Booth v. Maryland (1987) 482 U.S. 496, held that evidence of a murderer's impact on a victim's family and friends is not per se inadmissible in the penalty phase of a capital trial. However, the High Court expressly stated that, if such evidence is admitted, the defense must have the benefit of cross-examination and be allowed to present contrary evidence. (Payne, supra, 501 U.S. at p. 823.) This statement was consistent with the earlier statement by the dissenters in Booth - - who later of course became the majority in Payne - - that, assuming that victim impact evidence were admitted, there was "no doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement." (Booth v. Maryland, supra, 482, U.S. at p. 518.)

This Court has held that victim impact evidence is admissible as a "circumstance of the crime" under Penal Code section 190.3, subdivision (a) in light of Payne (People v. Edwards (1991) 54 Cal.3d 787, 832-836), thus implicitly recognizing that under Payne the defense is entitled to fully cross-examine the victims' family and produce relevant rebuttal evidence.

The High Court has not elaborated upon the scope of admissible "reverse victim impact" evidence since Payne.

However, a number of courts have considered this issue and concluded that the defense must be given broad latitude. For example, in State v. Bowie (813 So.2d 370, at 390 (Louisiana 2002), the court held that a prior conviction of the victim was admissible as suggesting that he had a "dubious moral character." The court recognized (a) the strategic risk a defendant would run by attacking the victim's character before the jury and (b) the danger of converting the penalty phase into a "mini-trial" on the victim's character and distracting the sentencing jury from determining whether the death penalty was appropriate in light of the accused's background and the particular circumstances of the crime. However the court held that a capital defendant must be permitted to put on evidence that the victim was of dubious moral character, unpopular, or ostracized from his family.

The Wisconsin Court of Appeal held in State v. Spires, 585 NW.2d 161 (1998) that a defendant must be "entitled to attempt to counter the weight of the victim impact evidence by introducing evidence showing that the murder victim's relatives may have overstated their loss or may have misconceived the character of their loved one."

In Mickens v. Greene 74 F.Sup.2d 586 (E.D. Virginia 1999) the Court observed that evidence that the capital murder victim had been charged with assaulting his mother could have been used by the defense to discredit the mother's professions of grief.

And, in Connover v. State, 933 P.2d 904, at 922-923 (Okla.Cr. 1997), the Oklahoma Court of Appeal held that the

refusal to permit a capital defendant to rebut victim impact evidence by presenting evidence that the decedent was involved in illegal drug activity violated the defendant's constitutional right to confront of adverse witnesses. The Court explained that such rebuttal evidence "was relevant in giving the jury a complete picture of the entire crime and the uniqueness of the victim as a human being, providing at least a "quick glimpse of the life the defendant chose to extinguish." (Id. at p. 922.) Thus, it was reversible error to preclude "cross-examination of the victim's family into any aspect of the victim's drug involvement," to exclude "rebuttal evidence on the subject," and to refuse "testimony of a police officer who searched the victim's home at the time of the homicide and found quantities of illegal drugs and drug paraphernalia."

This Court's view of the scope of admissible "reverse victim impact" evidence is not entirely clear.

In People v. Boyette (2002) 29 Cal.4th 381, the defendant argued that the trial court had erred in ruling that he would not be allowed to counter-act the effect of the victim impact evidence by cross-examining family members to elicit evidence that showed the victims were not the cherished family members the witnesses claimed them to be. The excluded evidence included inter alia evidence that one of the victims had twice been sent to prison. The trial court ruled that the defendant was improperly attempting to disparage the victim's character. This Court held on appeal that there was no error and, in any event,

no prejudice. While testimony from the victims' family members was relevant to show how the killing affected them, it had not been admitted to show that they were justified in their feelings due to the victims' good nature and sterling character. Accordingly, the defendant was not entitled to disparage the character of the victims on cross-examination. (Boyette, supra, 29 Cal.4th at pp. 444-445.)

More recently, in People v. Kelly (2007) 42 Cal.4th 763, at p. 799, this Court seemed to take a different view. The defendant in that case contended that the prosecution's victim impact evidence created an intolerable risk of improper comparisons between the victim's and the defendant's character. This Court however stated that "we see nothing in Payne v. Tennessee. . . , or our own cases, that prohibits comparing the victim and the defendant." If that is so, then it follows that the defense must be allowed to rebut the prosecution's victim impact evidence by introducing evidence that the victim was not all his family members claimed him to be. This Court later modified its opinion to delete the above quoted sentence since nothing in the record showed that the comparison complained of actually occurred. (People v. Kelly (2008) 42 Cal.4th 1120(a).) However, this Court did **not** repudiate its earlier statement suggesting that a comparison of the victim and the defendant was permissible.

In any event defendant Duff submits that, under Payne, a defendant in a capital case penalty phase trial must be given the

broadest latitude in cross-examining prosecution victim impact witnesses and presenting relevant rebuttal evidence. And - - as the Connover Court opined - - this necessarily means that the defense is entitled to present to the jury relevant evidence about the victim as a human being and the life the defendant chose to extinguish. The fact that such defense evidence may disparage the decedent's character cannot alter this conclusion. Furthermore, as this Court appeared to recognize in its original Kelly opinion, there is nothing wrong in permitting the jury to compare the victim and the defendant when determining the degree of harm caused by the victim's death and the appropriate penalty.

2. The Trial Court's Error in the Instant Case

Applying the above recited legal principles to the instant case, it is clear that the trial court erred. Ms. Correa and Ms. Teller were allowed to tell the jury about the harmful impact that the decedents' deaths had had on them. And yet, because the prosecutor artfully crafted and limited their testimony so as not to "open the door," the defense was never able to probe on cross-examination or through rebuttal evidence the degree of that harm and the jury was never given an accurate picture of who the decedents really were. The jury never learned that Maria Correa - - far from being saddened by Roscoe Riley's death - - actually was relieved and felt that a thousand pound weight had been lifted from her chest. The jury also never learned that these "family men" had engaged in acts of domestic violence and failed to support their children. And, the jury never learned of

the full extent of the decedents' extensive criminal records. All of this was relevant in assessing the actual harm caused by the decedents' deaths, and thus relevant to the jury's determination of whether Defendant Duff - - who extinguished their lives - - should live or die. And yet all of this was kept from the jury. The High Court in Payne, supra permitted the prosecution to introduce victim impact evidence only on the understanding that the defense would have the benefit of cross-examination and be allowed to present rebuttal evidence. Here, pursuant to the trial court's ruling, there was **no** cross-examination and **no** rebuttal evidence whatsoever.

Thus, the trial court erred and deprived Defendant Duff of a fundamentally fair penalty phase trial and reliable penalty determination in violation of the Eighth and Fourteenth Amendments.

3. The Error Was Prejudicial

The trial court's error in totally excluding the reverse victim impact evidence was sufficiently prejudicial to require a reversal of the penalty judgment.

There was evidence in this case that the decedents were armed drug dealers who may have provoked their own deaths by initiating a gun battle. There was also substantial mitigating evidence presented that Joe Joe Duff was the product of a completely dysfunctional family and the victim of extreme child abuse and neglect, and that he was a pathetic methamphetamine addict and mentally retarded. While the jury was aware from the

evidence presented during the guilt phase that the decedents were probably drug dealers and were killed in a dispute over drugs, they did **not** know the extent of their illegal activities, how they had mistreated those who loved them, and how little they would be missed. In summary, there is a reasonable probability that, if the defense had been allowed to elicit the abundant reverse impact evidence it was prepared to present, the jury might have reached a different conclusion.

XIII.

THE PROSECUTOR'S MISCONDUCT IN PORTRAYING DEFENDANT DUFF AS A DEDICATED FOLLOWER OF "MR. MURDER" DURING CLOSING ARGUMENT UNFAIRLY PREJUDICED THE JURY'S PENALTY DETERMINATION

A. PROCEEDINGS BELOW

Defense psychiatrist Albert Globus opined during the penalty phase trial that Joe Joe Duff was brain damaged and retarded. Dr. Globus' opinion was based inter alia on the results of electro-encephalograms, BEAM studies, IQ tests, and evidence that Joe Joe had suffered significant head injuries. (23 R.T. 7539-7628.)

Dr. Globus also noted that Joe Joe's verbal IQ was only 67 and that Joe Joe had difficulty with concepts and words. For example, while Joe Joe had done a good deal of reading while incarcerated, he stated that he liked to read "non-fiction novels," even though - - by definition - - there is no such thing. Joe Joe also stated that he liked "absorbing novels," even though "good authors still write bull shit." When asked to interpret various proverbs, Joe Joe generally "completely missed the point." At one point Joe Joe attempted to quote the Bible, which he had been reading in order to explain his interpretation. (23 R.T. 7585-7587.)

On cross examination the prosecutor elicited from Dr. Globus that Joe Joe had stated that, in addition to the Bible he was reading Stephen King, John Grisham, and Dean Koontz novels, as well as works by Scientology founder L. Ron Hubbard. Neither Joe Joe nor Dr. Globus referred to any specific novels. (23 R.T. 7699.)

The prosecutor stated during his closing argument:

> "Now, I want to talk to you a little bit about this IQ concept. . . I am just pulling out some books. The books that I just pulled out are a Stephen King novel, a couple of John Grisham books, a couple Dean Koontz.
>
> All these books, not necessarily these particular books, but [they] are books that apparently the defendant likes to read. Dr. Globus told us that although he has this incredibly low IQ, he actually enjoys reading novels. He reads these.
>
> He reads - - some of his favorite authors are, I don't know, Grisham, Dean Koontz and Stephen King, and I think he mentioned L. Ron Hubbard. Books he reads, books he can digest, books he has the mental capacity to understand.
>
> Probably some or all of you have read some of these authors, and what does that tell us. Really when you come down to it, what does it say about his IQ. . . . (24 R.T. 7984-7985.)

Defense counsel objected, outside the presence of the jury, to the books which the prosecutor had "pulled out" and displayed to the jury. The books included two Dean Koontz novels called "The Bad Place," and "Mr. Murder." Defense counsel stated:

> "I would like to note for the record, because I doubt if. . . [the prosecutor] is willing to give up the books that he posed to the jury, which are in clear view for the jury to read the spines.
>
> One is Dean Koontz called the Bad Place. The other is Dean Koontz's, and I certainly would have objected to this had I been able to see it. It's Mr. Murder, which I think is highly improper to. . . [display] to the jury.
>
> It's one thing. . . [to say that]. . . he reads Dean Koontz, he reads John Grisham, but to specifically pick out Mr. Murder and pose

that to the jury, I find that rises to the level of conduct. . . that. . . [justifies] a mistrial.

It's like Mr. Duff is sitting in jail reading about ways to commit murder. . . . I think that was highly improper to pose that. The next one - - I mean, it just keeps getting worse - - John Grisham's The Runaway Jury . . .

I mean, you know, there was a subliminal message that's being posed to the jury by 'The Bad Place.' I don't know what that conjures up, but these were specifically picked to give not just a message about who he reads, The Bad Place, Mr. Murder, The Runaway Jury . . .

. . . I strongly object to that type of conduct, and would have certainly made the motion at the very instant had I seen what he was doing there." (24 R.T. 8003-8004.)

The prosecutor responded:

"Everything I have ever read. . . of Dean Koontz, . . . [is] all about murder, and mayhem and killing, and the Grisham books are all about the law.

And I grabbed the books that I happen to personally own off my shelf, and I think I was very fair about telling the jury that I am not saying the defendant reads these particular books.

I think the record will reflect I actually said that. And the point of it is that I, as I think the record will clearly reflect, am saying that if he can read these books, this whole IQ thing is somewhat silly and that was the point of it. . . .

If the defense would feel better, I am more than happy to have the court admonish the jury. . . that in no way is there a suggestion Mr. Duff has ever read these particular books if that will make them feel better." (24 R.T. 8004-8005.)

The court, after some further discussion, decided to mull the matter over over the noon recess. The court urged defense counsel to mull over the prosecutor's suggestion that the court admonish the jury that the prosecutor was not attempting to attribute the particular books that he had displayed to Defendant Duff. (24 R.T. 8005-8006.)

When proceedings resumed, following the noon recess, the court stated that the defense motion for a mistrial was not meritorious and that the books displayed by the prosecutor would remain where they were in order to allow defense counsel to point out to the jury that they had actually come from the prosecutor's personal library rather than Defendant Duff's cell. (24 R.T. 8008-8009.)

Defense counsel during his closing argument, stated:

> ". . .When you have kind of a weak case. . . or you want to bolster your case, . . . you bring up little gimmicks. . .
>
> . . . [The prosecutor] brings up some books here. And I have to comment on them because they were sitting here for about an hour. And the first one - - Dean Koontz, The Bad Place - - [that's] a good choice. . . . The Bad Place. What we found out during the break here - - during lunch - - is [that] all of these books here didn't come from Mr. Duff . . . they came from Mr. Sawtelle's personal library. . . . these selections have nothing to do with Mr. Duff. But they are interesting choices by [the prosecutor]. . . [who] put them here. So we have the Bad Place. We have the run away jury by John Grisham.
>
> I will say this. What you heard. . . Dr.

> [Globus] say was [that] when he talked with Mr. Duff he was reading the Bible. We don't have the Bible here. . . . I guess that should have been placed. . [on display] by [the prosecutor]. But he chose not to. But this is what you do - - kind of bolster your case with little bit of gimmicks here - - the books. . . which really don't have much to do with anything." (24 R.T. 8018-8019.)

The court did not admonish the jury not to attribute "Mr. Murder" or the other books displayed by the prosecutor to Mr. Duff.

The jury, as noted ante, returned a death verdict.

The defense argued in their motion for a new penalty phase trial inter alia that the prosecutor had committed misconduct by displaying Mr. Murder, The Bad Place, and other specific books that Joe Joe had never read to the jury even though these particular books had never been introduced into evidence and insinuating during his penalty phase argument that Duff was obsessed with the idea of murder. (4 C.T. 1190-1191.)

The prosecutor, in his written opposition, argued that his remarks had focused on the defendant's IQ rather than his taste in literature and that it was perfectly legitimate to argue that the defendant's ability to read and comprehend popular novels placed him in the "mental mainstream." Additionally, the prosecutor argued that, since the defense failed to ask for a curative instruction and tactically opted to respond by pointing out that the origin of the books at issue was the prosecutor's personal library, the defense had waived the issue. (5 C.T. 1211-1212.)

The trial court denied the motion for a new penalty phase trial. The court stated:

> "First, I believe that the objection was waived by the defense's failure to seek a curative instruction. Nevertheless, I think that the remedy that was employed was far more effective than whatever curative instruction I would have given, and that was essentially to embarrass Mr. Sawtelle in front of the jury by having to admit that all of those books were his." (25 R.T.8120.)

B. DISCUSSION

The prosecutor's misconduct deprived Defendant Duff of a fair penalty trial and a reliable penalty determination in violation of the Eighth and Fourteenth Amendments. Consequently, the death sentence cannot stand.

1. The Issue Has Not Been Waived

A preliminary question is whether Defendant Duff forfeited appellate review of his prosecutorial misconduct claim by failing to accept the court's offer to admonish the jury that Mr. Murder and other books displayed by the prosecutor came from the prosecutor's personal library rather than Duff's jail cell. The answer is no.

As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless the defendant made a timely objection and requested that the jury be admonished to disregard the impropriety. (People v. Hill (1998) 17 Cal.4th 800, 820.)

The foregoing, however, is only the general rule. A defendant will be excused from the necessity of requesting that the jury be admonished if an admonition would not have cured the harm caused by the misconduct. (People v. Hill, supra; People v. Bradford (1997) 14 Cal.4th 1229, 1333.)

Here, even assuming that defense counsel's failure to accept the court's offer to admonish the jury can be deemed the equivalent of a failure to request such an admonition, the issue has not been forfeited. The jury had already seen "Mr. Murder," "The Bad Place," and other books prominently displayed by the

prosecutor during his argument and heard the prosecutor state that these were the kind of books that Duff liked to read. An admonition from the court referring to these very same books would simply have highlighted the impression that Duff was obsessed by the idea of murder and should be put to death before he could kill again. Telling the jurors **not** to attribute books like Mr. Murder to Duff would have been like telling them **not** to think of pink elephants. In both cases the very first thing that would naturally occur to the jurors would be precisely what they were told not to think about. On this record, it must be concluded that defense counsel's agreement to admonish the jury would have been futile and counter-productive to his client. (People v. Hill, supra, 17 Cal.4th at p. 821; People v. Arias (1996) 13 Cal.4th 92, at p. 159.)

Moreover it is extremely doubtful that defense counsel's tacit or implied rejection of the trial court's offer to admonish the jury can fairly be construed as a waiver in light of counsel's timely objection and request for a mistrial. The prosecution - - as the party claiming waiver - - has the burden to clearly establish that a waiver occurred and doubtful cases should be resolved against finding a waiver. (People v. Vargas (1993) 13 Cal.App.4th 1653, 1659.) Since it is at the very least unclear whether or not any waiver or forfeiture occurred, Defendant Duff is entitled to appellate review of his prosecutorial misconduct claim.

Furthermore, even assuming that a waiver or forfeiture

occurred, this would not preclude appellate review. The fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to prevent or correct the claimed error in the trial court does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is not prohibited from reaching a question that has not been preserved for review by a party. (People v. Berryman (1993) 6 Cal.4th 1048, 1072-1076 [passing on a claim of prosecutorial misconduct that was not preserved for review]; People v. Williams (1998) 17 Cal.4th 148, at 161-162, f.n. 6.)[8]

For the above reasons, finding that a waiver precludes appellate review would be inappropriate. Defendant's misconduct claim should be addressed on the merits.

2. The Prosecutor Committed Misconduct

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction. . . ." (People v. Andrews (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to an "elevated standard of conduct" because he exercises the sovereign powers of the state. (People v. Hill, supra, 17 Cal.4th at p.819; People v. Espinoza (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court has

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[8] The appellate court's authority to review issues not raised in the trial court by timely objection or motion does not extend to issues involving the admission or exclusion of evidence. (Evidence Code §§353 and 354.)

explained:

> "The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a particular and very definite sense the servant of the law, the two fold aim of which is that the guilty shall not escape or the innocent suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger v. United States (1935) 295 U.S. 78, 88.)

In other words the prosecutor's job isn't just to win, but to win fairly while staying well within the rules. (United States v. Kojayan (9th Cir. 1993) 8 Fd.3d 1315, 1323; Donnelly v. DeChristoforo (1974) 416 U.S. 637, 648-649 (dissenting opinion of Douglas J.)

Misconduct by a prosecutor deprives a criminal defendant of the guarantee of fundamental fairness enshrined in the Due Process Clauses of the Fifth and Fourteenth Amendments. (Darden v. Wainwright (1986) 477 U.S. 168, 178-179; Donnelly v. DeChristoforo, supra, 416 U.S. at p. 643.) Where the prosecutor's behavior infects the trial with unfairness, any resulting conviction is a denial of due process. (People v. Hill, supra, 17 Cal.4th at p. 819.) Misconduct by a prosecutor during the penalty phase of a capital prosecution may also violate a

defendant's right to a reliable penalty determination under the Eighth Amendment (Darden v. Wainwright, supra, 477 U.S. at pp. 178-179.)

It is prosecutorial misconduct to fill a hole in the State's evidence by arguing the existence of facts that cannot be found in, or reasonably inferred from, the record. (People v. Hall (2000) 82 Cal.App.4th 813, 818 ["a statement of supposed fact not in evidence is a highly prejudicial form of misconduct"]; see also People v. Pinholster (1992) 1 Cal.4th 865, 948; People v. Kirkes (1952) 39 Cal.2d 719, 724; accord Berger, supra, 295 U.S. at p.p. 84-85 [considering prosecutor's assumption of prejudicial facts not in evidence to be prosecutorial misconduct].)

In People v. Bolton (1979) 23 Cal.3d 208, this Court condemned this type of prosecutorial misconduct in no uncertain terms. There the prosecutor hinted to the jury that, but for the rules of evidence, he would show that the defendant had suffered prior convictions and/or had a propensity for committing crime. This Court stated:

> "There is no doubt that the prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally. In essence the prosecutor invited the jury to speculate about - and possibly base a verdict upon - 'evidence' never presented at trial.
>
> Closing argument presents a legitimate opportunity to argue all reasonable inferences from evidence in the record. [citation omitted] However, this Court has for a number of years repeatedly warned that statements of facts not in evidence by the

> prosecuting attorney in his argument to the jury constitute misconduct [citations]." (People v. Bolton, 23 Cal.3d at 212.)

It is also misconduct for a prosecutor to use arguments "calculated to inflame the passions or prejudices of the jury." (United States v. Young (1985) 470 U.S. 1, 8; People v. Mayfield (1997) 14 Cal.4th 668, 803.)

In this case the prosecutor used "facts" not in evidence to create the false impression that Defendant Duff was obsessed with the idea of murder and sitting in his jail cell avidly perusing the pages of books like Mr. Murder. The insinuation was that the defendant, whom the jury had found guilty of multiple murders, would likely kill again should his life be spared.

While the prosecutor did say that Defendant Duff had not necessarily read these particular books, the very fact that he chose to display them in front of the jury coupled with his statement that these were the kinds of books that Defendant Duff liked to read, left no doubt of the impression he intended to convey.

The prosecutor's attempt to "cover" himself by pretending that he only meant to suggest that Duff's ability to read books refuted Dr. Globus' claim that Duff was mentally retarded was disingenuous. If this had really been the prosecutor's intent, there would have been no need to display these **particular** books, taken from the prosecutor's own library and never referred to in the record in front of the jury.

Thus, the prosecutor committed misconduct during his penalty phase argument.

3. The Prosecutor's Misconduct Requires a Reversal of the Penalty Determination

The prosecutor's misconduct was sufficiently prejudicial to require a reversal of the penalty judgment and a new penalty phase trial. The decedents in this case were armed drug dealers who may have provoked their own deaths by initiating a gun battle. There was substantial mitigating evidence that Joe Joe Duff was the product of a completely dysfunctional family and the victim of extreme child abuse and neglect, and that he was a pathetic methamphetamine addict and mentally retarded. There is a reasonable probability that, if the jury had not been given the false impression by the prosecutor that Joe Joe was obsessed with the idea of murder and that he might kill again if his life were spared, the jury might have reached a different conclusion.

This conclusion is not altered by the fact that defense counsel attempted to mitigate the damage the prosecutor had done during defense counsel's closing argument. While defense counsel chastised the prosecutor for resorting to gimmicks and trying to bolster his argument by misstating the record, this was a case of too little too late. The bell could not be unrung. In fact defense counsel's argument - - like the court's proposed instruction - - may have actually made the problem worse by highlighting in the jurors' minds Joe Joe's supposed obsession with books "like" Mr. Murder.

Since there is a reasonable probability that Joe Joe Duff was deprived of a fundamentally fair penalty phase trial, he is entitled to a new one.

XIV.

THE EVIDENTIARY ERRORS AND THE PROSECUTOR'S MISCONDUCT DURING THE PENALTY PHASE, CONSIDERED COLLECTIVELY, REQUIRE REVERSAL

The court's evidentiary errors and the prosecutor's misconduct during the penalty phase, considered collectively, require that the death sentence be set aside.

The cumulative effect of multiple errors may compel a reversal of the penalty determination even assuming that no one error - - in and of itself - - justifies this. (People v. Hill, supra; People v. Sturm (2006) 37 Cal.4th 1218.)

Here, the combined effect of allowing the jury to consider highly prejudicial prior crimes evidence relating to Defendant Duff's past misdeeds and falsely portraying him as an obsessed murderer, while at the same time not allowing the jury to hear about the decedents' extensive criminal histories, made the penalty phase trial fundamentally unfair.

The cumulative effect of **all** of this deprived Defendant Duff of his Eighth and Fourteenth Amendment rights and mandates that the death judgment be set aside.

XV.

CALIFORNIA DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED IN DEFENDANT DUFF'S CASE, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Defendant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. (People v. Schmeck (2005) 37 Cal.4th 240, 304.)

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (Kansas v. Marsh (2006) 126 S.Ct. 2516, 2527, fn. 6.)[9] See also, Pulley v.

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[9] 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

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 particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime - even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) - to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the

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noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute - but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. DEFENDANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(People v. Edelbacher (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (People

v Bacigalupo (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offenses charged against Defendant Duff the statute contained almost thirty special circumstances[10] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (People v. Dillon (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

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[10] 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.

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.[11] (See Section E. of this Argument, post.)

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[11] In a habeas petition to be filed after the completion of appellate briefing, defendant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in Furman v. Georgia (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. DEFENDANT'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.[12] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[13] or having had a "hatred of religion,"[14] or threatened witnesses

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[12] 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.

[13] People v. Walker (1988) 47 Cal.3d 605, 639, fn. 10, cert. den., 494 U.S. 1038 (1990).

[14] People v. Nicolaus (1991) 54 Cal.3d 551, 581-582, cert. den., 112 S. Ct. 3040 (1992).

after his arrest,[15] or disposed of the victim's body in a manner that precluded its recovery.[16] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., People v. Robinson (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (Tuilaepa v. California (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (Tuilaepa v. California (1994) 512 U.S. 967, 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

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[15] People v. Hardy (1992) 2 Cal.4th 86, 204, cert. den., 113 S. Ct. 498.

[16] People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990).

factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright (1988) 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to

other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make - whether or not to condemn a fellow human to death.

1. Defendant'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. ___ (Jan. 22, 2007.)

In Apprendi, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (Id. at p. 478.)

In Ring, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (Walton v. Arizona (1990) 497 U.S. 639) it

had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of Apprendi, Walton no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In Blakely, the high court considered the effect of Apprendi and Ring in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (Blakely v. Washington, supra, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (Ibid.) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (Id. at 313.)

In reaching this holding, the supreme court stated that the governing rule since Apprendi is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after

finding additional facts, but the maximum he may impose without any additional findings." (Id. at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In United States v. Booker (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. Booker reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (United States v. Booker, supra, 543 U.S. at 244.)

In Cunningham, the high court rejected this Court's interpretation of Apprendi, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (Cunningham v. California, supra, 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.

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

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance - and even in that context the required finding need not be unanimous. (People v. Fairbank, supra; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[17] 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

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[17] 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.)

event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[18] 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.[19]

This Court has repeatedly sought to reject the

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[18] 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)

[19] 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.)

applicability of Apprendi and Ring by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (People v. Demetroulias (2006) 39 Cal.4th 1, 41; People v. Dickey (2005) 35 Cal.4th 884, 930; People v. Snow (2003) 30 Cal.4th 43, 126, fn. 32; People v. Prieto (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off Apprendi and Blakely in non-capital cases.

In People v. Black (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding Apprendi, Blakely, and Booker, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in Cunningham.[20] In Cunningham the principle that any fact which exposed a defendant to a greater potential sentence must be found

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[20] 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.)

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 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 at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[21] 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

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[21] 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."

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. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151.

(Ring, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (Ring, supra, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds

a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (Ring, 530 U.S. at 604.) In Blakely, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (Id., 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to Apprendi and Cunningham, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors - a prerequisite to imposition of the death sentence - is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See State v. Ring, supra, 65 P.3d 915, 943; accord, State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); State v. Ring, 65 P.3d 915 (Az. 2003); Woldt v. People, 64 P.3d 256 (Colo.2003); Johnson v. State, 59 P.3d 450 (Nev. 2002).[22])

No greater interest is ever at stake than in the penalty phase of a capital case. (Monge v. California (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[23] As the high court stated in Ring, supra, 122

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[22] See also Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[23] 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

S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of Ring to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

> for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra, 524 U.S. at p. 732 (emphasis added).)

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

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 (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See Winship, supra (adjudication of juvenile delinquency); People v. Feagley (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); People v. Burnick (1975) 14 Cal.3d 306 (same); People v. Thomas (1977) 19 Cal.3d 630 (commitment as narcotic addict); Conservatorship of Roulet (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In Santosky, supra, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that

> historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in Santosky, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (Santosky, supra, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (Winship, supra, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (Woodson, supra, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In Monge, the U.S. Supreme Court expressly applied the

Santosky rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (California v. Brown, supra, 479 U.S. at p. 543; Gregg v. Georgia, 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.)[24] The same analysis

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[24] 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.)

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 F.2d 417, 421; Ring v. Arizona, supra; Section D, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See Mills v. Maryland (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (People v. Demetrulias, supra, 39 Cal.4th at pp. 41-42) and "moral" (People v. Hawthorne, supra, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-Furman state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, ante.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See Kansas v. Marsh, supra [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review - a procedural safeguard this Court has eschewed. In Pulley v. Harris (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining

to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in Harris, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in Furman v. Georgia, supra. (See Section A of this Argument, ante.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, ante), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section

B, ante). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see Kansas v. Marsh, supra), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro (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 now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578; State v. Bobo (Tenn. 1987) 727 S.W.2d 945.)

Here, the prosecution presented extensive evidence regarding other criminal activity allegedly committed by Defendant Duff and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The U.S. Supreme Court's recent decisions in Cunningham v. California, supra, U. S. v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra, and Apprendi v. New Jersey, supra, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Defendant Duff's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Defendant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Mills v. Maryland (1988) 486 U.S. 367; Lockett v. Ohio (1978) 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - were relevant solely as possible mitigators (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory

> instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (People v. Kraft, supra, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see People v. Memro (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (People v. Arias, supra, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(People v. Morrison (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the Morrison case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (Id., 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (Ibid.) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., People v. Montiel (1994) 5 Cal.4th 877, 944-945; People v. Carpenter (1997) 15 Cal.4th 312, 423-424.)[25]

The very real possibility that defendant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived defendant of an important state-law generated procedural safeguard and liberty interest - the right not to be sentenced to

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[25] There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to aggravate the sentence. See People v. Cruz, No. S042224, Appellant's Supplemental Brief.

death except upon the basis of statutory aggravating factors (People v. Boyd (1985) 38 Cal.3d 765, 772-775) - and thereby violated defendant's Fourteenth Amendment right to due process. (See Hicks v. Oklahoma (1980) 447 U.S. 343; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that defendant'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 defendant "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.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., Monge v. California, supra, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (People v. Olivas (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict

scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (People v. Olivas, supra; Skinner v. Oklahoma (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In Prieto,[26] as in Snow,[27] 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,

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[26] "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.)

[27] "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.)

California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[28]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of

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[28] 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.

the laws.[29] (Bush v. Gore (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., Mills v. Maryland, supra, 486 U.S. at p. 374; Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra.)

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional

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[29] 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.)

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.]) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot, supra, 159 U.S. at p. 227; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly

disapproved." (Atkins v. Virginia, supra, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes - as opposed to extraordinary punishment for extraordinary crimes - is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Atkins v. Virginia, supra, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (Hilton v. Guyot (1895) 159 U.S. 113, 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[30] Categories of criminals that warrant such a comparison include persons suffering from mental illness

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[30] See Kozinski and Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L.Rev. 1, 30 (1995).

or developmental disabilities. (Cf. Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Defendant Duff's death sentence should be set aside.

F. THE IMPOSITION OF DEATH ON MR. DUFF IN THIS PARTICULAR CASE IS UNCONSTITUTIONALLY DISPROPORTIONATE UNDER BOTH THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

Defendant Duff requests that this Court undertake an **intra case** proportionality review and conclude that the death sentence imposed in this particular case was unconstitutionally disproportionate to his personal culpability in light of all of the circumstances. This Court has repeatedly held that the constitutional prohibitions against cruel and/or unusual punishments may be invoked to reduce any penalty which is so grossly disproportionate to a particular defendant and/or for the crime for which it is inflicted that it shocks the conscious. (People v. Dillon (1983) 34 Cal.3d 441; People v. Steele (2002) 27 Cal.4th 1230, at 1269.)

Imposing death in this case on Mr. Duff is grossly disproportionate to the nature of this particular offender since he is the product of an incredibly dysfunctional family, mentally retarded, and clearly suffering from severe and permanent brain damage exacerbated by the use of methamphetamine.

It is also disproportionate to the nature of the offense in that the decedents were armed drug dealers who may have provoked

the gun battle ending in their demise. The instant case is - - in many respects - - similar to Dillon, supra.

In Dillon the defendant fatally shot a man guarding a marijuana farm during an attempted robbery. The shooting was in response to a suddenly developing situation that the defendant perceived as putting his life in danger. This Court concluded that, even though the defendant intentionally killed the victim without legally adequate provocation, a first degree murder conviction would be constitutionally disproportionate to his individual culpability, and that he ought to be punished as a second degree murderer. (People v. Dillon, supra, 34 Cal.3d at 477-489.)

In our case, just as in Dillon, the fatal shooting occurred during the robbery of armed drug dealers. And, just as in Dillon, the fatal shootings were in response to a rapidly developing situation in which defendant Duff perceived that his life was in danger.

Therefore, just as in Dillon, a first degree murder conviction - - let alone a finding of special circumstances and imposition of the death penalty - - would be constitutionally disproportionate to Mr. Duff's individual culpability.

Mr. Duff urges this Court to find that, under the totality of the circumstances described hereinabove and detailed earlier in this brief (see Statement of Facts ante), the death penalty is unconstitutionally disproportionate and inappropriate here. A

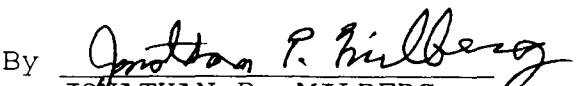
sentence of life imprisonment without possibility of parole is more than adequate to punish Mr. Duff and protect society.

CONCLUSION

The judgment must be reversed.

Dated: March 2, 2009

Respectfully submitted,

By 

JONATHAN P. MILBERG
Attorney for Defendant
and Appellant DEWEY
JOE DUFF

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.630, subdivision (b) of the California Rules of Court, I certify that the text of this Appellant's Opening Brief contains 46793 words, as counted by the Corel WordPerfect version 8 program, and does not exceed 300 pages.

Dated: March 2, 2009

Respectfully submitted,

JONATHAN P. MILBERG

PROOF OF SERVICE BY MAIL

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of Los Angeles, that I am over the age of 18 years and not a party to the within cause; that my business address is 300 N. Lake Ave., Suite 320, Pasadena, CA 91101.

On July 23, 2009, I served the attached

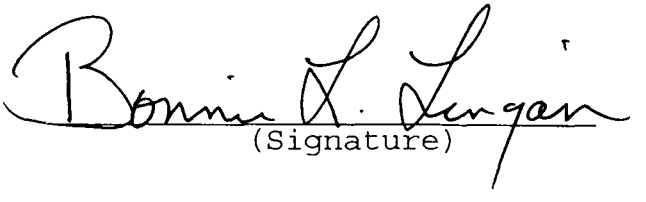
APPELLANT'S OPENING BRIEF

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

PLEASE SEE ATTACHED MAILING LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at Pasadena, California, on July 23, 2009.

Bonnie L. Lingan
(Typed Name)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DECLARATION OF JONATHAN P. MILBERG

I, Jonathan P. Milberg hereby declare:

I am the attorney of record for the Defendant and Appellant in People v. Dewey Joe Duff, California Supreme Court Case No. S105097, a death penalty case.

I have personally described to Defendant-Appellant Duff the substance and purpose of the Appellant's Opening Brief.

Mr. Duff has expressly stated that he does not wish to be served with a copy of the Appellant's Opening Brief.

I hereby declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed this 16th day of July, 2009, at Pasadena, California.

JONATHAN P. MILBERG, DECLARANT

DECLARATION OF DEWEY JOE DUFF

I, Dewey Joe Duff, hereby declare:

I am the Defendant and Appellant in People v. Dewey Joe Duff, California Supreme Court Case No. S105097, a death penalty case.

My attorney, Jonathan P. Milberg, has explained in detail the substance and purpose of the Appellant's Opening Brief which he has prepared on my behalf.

I do not wish to be served with a copy of my Appellant's Opening Brief.

I hereby declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed this 26th day of March, 2009 at San Quentin, California.

Dewey Joe Duff

DEWEY JOE DUFF,
DECLARANT