IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM LEE WRIGHT, JR., Defendant and Appellant.	No. S107900 (Los Angeles County Sup. Ct. No. KA048285-01)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

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INTRODUCTION

By the prosecution's own admission, the case against appellant rested on the questionable and internally contradictory eyewitness identifications of the victims. All of these witnesses had prior felony convictions, all admitted to having been involved in narcotics trade, and yet none of those who positively identified appellant were facing charges for their criminal conduct. The delay in the witnesses' identification further calls into question their veracity – although all the witnesses initially denied knowing the perpetrator, each one testified that at the time of the crime they were familiar with appellant, knew his name and address and had ongoing contact with him. Yet, it was not until weeks later, when the witnesses saw appellant's photograph in the newspaper in connection with an unrelated case, that they told the police they knew who had assaulted them.

Facing a prosecution case that was weak on evidence but long on innuendo, appellant alerted the court to his dissatisfaction with trial counsel's conduct both in and outside of court. The trial court's failure to

conduct an adequate inquiry into appellant's concerns and refusal to relieve counsel forced appellant to go on trial for his life with an attorney who failed to fully investigate the case, discounted and dismissed appellant's proffered witnesses, and flatly refused to present a defense.

Seeking a way to choose and conduct his own defense, appellant made a timely *Faretta* motion. Appellant asserted his right to self-representation as soon as it became apparent that counsel refused to investigate or present a defense, on only the sixth appearance before the judge to whom the case had been assigned for all purposes in the Los Angeles County Superior Court. The trial court's denial of this motion was in error.

Determined to obtain a capital conviction, the prosecution sought to prejudice the jury against appellant, bolstering its case with improper evidence of appellant's alleged bad character and improperly vouching for its most critical witness.

The convictions in this case were obtained at the expense of appellant's fundamental constitutional rights to a fair trial and should not be permitted to stand.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a jury trial and is authorized by Penal Code section 1239, subdivision (b).[1]

STATEMENT OF THE CASE

On June 13, 2001, Appellant was arraigned on the Information in Los Angeles Superior Court, which charged appellant in Count 1 with the

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[1] All statutory references are to the Penal Code unless otherwise indicated.

attempted deliberate and willful murder (§§664/187, subd. (a)) of Julius Martin on February 17, 2000; in Count 2 with robbery (§211) from Julius Martin on February 17, 2000; in Count 3 with the attempted willful, deliberate, premeditated murder (§§664/187, subd. (a)) of Douglas Priest on February 17, 2000, accompanied by allegations that he personally used a deadly and dangerous weapon, to wit a knife, during the commission of the offense (§12022, subd. (b)(1)) and that he personally inflicted great bodily injury upon Douglas Priest (§12022.7, subd. (a)); in Count 4 with the attempted willful, deliberate, premeditated murder (§§664/187, subd. (a)) of Mario Ralph on March 21, 2000, accompanied by an allegation that he personally used a firearm causing great bodily injury during the commission of the offense (§12022.53, subd. (d)); in Count 5 with the attempted willful, deliberate, premeditated murder (§§664/187, subd. (a)) of Willie Alexander on March 21, 2000, accompanied by an allegation that he personally used a firearm causing great bodily injury during the commission of the offense (§12022.53, subd. (d)); in Count 6 with the Street Gang Murder (§187) of Phillip Curtis, with the special circumstances of murder to further the activities of a street gang (§190.2, subd. (a)(22)), murder during the commission of a robbery (§190.2, subd. (a)(17), and murder during the commission of a burglary (§190.2. subd. (a)(17)), accompanied by an allegation that appellant personally used a firearm causing great bodily injury during the commission of the offense (§12022.53, subd. (d)); and in Count 7 with the second degree robbery (§211) of Faquir Singh (1 CT 214-220.) As to both Count 1 and 2 it was alleged that appellant personally discharged a firearm during the commission of the offense, and through the discharge of the firearm inflicted great bodily injury (§12022.53, subd (d) and §12022.53, subd. (c).) On February 20, 2002, an amended Information

was filed, deleting the section 186.22 allegations as to all counts but Count 4, the attempted murder of Mario Ralph, and Count 5, the murder of Phillip Curtis, and adding the prior robbery conviction as a strike. (1 CT 244-251.)

On April 29, 2002, appellant sought to exercise his right to self-representation. (2 CT 492.) The motion was denied as untimely. (2 CT 492.)

Jury selection began on May 1, 2002, and continued on May 6 and May 7. (2 CT 494; 7 CT 1915, 1917.) A jury and five alternates were empaneled on May 7, 2002. (7 CT 1917.)

The guilt phase of the trial began on May 7, 2002. (7 CT 1917.) On May 10, 2002 the court granted the prosecution's motion to dismiss Count 7. (7 CT 1924.) On May 13, 2002, after five days of evidence, both sides rested and argued the case to the jury and the jury was instructed. (7 CT 1927.) On the afternoon on May 14 the jury announced that it had reached verdicts on six counts, but was unable to reach a unanimous verdict on the gang allegations alleged pursuant to section 186.22, subdivision (b)(1) in counts 4 and 5, and the special circumstance allegation pursuant to section 190.2, subdivision (a)(22) in count 6. (7 CT 1935.) On May 15, 2002, the Court ruled that it would accept the verdicts that had been reached. (8 CT 2015.) Appellant was found guilty as to all counts and all special allegations were found to be true except for the allegations pursuant to section 186.22, subdivision (b). (8 CT 2015-2016.) The jury found the special circumstances pursuant to section 190.2, subdivision (a)(17) to be true, but made no finding as to the special circumstance alleged pursuant to section 190.2, subdivision (a)(22). (8 CT 2015-2016.) After the reading of the partial verdicts, the district attorney's motion to dismiss the special allegations pursuant to sections 186.22 and 190.2, subdivision (a)(22), in

light of the jury's verdicts, was granted. (8 CT 2023.)

The penalty phase of the trial began on May 16, 2002. (8 CT 2033.) Both sides rested and argued their case on May 22, on which date the jury received the case. The jury was out for ten days in penalty deliberation, deliberating for the first two days, resuming deliberation after a five-day break, and then deliberating for another two and a half days. (8 CT 2044-2064.) The jury announced it had reached a verdict on May 31, 2002, which was sealed. The Jury's verdict of death was unsealed in court on June 3, 2002. (8 CT 2110.)

On June 18, 2002, the Court denied appellant's motion for a new trial, sentenced appellant to life imprisonment as to Count 1, six years in prison, the upper term, as to count 2, life imprisonment as to counts 3, 4 and 5; denied the automatic motion for modification of the death sentence (§190.4(e)), and entered the judgment of death as to Count 6. (8 CT 2146-2150.)

STATEMENT OF FACTS

A. Guilt Phase

1. Shooting at 355 Chestnut Avenue, Long Beach

On February 17, 2000, Douglas Priest and Julius Martin were in their apartment at 355 Chestnut Avenue in Long Beach, California. (5 RT 862.) At approximately 1:00 a.m., there was a knock at the door. Martin went to the door and saw a man whom he later identified as appellant.[2] (6 RT 1138.) Despite the lateness of the hour, Martin let the man into the apartment because, he claimed, he knew him through mutual friends, and

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[2] Martin's belated identification of his assailant as appellant was contested by the defense at trial.

knew that he lived in the neighborhood. (6 RT 1138-39.)[3]

According to Martin, appellant came into the apartment, sat down, and asked "what's going on?" which Martin understood to be an inquiry as to whether or not Martin and Priest had any drugs he could buy. (6 RT 1127.) Martin and Priest were selling marijuana and cocaine out of their apartment. (5 RT 866, 888; 6 RT 1127.) Martin told appellant that although nothing was going on right now (meaning that he had no drugs to sell appellant), he would probably have something tomorrow. (6 RT 1127.) At that point, appellant got up to leave. (*Ibid.*)

As appellant and Martin approached the door, appellant pulled out a knife and a gun and said "this is a jack move." (6 RT 1128.) According to Martin, appellant then said, "you think I'm bullshitting?" and stabbed Priest, who was lying on the floor, in the back. (6 RT 1129.) After stabbing Priest, appellant then turned to Martin and said "give it up." (6 RT 1130.) Martin had $70 in one pocket and $100 in the other. Martin gave appellant the $70. When appellant asked, Martin said that was all he had. (*Ibid.*) Appellant told Martin to lie down and not look up. When Martin lay down, his head was about three and a half feet from the front door of the apartment. After he lay down, Martin heard the gate on the front door open, and then heard a gunshot. (6 RT 1143-1145.) Martin did not see who shot him, but assumed that the shot was fired from outside the front door of the apartment. (6 RT 1144.) After he heard the gunshot, Martin blacked out. (6 RT 1131.) Sometime later, Martin came to and was alone in the apartment with Priest. (6 RT 1133.) Martin walked over to Priest, who had

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[3] Martin's preliminary hearing testimony was read to the jury, and admitted as his testimony at trial without objection based on the court's finding of unavailability. (6 RT 1091.)

remained lying asleep on the floor after being stabbed. (6 RT 1142.) Martin woke Priest up, and then called the police. (6 RT 1147, 1133.)

Priest also heard the knock on the door of the apartment, but did not get up from the floor, where he had fallen asleep, drunk. (5 RT 888, 862-863.) He had been drinking Olde English 800 Malt Liquor and tequila since earlier that evening, and estimated he had drunk about six beers and one or two shots of tequila. (5 RT 887.)

According to Priest, he was awake from the time the man entered the apartment, but remained lying on the floor listening to the conversation, even after he was stabbed. (5 RT 888.) Although Priest could not hear precisely the conversation between Martin and the person who entered the apartment, it sounded to him like Martin was being pressured for the money in his pocket. (5 RT 863.) Priest testified that he believed he recognized appellant's distinctive voice, which he knew from appellant's regular visits to their apartment over the last four or five months. (5 RT 883.)

Priest heard two gunshots two or three minutes after he was stabbed. (5 RT 888-889; 6 RT 1211.) Priest testified that it was only after the gunshots that he heard the front door opening. He raised himself up slightly off the floor, turned his neck to the right, and saw the silhouette of a person leaving the apartment, without ever actually seeing the person. (5 RT 890-892, 895.) After this, Priest got up, checked on Martin, and called 911. (5 RT 868, 892, 906.)

Officer Clouhesy of the Long Beach Police Department interviewed Martin at St. Mary's Hospital in Long Beach, shortly after he was shot. (6 RT 1182.) Officer Clouhesy testified that Martin told him that he had known his assailant for about a year, that he was a Crip gang member who went by the name "Mad." (6 RT 1182, 1184.) Martin never told Clouhesy

where appellant lived. (6 RT 1185.)

Priest was interviewed by Officer Paul Seminara at the scene. Priest told the officer that he was in the apartment, asleep on the floor and woke up to the sound of gunshots. (6 RT 1176.) When he woke up, the suspect had already fled. (6 RT 1177.) Priest told Office Seminara he had no idea how or by whom he had been stabbed. (*Ibid.*)

This was consistent with Priest's statements to Officer Assef at the hospital on the day of the assault. (6 RT 1211.) Priest told Officer Assef that he had been drinking heavily the night of the 16th, starting at 6:00 p.m., and had continued drinking beer and tequila through the night. (*Ibid.*) Priest was asleep on the floor and was awakened by what sounded like two gunshots, then felt a sharp pain in his back. Believing he had been shot, Priest remained face down on the floor until the police arrived. (*Ibid.*)

Priest testified that he had always known that appellant was the person who stabbed him but he never told the police anything about appellant being his assailant until a month after the attack. (5 RT 894, 897.) Priest recalled that the Long Beach police only interviewed him one time, immediately after he had been stabbed and while he was still at the hospital. It was Priest's perception at that time that the police suspected he might be the shooter, because they checked his hands for powder burns. (5 RT 903.) Priest denied telling any officer that he had no idea how he was stabbed (5 RT 898), or that he had been drinking heavily since 6:00 p.m. (5 RT 899), or that he had no idea what happened in the apartment. (5 RT 900.)

About a month after the incident, Priest was watching television and saw that appellant had been arrested for another, unrelated crime. (5 RT 869.) Priest called Martin and told him that he had been watching television and seen "Mad," the name by which he knew appellant, going to

jail. (5 RT 870.) Shortly thereafter, on April 18, both Marin and Priest participated in a live lineup at the Los Angeles County jail at which they identified appellant as their assailant. (5 RT 871; 6 RT 1134.)

Both Priest and Martin testified that at the time of the incident they knew the identity of the person who entered their apartment in the early morning hours of February 17, 2000, and they knew where he lived. (5 RT 865-866, 883, 893-894.) Both testified that until they saw appellant on television they never revealed any information to the Long Beach Police Department as to appellant's true identity, or where he could be found. (5 RT 865-866, 883, 893-894.)

Officer Collazo of the Long Beach Police Department testified that he went to Martin and Priest's apartment on February 17, 2000, and recovered a bullet fragment from Martin's shirt, which was lying on the floor. (6 RT 1002.) Officer Collazo logged the bullet fragment into evidence. (6 RT 1002-1003.) Officer Collazo also recovered two bags of marijuana, one of which contained 13 smaller bags, and a .358 caliber handgun from a drawer in the bedroom of the apartment. (6 RT 1005.) The handgun and bullet fragment were the only ballistics evidence recovered from the Chestnut Avenue crime scene.

2. Shooting at 580 Williams Street, Pomona

Over four and a half weeks after the incident at Martin and Priest's apartment, on March 21, 2000, at approximately 8:30 p.m., the Pomona Police Department received a call of shots being fired at 580 Williams Street, in Pomona.[4] (4 RT 692.) Three men, Mario Ralph, Phillip Curtis

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[4] Martin and Priest's apartment in Long Beach and the dope house at 580 Williams Street in Pomona are over forty miles apart and are on

(continued...)

and Willie Alexander, were using 580 Williams Street as "a dope house," to sell crack cocaine. (4 RT 754; 5 RT 792.) The house had been secured with refrigerators barricading all the doors and windows other than the front door. (5 RT 854.) When someone came to the door to purchase drugs, one of the three would be "on point" – patting down and watching the people who entered the house to buy drugs. (5 RT 792.) Generally, Ralph would be the one "on point." (*Ibid.*)

Ralph testified that he, Curtis and Alexander all knew appellant, because he had purchased cocaine from them. Indeed, as Ralph explained it, one time, "there was a little incident. [Appellant] had come over and him and Phillip got into it. That's when they like banged on it [sic] each other a little bit. That's when we introduced each other and telling where we were from and who knows who." (5 RT 793.) As Ralph explained it, "banged on each other" does not mean that they were physical with each other, just that they told each other where they were from: "[j]ust like Southside, Duroc, things like that. They was just introducing each other." (5 RT 835.)

According to Ralph's testimony, appellant came to the Williams Street dope house on the evening of March 21 and purchased $50 worth of crack.[5] (4 RT 755.) He asked if Curtis, Alexander and Ralph had an ounce of cocaine that he could buy. The men told him they did not have that much on hand, but to come back later in the evening, and they might have it. (4 RT 757.) The trio did, in fact, have enough cocaine in the house to sell an ounce to appellant, but they wanted to hold out to see if they could make

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[4](...continued)
opposite sides of Los Angeles.

[5] The defense disputed appellant's identity as the person who came to the Williams Street apartment that night.

more money by selling what they had in smaller quantities. (4 RT 758.)

When appellant returned, Ralph was asleep in a bedroom, but woke up when he heard a knock on the door. Ralph heard the person he identified as appellant say, "mother fuckers. Duroc. Where is the dope at?" (4 RT 762.) The next thing Ralph heard was one gunshot, followed by one or two more. (4 RT 763.) As Ralph walked into the room he saw that both Alexander and Curtis had been shot. (4 RT 764.) Ralph testified he saw appellant standing in the middle of the room. (4 RT 796; 5 RT 840.)

According to Ralph, Curtis was sitting in a chair behind a table with a gun in his hand, leaning over the table, and gasping as Ralph approached him. (4 RT 764; 5 RT 839.) Ralph had seen Curtis pull a gun out of his pants pocket. (4 RT 766.) Ralph also saw that Alexander had been shot, and was sitting in the middle of the couch, with his phone in his hand. (4 RT 764; 5 RT 842.) Ralph testified that when he looked "back" he could see appellant. (4 RT 764.)

Ralph immediately went to grab the gun out of Curtis's hand, turning his back on appellant. (4 RT 764; 5 RT 797.) As he did so, appellant shot him. (4 RT 767.) Ralph fell to his knees, then jumped up and fired twice at appellant. (*Ibid.*) Ralph testified that he squeezed the gun too hard and the shots went off too quickly, and there were no more bullets. (5 RT 845.) At that point, both Ralph and appellant were screaming, and running to the front door to get out of the apartment. (5 RT 798.) Ralph got out of the apartment first, with appellant close behind. (5 RT 798.)

Despite how quickly all the shots were fired, Ralph claimed that at some point after all the shooting, but before he ran out of the apartment, appellant appeared to be looking for the drugs in the apartment. Ralph saw appellant lifting up the cushions on the couch, and heard appellant ask,

"where's the fucking dope?" (5 RT 848-849, 853.)

As they got out of the apartment, appellant ran past Ralph. (5 RT 798.) Ralph still had the gun in his hand, but it had no more bullets in it. (*Ibid.*) Ralph saw appellant jump into a white Cadillac, which was driven away. (5 RT 810.) Ralph tried to chase after the Cadillac, but he fell down. (5 RT 846.)

Ralph decided to go back into the house to dispose of incriminating evidence. He tried to throw the gun he had taken from Curtis onto the roof of the house as he went back in. (5 RT 846.) However, the gun did not make it to the roof, and instead fell between his house and the neighbor's. (4 RT 732.) Once inside, Ralph went into the kitchen, got the remaining dope out of the oven where it was stored, and flushed it down the toilet. (5 RT 846.) Ralph testified that he did not know what happened to the money that was in the Williams Street house. (5 RT 817.) Only after Ralph had flushed the cocaine down the toilet did he go back outside and ask someone to call an ambulance. (5 RT 846.) By then, Alexander had also come outside, and, according to Ralph's testimony, both he and Alexander were sitting on the front porch when the police arrived. (5 RT 847.)

Sergeant Mark Warm of the Pomona Police Department was the first officer to respond to the scene. According to Warm, as he arrived at the scene, Ralph was on the south side of Williams Street, and was walking toward Warm from a westerly direction. (4 RT 693.) Ralph shouted to the sergeant that he had been shot, and Warm called for an ambulance. Warm testified that in response to his question as to what had happened, Ralph only said that the shooter was a member of the Duroc gang. (4 RT 694.) As Warm was talking to Ralph, Alexander approached him from the house, walking towards Warm from the east. (4 RT 695.) Alexander had also

been shot, and was bleeding from his chest. (*Ibid.*) Warm testified that he discovered a third victim, who was later identified as Philip Curtis, lying on the ground inside the residence. (4 RT 698.) Warm was not certain if Curtis was pronounced dead at the scene, or after transport to the hospital. (4 RT 698.)

Initially, Ralph did not tell the police that he had fired the gun and then tried to dispose of it, or that he had flushed the narcotics down the toilet. Eventually, however, he disclosed both things to the police. (4 RT 777, 780.) According to Detective Gregg Guenther, Ralph told him that the shooter had a small, black semiautomatic handgun, not a revolver. (6 RT 1190.)

As a result of being shot, Ralph lost a kidney, and had to have almost 100 feet of his intestines removed. At the time of trial, Ralph had ongoing medical problems and repeated hospitalizations since his injury. (4 RT 768.)

While Ralph was in the hospital, he asked one of his cousins to bring him the Pomona newspaper. (5 RT 819.) In it, he saw appellant's picture, and recognized him as the shooter. (5 RT 820.) At the time, Ralph knew who appellant was, knew appellant's nickname and gang affiliation, but did not know his legal name. (5 RT 822.)

After seeing the newspaper, Ralph called Detective Guenther and told him that there was a photograph of the person who shot him in the paper. (5 RT 821.) Alexander also told Detective Guenther he saw appellant's photograph in the newspaper and appellant was the one who shot him. (6 RT 1204.) After this, Detective Guenther conducted a photographic lineup with both Alexander and Ralph while they were in the hospital, and both men identified appellant's photograph from the

photographic lineup. (6 RT 1199, 1204.) Ralph and Alexander attended a live lineup at which both identified appellant. (4 RT 776; 6 RT 1055-1056.)

At trial, Alexander testified that on March 21, 2000, he was shot twice, once in the chest and once in the back. (6 RT 1046, 1050.) Alexander denied that anyone was selling crack cocaine out of the Williams Street house; denied that anyone was in the house other than him, Curtis, and a man named Mario; and denied having any knowledge or recollection as to who shot either him, Curtis or Mario. (6 RT 1048; 8 RT 1703.) Alexander specifically denied appellant was the person who shot him. (6 RT 1049.)

Alexander agreed that he attended a live lineup at which he identified someone as the shooter, but denied that his selection reflected any recollection of the actual shooter. He testified, "I just chose anybody" (6 RT 1055); "I was going with the same thing that the other individual [Mario] was going with." (6 RT 1057-1058.) Ultimately, Alexander gave the following explanation for why he identified appellant as the shooter, despite not having any independent recollection of who actually shot him: "Somebody got to suffer, right? . . . I didn't know who did it . . . I'm going with the next man who seen it." (6 RT 1068.)

When shown a photograph from that lineup of the person he identified as the perpetrator of the shooting, Alexander denied that the person in the photograph was appellant.[6] (6 RT 1056.) Alexander stated that when he was at the lineup, he did not recognize anyone, but only identified the person who Mario told him to identify. (6 RT 1057, 1059,

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[6] Detective Guenther testified that the person identified in the photograph as being in position 4 at the live lineup was appellant. (6 RT 1200.)

1060-1069.)

At the time of trial, Alexander was serving a six-year prison sentence following his arrest for selling crack cocaine in another drug house in Pomona a few months after he was shot. (6 RT 1052.) Alexander testified he did not receive any benefit in that case in exchange for his testimony in appellant's case. (6 RT 1052.) Alexander agreed with the district attorney's statement that an inmate in state prison might have to pay a price for cooperating with law enforcement and testifying and identifying someone in court. (6 RT 1054.)

Deputy Medical Examiner Ogbanna Chinwah testified that Curtis was killed by a single gunshot wound to the chest. (5 RT 910.) The bullet was recovered from the body. (5 RT 913.)

The Pomona Police Department recovered one expended bullet from a rear closet of the Williams Street house. (4 RT 725.) Adam McDonald, a crime scene investigator for the City of Pomona, testified it appeared that the bullet was fired from the front of the house into the rear. A second expended bullet was recovered from the wall east of the front door. (5 RT 920.) The police also recovered two .380 caliber casings from the rear of the house. (4 RT 729.) The two bullets and two casings were the only ballistics evidence recovered from the Williams Street house. (5 RT 925.)

The Pomona Police Department also recovered a .380 caliber semiautomatic handgun from the passageway next to 580 Williams Street. (4 RT 730, 732, 734; Peo. Exh. 4B.)

Appellant was arrested on March 24, 2000, for an unrelated crime in San Bernardino by Officer Joseph Giallo of the Ontario Police Department. (6 RT 1026.) Officer Giallo searched the apartment in which appellant was arrested and recovered a revolver from underneath a couch cushion. (6 RT

1028.) That revolver, a Smith and Wesson, was identified as People's 15 at trial. (6 RT 1029.)

Criminalist Dale Higashi testified as an expert witness on ballistics. Higashi identified People's 15 as a Harrington and Richardson model 732, .32 Smith and Wesson long-caliber revolver. (5 RT 940.) In a revolver, the ammunition sits in a cylinder which rotates. When the cylinder is lined up with the barrel of the firearm and the trigger is pulled, the ammunition goes down the barrel and the casing stays in the cylinder. The casing is manually extracted from the cylinder. (5 RT 941.) Higashi identified the gun depicted in photo 4B as a semi-automatic .380 caliber handgun. (5 RT 943.) With a semi-automatic handgun, when the weapon is fired, as the bullet goes down the barrel the casing is ejected from the weapon, and the weapon then automatically chambers the next round. (5 RT 942.)

Higashi first testified that the .32 caliber bullet recovered during the autopsy of Curtis had been fired from People's 15, the Smith and Wesson revolver confiscated from the apartment in which appellant was arrested. (5 RT 948.) Higashi testified that the caliber of the bullet was .32 automatic, meaning the ammunition was designed for use in an automatic handgun, but that it fits into the revolver and fires properly from it. (5 RT 948.) Higashi next testified that People's 3, the bullet recovered from the corner of a closet at the rear of the Williams Street residence, was also fired from People's 15, the Smith and Wesson revolver, to the exclusion of all other guns. (5 RT 949.) Higashi testified that a third bullet recovered from the Williams Street crime scene was tested and determined to have been fired from the silver semi-automatic Davis manufacturer .380 caliber handgun, identified in the photo 4B, to the exclusion of all other guns. (5 RT 951.)

Additionally, Higashi testified that the two expended casings that

were recovered from the Williams Street residence, identified as People's 13 and 14, were both also fired from the silver semi-automatic Davis manufacturer .380 caliber handgun, identified in the photo 4B, to the exclusion of all other guns. (5 RT 953.)

Higashi testified that a bullet provided to him by the Long Beach Police Department, which was associated with the investigation of the Chestnut Avenue incident, had been fired from the Smith and Wesson revolver recovered from the apartment in which appellant had been arrested.[7] (5 RT 952)

Higashi provided all of this testimony on direct examination. There was no cross-examination of this expert witness. (5 RT 960.)

Los Angeles County Sheriff's Deputy David Bly, offered expert testimony on the Duroc Crip street gang. Deputy Bly testified that in his opinion the Duroc Crip street gang was a street gang within the meaning of section 187.22, subdivision (b)(1), because members of the group use common hand signs, have common tattoos, strive to hold their territory to commit criminal acts, such as drug sales, attempted murders, murders and robberies, and act in a threatening manner to assert their presence in the community. (6 RT 1011.) Deputy Bly testified that in his opinion, appellant was a member of the Duroc Crip street gang, based on his tattoos and his prior statements to law enforcement identifying himself as a member of the Duroc Crip gang. (6 RT 1013.)

Deputy Bly further testified that in his opinion a Duroc Crip gang member who had purchased rock cocaine from a drug house in the past,

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[7] Although Officer Collazo testified only to the recovery of a bullet fragment (6 RT 1002), criminalist Higashi testified that he conducted an examination of a bullet.

who then buys some cocaine and asks if he can buy a much larger quantity, and pulls out a gun when he returns to pick up the larger quantity, shoots three people and makes statements referencing the Duroc Crip gang has committed the crime for the benefit of the Duroc Crip gang. (6 RT 1012.)

Toni Wright testified that on March 22, 2000, she saw appellant with a small, dark-colored handgun. (6 RT 1098.) Ms. Wright was not asked to identify any weapon, or photographs of any weapon.

The defense called eight police officers, five of whom were involved in the Williams Street crime investigation, and three of whom were involved in the Chestnut Avenue crime investigation. (6 RT 1103 [Sgt. Mark Warm]; 6 RT 1110 [Officer Paul Hitt]; 6 RT 1160 [Officer Eric Berger]; 6 RT 1168 [Officer Duane Leonard]; 6 RT 1175 [Officer Seminara]; 6 RT 1181 [Officer Cloughesy]; 6 RT 1190 [Detective Guenther]; 6 RT 1211 [Officer Assef via stipulation].) Each of these witnesses offered brief testimony consistent with their written police reports. The testimony focused on impeaching the credibility of witnesses Ralph, Priest and Martin and the thoroughness of the investigation.

B. Penalty Phase

The prosecution introduced evidence in aggravation of nine incidents of violence or threats of violence and two prior felony convictions, in addition to evidence regarding the circumstances of the crime. The following offenses were introduced:

- On May 15, 1989 appellant was convicted of second degree robbery. (11 RT 2142.) After ordering food from Anna Laura Martinez, an employee of Troy Burgers in Monrovia, appellant pulled out a gun and demanded money, which Ms. Martinez gave to him. (8 RT 1704-1705.)

- On August 27, 1999, appellant was convicted of felony evading a police office. (11 RT 2164.) Appellant failed to respond to Officer Pritchett's emergency lights, drove around the block at 35-40 m.p.h., failed to stop at stop signs, and periodically stopped short in the street to allow passengers to jump out of the car. (9 RT 1743-1745.) Appellant was taken into custody after a short foot chase. (9 RT 1748.)
- On June 24, 1992, appellant was observed by Marilyn Deboe in a vehicle with other members of the Duroc Crips, shooting at the Mitchell brothers' residence.[8] (9 RT 175-1767.) The Mitchell brothers were members of the West Covina Mob, a "Blood" gang. (9 RT 1764, 1766.) Deboe and one of the Mitchell brothers followed appellant's car and observed appellant discard a gun in the bushes, which was later recovered by the police. (9 RT 1767, 1769.)
- On September 6, 1994, appellant was observed attacking a fellow inmate at New Folsom State Prison. (8 RT 1580, 1582, 1584.) The victim testified that appellant had attempted to break up the attack, and had not assaulted him. (9 RT 1811.)

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[8] This incident was related to a prior murder charge for which appellant was convicted in 1992 and which was subsequently dismissed by a federal judge based on a finding that appellant was factually innocent of the murder charge. (1 RT 44, 77.) According to the district attorney's uncontested representation to the court, although the facts underlying the murder conviction could not be introduced in aggravation, the shooting at the inhabited dwelling could properly be introduced at penalty because that charge was dismissed by the prosecution upon appellant's murder conviction. (1 RT 45.)

- On March 22, 2000, while riding in a vehicle with his ex-wife Toni Wright, appellant shot Ms. Wright in the right side of her face, next to her ear. (9 RT 1787.) After shooting Ms. Wright once in the face, appellant twice more put the gun to Ms. Wright's face and pulled the trigger, but the gun did not discharge. (9 RT 1788-1790.)
- On March 23, 2000, appellant barricaded himself in an apartment at 1021 West B Street, Ontario, with his girlfriend, Janice Marrow-Wright, Ms. Marrow-Wright's mother, and Ms. Marrow-Wright's three nephews – one 11-year-old and two 5-year-old twins. (8 RT 1595.) While barricaded in the apartment appellant repeatedly shot at members of the Ontario Police Department. (8 RT 1601, 1632, 133, 1651, 1665, 1674.) Appellant was ultimately taken into custody, along with Ms. Marrow-Wright and her mother, after police deployed tear gas. (8 RT 1609, 1668.)
- On June 28, 2001, while appellant was incarcerated in the Los Angeles County jail awaiting trial, a jail-made spear was recovered from appellant's cell. (8 RT 1695.)
- On July 10, 2001, while appellant was incarcerated in the Los Angeles County jail awaiting trial, appellant threw a white liquid milky substance on Deputy Mikesell which burned the deputy's eyes. (9 RT 1724.)
- On July 10, 2001, three altered razor blades were recovered from appellant's jail cell in the Los Angeles County jail. (8 RT 1519.)
- On October 28, 2001, while incarcerated in the Los Angeles

County jail awaiting trial, appellant threatened and then "head butted" and twice kicked Deputy Jouzi. (8 RT 1542, 1550, 1551.)

The defense presented the testimony of four lay witnesses and one expert witness in mitigation.

Janice Marrow-Wright testified that she had known appellant since November of 1999 and that they were married in August of 2000 while he was incarcerated. (10 RT 1936, 1978.) Marrow-Wright had never seen appellant behave disrespectfully to others. (10 RT 1936.) She felt that he tried to act like a good parental figure around kids. (10 RT 1936.)

Juanita Anderson had known appellant for 30 years, during which he had always been a normal, kind and respectful person. (10 RT 1985.) When appellant knew that she was under a doctor's care, he would call her twice a week to check on her and make sure she was doing alright. (10 RT 1986.)

Donell Walls had known appellant since elementary school. (10 RT 1989.) In all that time, appellant had been a good friend and a generous person. (10 RT 1990.) Walls had never known appellant to belong to a street gang, or abuse PCP, marijuana, alcohol or cocaine. (10 RT 1996, 1999.) Walls believed appellant may have psychological problems based on difficulties appellant has in comprehending things. (10 RT 2001.) Walls urged the jury to sentence appellant to life in prison rather than to death. (10 RT 1994.)

Melinda Mix, appellant's girlfriend at the time of trial, testified that she had known him for 15 years, since she was 13 years old. (11 RT 2027.) He had always been kind and respectful, and she believed him to be a good person. (11 RT 2028.)

Dr. David Joel Jimenez, a licensed psychologist, conducted an evaluation of appellant which included a review of police reports, interviews with appellant's parents, review of two prior competency evaluations, review of a report from the Los Angeles County Sheriff's Department concerning interviews with appellant, and administration of psychological tests. (10 RT 2007-2011.) Dr. Jimenez had difficulty administering the psychological evaluations because appellant was not fully compliant and because of the side effects of the anti-seizure medication appellant was taking. (10 RT 2010, 2017-2019, 2020, 2045).[9]

Dr. Jimenez did not review appellant's school records, rap sheet, or prior probation reports. (11 RT 2099.) Although Dr. Jimenez had explained to trial counsel the importance of reviewing medical records, he was not provided any to review relating either to past injuries or current or past medications. (11 RT 2100-2101.) Although Jimenez was aware that appellant had spent a significant amount of his adult life in prison, he was neither provided nor did he review any records, evaluations or reports relating to appellant's conduct or treatment while in prison. (10 RT 2013-2014.)

Dr. Jimenez testified to a few significant characteristics in appellant's social history, including trauma linked to early gang enrollment (10 RT 2012); self-reported suicide attempts which Dr. Jimenez was unable to corroborate, and which Jimenez testified were in fact denied by appellant's family (10 RT 2013); possible brain injury from two attacks, one a stabbing to the head, the other involving blows to the head, although

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[9] Although Dr. Jimenez testified that appellant was on anti-seizure medication, there was no testimony about appellant's seizure disorder.

neither of these reported events were confirmed by medical records (10 RT 2014-2015); self-reporting of extensive drug and alcohol use, including using PCP over one hundred times (10 RT 2015); and a history of attention deficit disorder and hyperactivity for which appellant was treated with Ritalin from the age of two, according to reports from appellant's mother. (11 RT 2041.)

Dr. Jimenez testified that he administered two psychological tests, the Slossum Full Range intelligence test and the Thematic Apperception Test. However, Dr. Jimenez did not testify as to the results of either test because he believed appellant did not put forth his best effort, and thus the results were not valid. (10 RT 2017-2019.) Based on appellant's performance on these two tests, Dr. Jimenez abandoned any attempt to conduct further psychological testing. (10 RT 2020.) Dr. Jimenez also testified that he believed appellant attempted to malinger, or fake a mental disorder at two points during their interviews. (11 RT 2045.)

Dr. Jimenez diagnosed appellant as having an anti-social personality disorder. (11 RT 2048.) Dr. Jimenez testified that he could not rule out that appellant had a paranoid personality disorder, but that because of appellant's malingering it was impossible to make a definitive diagnosis. (11 RT 2045.) Also, Dr. Jimenez found there to be a depressive quality to appellant's personality typical of adolescents, but he did not actually diagnose appellant as having a depressive disorder. (11 RT 2047.) Dr. Jimenez also testified to appellant's history of attention deficit disorder and hyperactivity which was treated with Ritalin from the age of two years old. (11 RT 2041.) In particular, Dr. Jimenez testified that children who are diagnosed with attention deficit disorder and hyperactive disorder, and who do not grow out of these disorders as they approach adulthood, have a

higher rate of problems with impulsivity and conduct disorder difficulties than the average population. Adults with these disorders have higher rates of substance abuse and higher rates of breaking the law and being apprehended. (11 RT 2061-2062.)

Finally, Dr. Jimenez testified that appellant told him that he had been smoking PCP on March 23, 2000, prior to going over to Janice Marrow-Wright's mother's house. (11 RT 2044.)

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I. THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S TIMELY REQUEST TO REPRESENT HIMSELF VIOLATED HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

Appellant asserted his right to represent himself before his trial began, two days prior to scheduled hardship qualification of the large venire. (1 RT 218.) Appellant informed the trial court that he wished to proceed pro per because he was dissatisfied with his attorney's performance in court and out, disagreed with trial counsel's asserted defense strategy and wished to conduct an investigation that his attorney refused to pursue. (1 RT 220-222.)[10] The trial court denied appellant's request, ruling that his request was untimely. (1 RT 231.) In so doing, the court violated appellant's right to self representation under the Sixth and Fourteenth Amendments because granting appellant's request would not have disrupted the proceedings in any way, and the request was not made for the purpose of delay. Accordingly, the entire judgment must be reversed. (*Faretta v. California* (1975) 422 U.S. 806, 834-835.)

A. Procedural Background

Appellant was arraigned in superior court on June 13, 2001. (1 CT 225.) On September 12, 2001, the prosecutor announced that he would seek the death penalty, and asked for a trial date in March 2002, six months away. (1 RT 17.) At that time, Judge Wesley, the master calendar judge, transferred appellant's case forthwith to Judge Tarle's courtroom for trial and all further proceedings, as the parties had agreed it was a long cause matter. (1 RT 18.) At the time of the transfer for setting, Judge Wesley

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[10] Reporters Transcript pages 220-223 were ordered unsealed by order of this Court on February 20, 2013.

informed both parties that Judge Tarle would set a trial date immediately, because that was the practice in the long cause courtroom. (*Ibid.*)

At the initial appearance in Judge Tarle's court, defense counsel told the court that he and the assigned district attorney, John Monaghan, had agreed on a trial date of March 12, 2002, which was six months away. (1 RT 21.) Counsel explained that the additional time was needed primarily to prepare for the penalty phase, however, he had also not yet received the list of potential factors in aggravation. (1 RT 22.) The court agreed to the proposed trial date. (*Ibid.*)

On December 17, 2001, at the second appearance before Judge Tarle, both counsel reported to the court that discovery was still forthcoming, and that neither side was ready to proceed with pretrial motions. (1 RT 28-29.) Although the parties told the court they would be prepared to go to trial on March 12, 2002, it was agreed that because several tasks still needed to be completed before trial could begin, including filing pretrial motions, completing discovery and preparing a jury questionnaire, the court would add an intervening date at counsel's request to address these matters. (1 RT 29.) The matter was set over until March 12, 2002, for trial. (1 CT 234.)

Instead of requesting an intervening date for motions, on March 4, 2002, defense counsel filed a motion to continue the trial date. (1 CT 404.) In the declaration in support of the motion to continue, counsel stated that he was still receiving discovery and had neither identified nor interviewed all potential witnesses. (1 CT 405.) On March 12, 2002, the third appearance before Judge Tarle, the court granted the defense motion to continue, and set March 26 for hearings on motions, and April 29 as a trial date. (1 RT 38.) The prosecution neither opposed the motion to continue,

nor indicated any potential witness problems arising from the continuance.

The trial court set the April 29 trial date as day 5 of 10 on a time waiver basis.[11] In setting the trial date, the court asked counsel whether it was going to be a definite trial date or "zero of ten." (1 RT 38.) The district attorney responded, "I would like it to be a definite trial date. I know Mr. Coleman was willing to at least go as 5 of 10." Mr. Coleman agreed with the district attorney's representation. (*Ibid.*) By agreeing that the trial date was "five of ten" the trial court assented to the possibility of a week continuance past the trial date before the trial would begin.

On March 26, 2002, the court heard and ruled on a series of defense motions and took under submission the motion to sever the robbery count from the murder count. (1 RT 72.) Neither party expressed any concern regarding the timeliness of the court's ruling on the motion to sever. When the court turned to a discussion regarding discovery, defense counsel said he had just been given 700 pages of discovery, and was getting "apprehensive" about the trial date. (1 RT 96.) The district attorney confirmed that almost all of the new discovery was previously undisclosed materials relating to the alleged incidents in aggravation, including records from the California Department of Corrections, the Los Angeles County jail, and over 300 pages of transcripts from the hostage negotiations from the San Bernadino incident. (1 RT 96-97.) The court agreed with counsel that this was a substantial amount of new information, and asked counsel to

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[11] The use of the term "five of ten" refers to the 10-day grace period of section 1382, subdivision (a)(2)(B), which allows the prosecution a 10-day grace period for bringing the case to trial after the statutory time has run, or after the date to which the defendant has consented. (§1382, subd. (a)(2)(B); *Bryant v. Superior Court* (1986) 186 Cal.App.3d 483, 488.)

return on April 11 prepared to make a specific request to the court regarding additional time, if necessary. (1 RT 98.) Once again, the prosecution did not voice any opposition to a possible continuance, and did not indicate there were any particular witness problems in the case. (1 RT 96-101.)

On April 11, 2002, the fourth appearance before Judge Tarle, the court conducted a hearing on the admissibility of aggravating evidence under *People v. Phillips* (1985) 41 Cal.3d 29. (1 RT 95.) There was no discussion regarding the timing of the trial or witness issues on this date, nor on April 15, when the court and counsel met briefly to discuss jury questionnaires. (1 RT 95, 212.)

The court had set the morning of April 29 as a final "check in" date to make sure that both sides were prepared to start the trial, and that the court was not "engaged," which would prevent jury selection from beginning on May 1, 2002. (1 RT 217.) A large venire of 200 jurors was scheduled to be ordered to appear on May 1, at which time the court would begin hardship qualification of the jury by distributing a one-page time qualification to each of the large venire members. (1 RT 190, 224, 238.)

At the beginning of the April 29 appearance, defense counsel, Lee Coleman, informed the court that appellant wished to represent himself. (1 RT 218.) Coleman told the court that appellant had informed him of this at a meeting the week prior, and had confirmed his desire to proceed pro se that morning in court. (*Ibid.*) Coleman was not asked for and offered no explanation for why he did not immediately contact the court regarding appellant's desire to proceed pro se. The court questioned appellant:

The Court: Why do you want to do that?

The Defendant: I have a right under Faretta, don't I?

The Court:	I know you have a right to do it. The question is why do you want to do it? That is the question.
The Defendant:	Conflict between me and my attorney.
The Court:	It sounds as though we may get into a Marsden type of issue

(1 RT 218.)

The court on its own motion cleared the courtroom and conducted a sua sponte "*Marsden*" inquiry[12] at which appellant voiced two major complaints about Coleman's representation. First, Coleman had failed to communicate with appellant's girlfriend, who had contact information for a witness who had information about the actual perpetrator in one of the charged crimes. (1 RT 219-221.) Second, appellant felt that no defense was being put forward on his behalf. (1 RT 222.)

Coleman confirmed that he had told appellant's girlfriend to stop contacting him and to speak only to his investigator because he believed her to be "an officious intermeddler." (1 RT 221.) Coleman also confirmed that although appellant's girlfriend claimed that she had contact information for potentially useful witnesses, Coleman cut off communication with her before receiving this information. (*Ibid.*) Although Coleman informed the court that he did not believe the girlfriend had any helpful information, he never provided any basis for this belief.

After finding insufficient evidence of a conflict between appellant and Coleman to warrant the appointment of new counsel, the court returned to appellant's request to proceed pro se, and engaged in a colloquy with him

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[12] *People v. Marsden* (1970) 2 Cal.3d 118.

about self-representation.[13] (1 RT 224.)

The Court:	The issue about representing yourself, you can always represent yourself. I am required, as you know to let you do that as long as you understand what you are getting yourself into. And it is your belief that you can do a better job than your attorney on this?
The Defendant:	Yes.
The Court:	You understand that we are going to trial on Wednesday. Whether you are pro per or represented, we are going to trial on Wednesday. We have set the date. We have 200 jurors coming in. We have cleared this Court's calendar. The witnesses have been subpoeanaed for that particular date. Today is 8 of 10.[14] We have set it on Wednesday so we can have the jurors actually present and give them the questionnaires that will be necessary in this case. There is no good cause to put the matter over. If you wish to represent yourself, certainly at any stage you can do that. And but [sic] you should understand you won't even be in the pro per module by the time we start trial. That won't happen until the weekend. You do understand all of this?

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[13] Appellant challenges the propriety of the trial court's denial of the *Marsden* motion in Argument II, *post*.

[14] The court's statement that April 29 was 8 of 10 was in error. The court had previously set the date as 5 of 10. (1 RT 38.)

The Defendant: Yes.

The Court: You do understand that you are still going to be required to be seated at counsel table, and you are not going to be able to move around. You are going to be treated like an attorney. I am not going to give you any further help in this case. You will have to do it all just like the prosecutor is on his own to do it all. You do understand that?

The Defendant: Yes, I just need time to prepare for my case.

The Court: You don't have any more time other than Wednesday. Wednesday is the trial date.

The Defendant: I won't be ready by Wednesday.

The Court: If you are not going to be prepared to go in the next two days, then you can't represent yourself.

The Defendant: I have a right to.

The Court: Well, you have a right to go – you have the right to go to trial, and you also have the right to represent yourself. And they are in conflict right now. I am not putting this case over. Why didn't you bring this up before?

The Defendant: Just really transpired when I talked to my lawyer to cross examine one of the deputies [sic]. I feel he wasn't aggressive enough, and this is a death penalty case.

The Court: And you believe you can do a better job?

The Defendant: Yes. I need time to prepare my case.

The Court: How have you – have you ever represented yourself before?

The Defendant: No, I haven't. But I been in the courts long enough to know how to represent myself.

The Court: Okay. Well, you have a choice. You can either go to trial by yourself in two days –

The Defendant: I don't have enough time to go – you can either just deny me and I put it up for appeal, or grant me my motion to –

The Court: It seems to me you are setting up another issue for appeal that you are not really –

The Defendant: You are not give me enough time to be ready in two days

The Court: – taking to be serious.

The Defendant I am serious. You telling me to be ready for a death penalty case in two days. I have a whole lot of paperwork to go over once this is turned over, and two days is not enough.

The Court: Did you talk to your attorney about this before about representing yourself?

The Defendant Yes, I have talked to him.

The Court: When was that?

The Defendant: I talked to him – when was that?

Mr. Coleman: Wednesday.

The Court Wednesday?

The Defendant: Yes.

Mr. Coleman: Wednesday he indicated he was thinking about it, Judge.

The Court: Okay. This case has been going on for how long now? At least a year and a half, something like that.

The Defendant: A year.

Mr. Monaghan: About a year.

The Court: About a year

Mr. Monaghan: A little over a year.

The Court: And you are making your first request in court two days before trial. You are going to have to make the decision. Either you represent yourself on Wednesday –

The Defendant: You put me in a position I am going to represent myself, but I am not going to be ready on Wednesday.

The Court: That is up to you. The first thing I am going to do is allow you to fill out the pro per advisement form. And I want you to think about this a little while because obviously you didn't know I was going to say no. But now you know I am going to say no as far as a continuance is concerned.

We are going to trial Wednesday. You can either do it by yourself, which I'm telling you is a terrible mistake. I am not going to equivocate with you. Or you can go to trial with Mr. Coleman.

The Defendant: I am not going to be ready Wednesday.

The Court: But that is not the issue. Those are your two choices. Either going to trial by yourself Wednesday or Mr. Coleman represents you. I want you to think about it while you fill in that piece of paper.

We will reconvene in about 15 minutes. It should be quite enough time for you to fill in what is required there. All right. We will be in recess.

(RECESS)

The Court: Mr. Wright is again present. Both attorneys are here. The court is reviewing the petition to proceed in pro per.

(Pause in the proceedings)

The Court: You have read the entire petition, sir?

The Defendant: Yes.

The Court: Did you understand it.?

The Defendant: Yes.

The Court Do you have any questions about any of the areas?

The Defendant: Why am I being denied the time to prepare for my case?

The Court: Do you have any questions about anything on the form?

The Defendant: No.

The Court: You didn't fill in the portion indicating what crimes you are charged with. Do you understand what crimes you are charged with?

The Defendant: Yes.

The Court; What are they?

The Defendant: Murder and 4 counts of attempted murder and a robbery.

The Court And what kind of continuance are you asking for?

The Defendant: Some time to prepare for my case

The Court How much time are you asking for?

The Defendant I don't know. A month, two.

The Court: Now, Mr. Coleman was your attorney at the time of the preliminary hearing, wasn't he?

The Defendant: Yes.

The Court: Why didn't any of this come up at that time?

The Defendant: Because I didn't notice it until the last time. If the court going to deny me time to prepare for my case, I will proceed with Mr. Coleman.

The Court: I am going to deny you time to prepare for your case because I do think it is untimely. I see the areas that you failed to initial, and it seems to me that you don't thoroughly understand what you are getting yourself into. But aside from that – we can go through those – that is not really the issue. The issue is the time limits. The reason for the request, although you don't need reasons for the request, I don't think are

adequate.

It seems to me Mr. Coleman is doing a very good job for you. He has filed and argued numerous motions on your behalf. He has been able to keep out some of the penalty phase evidence that the people, afer being forced to review it by Mr. Coleman, have decided not to put forward. The court denied the people's request for one piece of penalty phase evidence. So he is doing a good job.

His job is to evaluate the evidence before putting it on. And I think, again, he – Mr. Coleman is doing a fine job. He has experience in the area. He knows what he is doing.

The court is going to deny the request for pro per status based on the fact that it is untimely, and the defendant would clearly need time to prepare. Mr. Coleman will remain attorney of record.

(1 RT 224-231.) Although recognizing that appellant required a continuance to prepare his case, and that appellant had a right to proceed pro se, the trial court categorically denied appellant's request for a continuance solely because his request to proceed pro se was made in close proximity to the date set for beginning the jury selection process. Notably, at no point did the trial court find that appellant's desire to proceed pro se was made for the purpose of delay or to obstruct the proceedings in any way.

This was the sixth appearance before Judge Tarle, and only seven months after the case was announced as a death case and transferred to Judge Tarle's courtroom for setting for trial. Before this date, appellant had

made no prior motion to represent himself, nor had he moved to have his counsel relieved.

B. A Criminal Defendant Has A Sixth Amendment Right To Self-Representation So Long As His Assertion Of That Right Will Not Unjustifiably Disrupt The Trial Or Obstruct The Administration Of Justice

1. Introduction

Over thirty years ago the United States Supreme Court established that "[t]he Sixth Amendment grants to the accused personally the right to make his own defense." (*Faretta v. California*, *supra*, 422 U.S. at p. 819.) The Sixth Amendment right to self-representation is not a "legal formalism." (*Adams v. U.S. ex. Rel. McCann* (1942) 317 U.S. 269, 279.) In *Faretta*, the court understood that self-representation rarely was a wise decision: "[I]n most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." (*Faretta v. California*, *supra*, 422 U.S. at p. 834.) Nevertheless, "[t]he right to defend is personal[,]" grounded on the "inestimable worth of free choice." (*Id.* at p. 834; see *McKaskle v. Wiggins* (1984) 465 U.S. 168, 178 ["The right to appear pro se exists to affirm the dignity and autonomy of the accused . . ."].) As this Court has acknowledged, "[t]he primary motivation for the *Faretta* rule is respect for the accused's freedom of choice personally to conduct his own defense." (*People v. Joseph* (1983) 34 Cal.3d 936, 946.) Thus, although a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" (*Ibid.*, quoting *Illinois v. Allen* (1970) 397 U.S. 337, 350-351 (conc. opn. of Brennan, J.).)

In *Faretta*, the high court concluded that the Sixth Amendment implies a right of self-representation by examining the history and structure

of the Sixth Amendment, federal and state authority, and English legal history. (*Faretta v. California, supra*, 422 U.S. at pp. 818-831.) In so doing, *Faretta* disapproved of this Court's decision in *People v. Sharp* (1972) 7 Cal.3d 448, which had held a criminal defendant had no federal or state constitutional right to represent himself. (*Faretta v. California, supra*, 422 U.S. at p. 811, fn. 6.) Under *Faretta*, a defendant is entitled under the Sixth and Fourteenth Amendments to defend himself so long as he "clearly and unequivocally" declares his wish to represent himself and "proceed without counsel" and "voluntarily and intelligently elects to do so." (*Id.* at pp. 807, 835; accord, *Indiana v. Edwards* (2008) 554 U.S. 164, 170.)

Although the court in *Faretta* did not explicitly state the reasons a defendant may be refused self-representation, the court recognized that this "unconditional right" to self representation could be subject to termination in only a limited set of circumstances. (*Faretta v. California, supra,* 422 U.S. at p. 820). In *Faretta*, the court stated that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.) Logically, the grounds for denying the right in the first place must be, and until very recently have been, similarly circumscribed. Thus, a defendant can be denied self-representation only when it is shown that proceeding pro se will seriously and unjustifiably disrupt or obstruct the trial. (See *Indiana v. Edwards*, *supra*, 554 U.S. at p. 71 [*Faretta* does not include the right to abuse the dignity of the courtroom, avoid compliance with rules of procedural and substantive law, and engage in serious and obstructionist misconduct].)[15]

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[15] As Justice Scalia has stated:

(continued...)

2. Invocation of the constitutional right to counsel identified in *Faretta* is not dependent on the timing of the assertion

Nothing in the holding or rationale of *Faretta* made the constitutional right of self-representation subject to a timeliness requirement. (See *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 265 (conc. opn. of Fernandez, J.).) The court in *Faretta* did not have occasion to consider the timeliness of a defendant's assertion of the right because Faretta had requested to represent himself well in advance of trial. (*Faretta v. California*, *supra*, 422 U.S. at p. 807.) Although jurisdictions, including California, have read a timeliness requirement into the invocation of the right to self-representation, as this Court has explained, "the purpose of the [timeliness] requirement is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 721, citations omitted.) The timing of the motion in and of itself is not dispositive; it is merely a factor to be considered in assessing whether granting the motion would likely disrupt the trial or obstruct the orderly administration of justice.

Shortly after *Faretta* was decided, this Court again addressed the right to self-representation in *People v. Windham* (1977) 19 Cal.3d 121. It held that to invoke this "constitutionally-mandated unconditional right to

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[15](...continued)

> The only circumstance in which we have permitted the State to deprive a defendant of this trial right [self-representation] is the one under which we have allowed the State to deny *other* such rights: when it is necessary to enable the trial to proceed in an orderly fashion.

(*Indiana v. Edwards*, *supra*, 554 U.S. at p.185 (dis. opn. of Scalia, J.).)

self-representation," a defendant had to do so "within a reasonable time prior to the commencement of trial." (*Id.* at p. 128.) This Court's decision in *Windham* and its progeny are illogical and impermissibly impinge on a defendant's Sixth Amendment rights. *Windham*'s timeliness rule has two significant consequences. First, when the request is made within a reasonable time before the commencement of trial, the trial court must permit the defendant to represent himself if he has voluntarily and intelligently waived his right to counsel. (*Ibid.*) However, if the request for self-representation is untimely, the decision to grant or deny the demand is within the trial court's discretion. (*Ibid.*) Second, the erroneous denial of a timely *Faretta* motion is a matter of constitutional magnitude requiring reversal per se (*People v. Tyner* (1977) 76 Cal.App.3d 352, 356), whereas the erroneous denial of an untimely *Faretta* motion is subject to review under the state harmless error standard. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1051.)

The most logically consistent explication of this Court's interpretation of the right to self-representation is set forth in *People v. Mayfield* (1997) 14 Cal.4th 668. There, the court held that the right is absolute only when it is asserted a reasonable time before the trial begins, and that self-representation motions made after that time are addressed to the trial court's sound discretion. This Court identified the timeliness requirement as the tool that prevents a defendant from misusing a *Faretta* motion "'to delay unjustifiably the trial or obstruct the orderly administration of justice.'" (*Id.* at p. 809, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1110 [categorizing the assertion of a right to self-representation made prior to the start of trial as the "constitutionally

mandated unconditional right of self-representation"].)

Notably, *Windham* made clear that the "reasonable time" requirement for asserting the right to self-representation should not be used to limit a defendant's constitutional right to self-representation. Rather, it was only to be used to ensure that a defendant not misuse the *Faretta* mandate as a means to unjustifiably delay, i.e., to disrupt a scheduled trial or to obstruct the orderly administration of justice. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) A fair reading of *Windham* is not that the federal constitutional right to self-representation somehow evaporates at the point at which a request for self-representation becomes untimely, but rather that the timing of the request for self-representation affects the evaluation of the factors that may legitimately limit the right – the disruption or obstruction of the trial. This is the only reading that makes sense, since the right of self-representation for a criminal defendant in California has its source only in the federal Constitution.

This concern with unjustifiable delay and obstruction is consistent with *Faretta*, where the United States Supreme Court noted that "[w]e are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46.) Thus, while the assessment of the factors identified by the high court that lead to disruption of a trial – obstruction of justice and, possibly, delay – may vary depending upon the stage of the trial at which the defendant asserts the right to self-

representation, the factors themselves remain the same, and these are the only factors that can be considered under the federal Constitution. To the extent that this Court has held that concerns other than these should be factored into a trial court's assessment of whether to grant a *Faretta* motion, such holdings are without foundation.

3. This Court's interpretation of the timeliness requirement for the assertion of the Sixth Amendment right to counsel is not supported by state law and violates the federal Constitution

This Court views the *Faretta* right as being unconditional if asserted a reasonable time prior to trial and discretionary if asserted close to the time of trial or after trial has begun. Yet no opinion of the court discusses why this is the case, either legally or logically. There is nothing in *Faretta* itself that warrants such a distinction, and a reading of *Windham* that is consistent with *Faretta* does not warrant such a distinction. Apart from the aspect of a knowing and voluntary relinquishment of the right to counsel, there is no logical or legal reason why the federal constitutional right to self-representation should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice

As noted previously, the impetus for the *Faretta* decision was this Court's ruling in *People v. Sharp*, *supra*, 7 Cal.3d 448, which erroneously held that there was no right to self-representation under either the state or federal Constitutions. Since *Faretta*, the decisions from this Court and the Courts of Appeal that have addressed a defendant's right to self-representation have centered on the proper application of that decision, both when the right is asserted before trial and after the trial starts.

Consequently, to say – as this Court has said – that a request that is not asserted a reasonable time prior trial does not have a constitutional basis is perplexing. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1220.)[16] There simply is no basis in California for the right to self-representation other than a federal constitutional basis. (*People v. Johnson* (2012) 53 Cal.4th 519, 528 [California law provides neither a statutory nor constitutional right of self-representation].) And the Sixth Amendment right to represent oneself, which applies to the states through the Fourteenth Amendment, is not transmuted into a non-constitutional right based on when in the proceedings it is asserted.

Apart from its illogic, holding that the federal constitutional right to self-representation can evaporate based on when in the proceeding the right is asserted impinges on a defendant's Sixth Amendment rights in a manner not condoned by the federal Constitution itself. As stated above, the right of self-representation recognized in *Faretta* finds support in the structure of the Sixth Amendment and its fundamental nature. (*Faretta v. California*, *supra*, 422 U.S. at. p. 818; *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161.) Because this Court has established a rule that significantly interferes with the exercise of a fundamental constitutional right, the validity of that rule must be assessed by applying the strict scrutiny standard, which applies when there is a real and appreciable impact on, or significant interference with, the exercise of a fundamental right. (*In re*

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[16] It is possible that this statement worked its way into the opinion because Bloom based his argument upon a supposition that he did not have a constitutional right to self-representation after the trial began, and this Court merely accepted that statement as correct. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1220.)

Marriage Cases (2008) 43 Cal.4th 757, 783-784; *People v. Ramos* (2004) 34 Cal.4th 494, 512; see Winnick, *New Directions in the Right to Refuse Mental Health Treatment: the Implications of Riggins v. Nevada* (1993) 2 Wm. & Mary Bill Rts. J. 205, 225-226 & fn. 117 [citing *Faretta* for proposition that a criminal defendant's right to control his or her defense is a fundamental constitutional right, the infringement of which warrants heightened scrutiny].)

Under the strict scrutiny standard, the state must establish a compelling interest which justifies the rule at issue, and must establish that the distinctions drawn by the rule are necessary to further the purpose of that interest. (*Lucas v. Superior Court* (1988) 203 Cal.App.3d 733, 738.) To the extent that *Windham* changes the equation for determining whether a defendant can exercise his or her right to self-representation based solely upon the fact that the right is asserted close to or after the start of the trial, it does not meet this test. Any compelling interest for regulating the assertion of the right to self-representation is encompassed by the *Faretta* standards themselves. As discussed previously, the concerns about disruption of the trial and obstruction of justice are interests that can be given proper effect at any point in the trial; consequently, establishing a different, and discretionary, test merely because of the proximity of the assertion of the right to the start of the trial does not reflect a purpose or interest that withstands strict scrutiny.

To be sure, the discretionary aspect of the *Windham* decision essentially has been adopted by all federal jurisdictions when applying *Faretta* to a self-representation request that is made after the start of trial. (See, e.g., *United States v. Mayes* (10th Cir. 1990) 917 F.2d 457, 462; *United States v. Wesley* (8th Cir. 1986) 798 F.2d 1155, 1155-1156; *United*

States v. Brown (2d Cir. 1984) 744 F.2d 905, 908.) But the federal courts have long recognized the right of self-representation by dint of federal statute. (See 28 U.S.C. § 1654.) With regard to federal cases, *Faretta* only made clear that self-representation was a fundamental constitutional right when asserted before the start of trial. Thus, federal courts simply continued to follow their same practice, based on a statutory rather than a constitutional right, regarding self-representation requests asserted after the start of trial.

This state was in a different posture when *Faretta* was decided, however, because it did not recognize the right of self-representation. Consequently, *Faretta* was not a clarifying holding that confirmed an accepted practice, it was a revolutionary holding that created new law for this state. *Windham*, therefore, was a case that did not – as the post-*Faretta* federal cases did – say that *Faretta* had no effect on existing law interpreting the right of self-representation at a later stage of trial. Rather, *Windham* was a case that said the United States Supreme Court in *Faretta* was making a doctrinal distinction between an assertion of a self-representation right made pretrial as opposed to during trial. That is an unreasonable interpretation of the *Faretta* decision and should not be followed.

In short, *Faretta*'s clear constitutional doctrine is that a criminal defendant has a fundamental Sixth Amendment right to represent himself. (*Faretta v. California*, *supra*, 422 U.S. at pp. 833-834.) This right can be denied only when its assertion will unjustifiably disrupt or obstruct the trial. The fact that this rule arose from a case in which the demand was made pretrial is not in and of itself constitutionally significant. In *Windham,* this Court was simply incorrect to ascribe doctrinal meaning to this fact.

C. The Trial Court Erroneously Denied Appellant's *Faretta* Motion In Violation Of The Sixth And Fourteenth Amendments

The erroneous denial of the Sixth Amendment right to self-representation is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8; *People v. Dent* (2003) 30 Cal.4th 213, 217.) In contrast, this Court reviews claims analyzed under *Windham* for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 961.) If this Court applies the latter standard, the trial court's discretion is "subject to the limitations of legal principles governing the subject of its action." (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) Under either standard, the trial court erroneously denied appellant's motion to represent himself because to grant the request would have neither unjustifiably delayed the trial nor obstructed the administration of justice. Whether judged independently of *Windham*, as appellant asserts is correct, or under *Windham*, the trial court impermissibly violated his right of self-representation.

As a preliminary matter, appellant's request was clear and unequivocal. (*Faretta v. California*, *supra*, 422 U.S. at p. 835.) Defense counsel informed the trial court in unambiguous terms that appellant wished to represent himself. (1 RT 218.) Moreover, counsel represented to the court that he and appellant had discussed appellant's desire to represent himself a week earlier, and that he had confirmed prior to court that morning that appellant continued to wish to represent himself. (1 RT 224.) Appellant filled out a written petition to proceed pro per (1 RT 228), and reasserted his desire to proceed pro se in an extended colloquy with the court both before and after filling out the written petition. (1 RT 218, 224, 225, 229.) In contrast to cases which have found a defendant's assertion of

his right to self-representation to be equivocal, here there can be no question about the nature of appellant's request. (Compare, e.g., *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888-889 [impulsive, emotional outburst after denial of defendant's motions for new trial and substitution of counsel did not seriously invoke *Faretta*]; *People v. Marshall* (1997) 15 Cal.4th 1, 14-27 [defendant's history of vacillating about self-representation and assertion of request in the course of a rambling, virtually incoherent diatribe deemed not to be clear and unequivocal].)

The trial court's finding that appellant's motion was untimely is unsupported by the record, and thus was erroneous under any standard. To be sure, appellant's motion was made close in time to the scheduled beginning of the jury selection process, and granting the request would have required a relatively short continuance. However, these facts alone do not establish that the request was untimely. As discussed at length above, the right to self-representation should only be denied based upon a finding that to grant the right would lead to a disruption of the trial proceedings or the obstruction of justice, whether analyzed under *Windham* or as a federal constitutional issue. The timing of the motion, in relation to other trial proceedings, is relevant only in so far is it impacts these considerations.

This Court recently addressed the issue of timeliness for purposes of the assertion of the *Faretta* right in *People v. Lynch*, *supra*, 50 Cal.4th 693. In that case, this Court pointed out "timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*Id.* at p. 724.) This Court explained that the totality of the circumstances rule is in accord with the "purpose of the timeliness requirement, which is 'to prevent the defendant from misusing

the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'" (*Ibid.*, citing *People v. Burton* (1989) 48 Cal.3d 843, 852.) Factors that a trial court should consider in determining whether a *Faretta* request is timely include whether trial counsel is ready to proceed to trial; the number, reluctance and availability of trial witnesses; the complexity of the case; ongoing pretrial proceedings; and whether appellant had earlier opportunities to assert his right to self-representation. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726.) Consideration of the totality of the circumstances in appellant's case, as outlined in *Lynch,* establishes that his assertion of his right to self-representation was timely.

First, as discussed in more detail below, appellant asserted his right to self-representation as near in time as was practicable to the events that caused his concern, and after speaking with counsel and learning that he had not developed the third party culpability defense and intended to present the defense primarily through cross-examination. This is in clear contrast to *Lynch*, in which this Court noted that appellant "gave no explanation for why he had waited nearly three years to express concern about counsel's perceived deficiencies at the preliminary hearing." (*People* v. *Lynch*, *supra,* 50 Cal.4th at p. 727.)

Second, the prosecution's case was straightforward, based primarily on eyewitness identification and uncontested ballistics evidence. There were limited pretrial proceedings and very few difficulties securing witness attendance in court. The prosecution called 28 witnesses during both the guilt and penalty phase of the trial. Twenty-three of those witnesses were law enforcement, including two civilian employees of the Los Angeles Sheriff's Department and numerous officers from the California Department of Corrections. Although the trial focused on two separate

incidents, the guilt phase discovery was not voluminous. (1 RT 90.) The pretrial motions were uncomplicated, and on the whole not seriously contested, with all six of the defense motions being heard on a single day. (2 CT 461-462.) The two defense in limine motions that were granted were uncontested: a motion to bifurcate the prior conviction (1 RT 60), and a motion for a preliminary hearing on the proposed aggravators for which there was no criminal conviction. (1 RT 90, 94.) The motion to discover prosecutorial standards in capital cases was denied, with the trial court stating that there was "no plausible explanation provided by the defense to justify the request." (1 RT 85.) Similarly, the motion for a separate jury trial as to penalty phase was denied, with the trial court stating that "there is a long line of cases that say this is not a problem." (1 RT 87.) As to the remaining two motions, the motion to sever the robbery charged in Count 7 was taken under submission and then denied by the court.[17] (1 RT 72, 204.) The motion to bifurcate the gang allegation was also denied, with the court reasoning that given the nature of the crime and the charged special circumstances, the well-narrowed gang evidence proffered by the district attorney would come in regardless. (1 RT 73.)

Third, there is no evidence in the record that a continuance of the trial would have negatively impacted the prosecution's ability to produce its witnesses. None of the five civilian witnesses was elderly, nor expressed any difficulties in testifying or in preparing to testify. Although Mario Ralph was initially reluctant to testify, his cooperation was secured after a court ordered conversation with the prosecutor during a break in the

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[17] This count was ultimately dismissed by the district attorney. (7 CT 1924.)

preliminary hearing, and he remained cooperative throughout the proceedings. (1 CT 99-105; 5 RT 829.) There were no victim impact witnesses called. Although one witness, Julius Martin, had health issues, ultimately the court ruled he was unavailable as a witness and the prosecution was allowed to introduce his preliminary hearing transcript in lieu of live testimony for the guilt phase trial. (6 RT 1122.) Given that Martin did testify at the penalty phase of the trial (9 RT 1759), a delay in the proceedings might actually have benefitted the prosecution, as Martin's health apparently improved enough from the time of the guilt trial to the penalty trial to allow him to testify.

The corollary to the rationale articulated in *Burton,* and reasserted in *Lynch,* is that when, as is the case here, the record clearly shows that the request was not made for the purpose of delay or that granting the request would not obstruct the orderly administration of justice, the motion should not be deemed untimely. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1110-1111 [request for self-representation made on date trial is scheduled to begin is untimely because it was made for the purpose of delay and obstruction]; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354 [request to proceed pro se made immediately prior to the close of evidence is untimely despite absence of any request for continuance because record established defendant's likely inability to comply with procedural rules].)

Here, in contrast to *Horton* and *Bradford*, the record clearly reflects that appellant's assertion of his right to self-representation was made in response to his serious concerns about the quality of counsel's representation, specifically counsel's cross-examination skills, and asserted as soon as was practicable after appellant had an opportunity to discuss these concerns with his attorney. Such a request is not untimely, even if

made close in time to the beginning of trial. (*People v. Herrera* (1980) 104 Cal.App.3d 167, 174 ["to hold a motion for self-representation made by a defendant at his earliest opportunity is untimely when that 'earliest opportunity' appears to be shortly before trial, would effectively thwart defendant's constitutional right to proceed in propria persona as established in *Faretta v. California"*].) There is no evidence in this record that appellant's assertion of his right to self-representation was made for the purpose of delay or that granting it would have obstructed the orderly administration of justice, the critical factor noted by the court in *Herrera*.

In response to the court's inquiry as to why he was asserting his right to self-representation so close to the time set for trial, appellant explained "[it] just really transpired when I talked [sic] to my lawyer to cross-examine one of the deputies. I feel he wasn't aggressive enough, and this is a death penalty case." (1 RT 226.) Subsequently, appellant met with counsel to express his concerns about the representation, and to inform counsel he was considering asserting his right to self-representation. However, this meeting did little to allay appellant's concerns. As counsel explained to the court, at this meeting he had "outlined to [defendant] what our defense would be. And basically through cross-examination of the witnesses." (1 RT 222.) This was cold comfort to appellant, given his serious concerns about counsel's cross-examination skills.[18] Additionally, the record of the *Marsden* hearing evinces an underlying conflict between trial counsel and appellant about trial strategy, and concern by appellant about counsel's preparation. As appellant explained to the court, he wanted his attorney to

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[18] The reasonableness of these concerns is supported by the trial court's own observation that defense counsel's cross-examination of witnesses at the *Phillips* hearing was "anemic." (11 RT 2137.)

contact his girlfriend so that she could provide information on third party culpability witnesses for his defense. (1 RT 220-221.) Counsel informed the court that he felt appellant's girlfriend was "an officious intermeddler," that he did not have any faith that she had information and that he would no longer discuss anything with her. (1 RT 221.) Significantly, counsel never said he had investigated a third party culpability defense and found such a defense to be unavailable.

At the next appearance after appellant's meeting with counsel in which his concerns were aired but not met, appellant asserted his right to pro se representation. Prior to this assertion on April 29, appellant had not previously made requests for substitution of counsel, or for self-representation. (See *People v. Horton, supra,* 11 Cal.4th at p. 1110 [prior assertion and withdrawal of requests for self-representation supports finding that request for self-representation is untimely].) Because the record in this case is clear that appellant's assertion of his right to self-representation was promptly made in response to specific concerns, not motivated by any desire to delay trial or obstruct justice, and not likely to result in an obstruction of justice or disruption of trial proceedings, the court's finding that the motion was untimely was an abuse of discretion under the *Windham* analysis. (*People v. Burton, supra,* 48 Cal.3d at p. 854 [*Windham* analysis, like the federal court's analysis under *Faretta*, limits denial of motion to proceed pro se to those instance in which the motion is made for the purpose of delay or obstruction of justice; the identified factors are merely potential indicators of a dilatory intent]; see *People v. Horton, supra*, 11 Cal.4th at p. 1110 [trial court's denial of *Faretta* motion made on day set for trial was not abuse of discretion where record showed that appellant was playing the "*Faretta* game" to delay trial]; *People v.*

Bradford, *supra*, 187 Cal.App.4th at p. 1354 [upholding trial court's denial of *Faretta* motion made immediately prior to closing argument because consideration of the *Windham* factors supported the conclusion that defendant would use closing argument to disrupt the proceedings]; *People v. Perez* (1992) 4 Cal.App.4th 893, 904 [trial court denial of *Faretta* motion made day before jury selection was not abuse of discretion because record supports finding that the request was "merely a device" to disrupt the proceedings and delay the trial].)

In addition to the factors outlined in *Lynch* and discussed above, the particular posture of this case supports appellant's position that the motion for self-representation was timely. (*People v. Lynch, supra,* 50 Cal.4th at p. 724 [determination of whether a *Faretta* motion is timely is based upon consideration of circumstances that exist in the case at the time the motion is made].) Despite the fact that the motion was made close in time to the date set for trial, the actions of the court and counsel at the time the motion was made reflect an understanding between the court and counsel that a continuance might be necessary, and if so would not be objected to by the parties. First, as discussed above, the trial court had expressly contemplated the necessity of continuing the trial on the very date that appellant asserted his right to self-representation. (1 RT 217-218 ["I scheduled [this date] also quite frankly, to make sure I wasn't engaged in this Court"].) Second, at the time appellant asserted his right, although the court had just announced that the courtroom would be available, neither party had announced ready to proceed to trial. This is particularly significant because at the time of appellant's motion to proceed pro se, the court had not yet asked counsel about their concerns regarding late discovery and trial readiness. (1 RT 96-98.) Because the record at the time the motion was made does not reflect

that the parties were committed to beginning the trial, it can not reasonably be argued that the continuance requested by appellant to allow him to proceed pro se would have obstructed the orderly administration of justice.

In *People v. White* (1992) 9 Cal.App.4th 1062, the defendant made a motion to represent himself a little less than four weeks prior to his trial date. The defendant insisted that he needed a continuance in order to be prepared for trial. Similarly to the instant case, at the time the defendant in *White* sought to represent himself neither counsel had announced ready for trial, and the defense had informed the court that it might need to continue the trial date. The trial court denied the defendant's *Farretta* motion as untimely. The appellate court reversed, holding that because defense counsel had not answered ready at the time the motion was made and the court had expressly contemplated a continuance, regardless of the proximity to the trial date the motion was not untimely. (*Id.,* at p. 1074.) As in *White*, at the time appellant made his motion to proceed pro se, the court had just announced that its courtroom was available, there had been prior, as of yet unresolved discussions by the defense of a possible need for a continuance, and neither party had announced ready to proceed to trial. Because the focus of the trial court's analysis in reviewing a motion to proceed pro se is whether granting the motion will obstruct justice or unreasonably delay trial, if, as was the case here, at the time the motion is made the parties are not fully committed to beginning trial, the motion is timely even if granting the motion would require a short continuance. (*People v. Bradford, supra*, 187 Cal.App.4th at pp. 1353-1355 [review of trial court's denial of *Faretta* motion made during trial is not dependent on whether defendant seeks a continuance, but rather, whether granting the motion would disrupt the trial or obstruct the orderly administration of justice].)

While granting appellant's request would have required a continuance of a month or two, there is absolutely no evidence in the record to suggest that such a delay would have obstructed the administration of justice. In determining whether granting a request to proceed pro se will obstruct the administration of justice, this Court clearly articulated in *People v. Lynch, supra,* 50 Cal.4th at pp. 726-727 that the trial court should consider the totality of the circumstances, including witness unavailability, impact on the courts, and prejudice to the prosecution. All of these factors are relevant to the underlying inquiry of whether "the government's interest in ensuring the integrity and efficiency of the trial . . . outweighs the defendant's interest in acting as his own lawyer." (*Martinez v. Court of Appeal of Cal., supra,* 528 U.S. at pp. 162.) There is nothing in the present case to suggest that granting a continuance would have prejudiced the prosecution or impaired either the integrity of this trial or the efficiency of the Los Angeles Superior Court trial proceedings.

First, the district attorney never objected to the possibility of a continuance, whether the possibility was raised by trial counsel (1 RT 98) or appellant (1 RT 224-227). Indeed, the record reflects that when the court itself, being unsure of its availability prior to the actual calling of the case on April 29, had discussed with counsel the possibility of a continuance and a reassignment of the case, neither side had objected. (1 RT 217.) In *People v. White, supra,* 9 Cal.App.4th 1062, in addition to the factors discussed above, in reaching its holding that the *Faretta* motion was not untimely the court also found compelling that the district attorney did not object to the continuance sought by the defendant and the absence of evidence that the continuance would create any serious witness problems. (*Id.* at pp. 1066, fn. 5, 1067, fn. 7.) The *White* court found support for its

decision by contrasting it with *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790-791, in which the reviewing court found the request untimely because the district attorney *did* oppose the requested continuance, and there was evidence that the continuance would cause witness problems and prejudice the prosecution's case. (*People v. White*, *supra*, 9 Cal.App.4th at pp. 1072-1073.)

The district attorney's indifference to the possibility of a continuance is understandable given the straightforward nature of his case and the lack of witness difficulties. As discussed above, the prosecution's case was not complex, and the witnesses were readily available. There is nothing in the record to suggest that a one or two month continuance would have had any impact on the prosecution's ability to put on its case.

Moreover, the record does not support that a one or two month continuance would have obstructed the orderly administration of justice within the Los Angeles Superior Courts, because the case would likely have been continued on Judge Tarle's calendar without reassignment. The department to which the case was assigned was a long cause courtroom. This Court has had prior occasion to examine the nature of the "long cause" courtrooms within the criminal division of Los Angeles County, albeit in a different context. In examining whether assignment of a case to a long cause courtroom is for all purposes, this Court found that in a long cause courtroom, "case transfer after the initial assignment is rare. Thus, it appears an assignment of a case to a 'long cause' trial department instantly pinpoints the judge who will preside at trial with certainty sufficient to invoke the all purpose assignment rule." (*People v. Superior Court* (*Lavi*) (1993) 4 Cal.4th 1164, 1181.) Had Judge Tarle granted the continuance, and allowed appellant to remain in his courtroom, the matter would have

remained on the court's docket, and would not have required reassignment. Although the court had requested 200 jurors, no questionnaires had been distributed and no venire had yet been sworn. Consequently, had the trial court granted appellant's motion and continued the case, the ordered jurors could have simply been reassigned to another courtroom without any loss of service or inconvenience.

Additionally, given the limited resources the trial court had invested in the case up to this point, a short continuance cannot reasonably be construed as impairing the orderly administration of justice. The case had been in the superior court for approximately eight months, well short of the two year average for capital cases in Los Angeles Superior Court.[19] There had been only four prior appearances in Judge Tarle's courtroom. Although jurors had been ordered to report on May 1, because the venire had not yet been sworn, a continuance would not have resulted in the loss of available jurors. Finally, as noted above, the case itself was not particularly complicated.

Moreover, the mere fact that a continuance would have been necessary had the motion been granted does not render the motion untimely. Nothing in *Faretta*, or this Court's cases interpreting *Faretta*, prohibits a trial court from granting a *Faretta* request when granting the motion will require a continuance of the trial. Nothing in this Court's jurisprudence, nor that of the United States Supreme Court suggests that delay alone justifies the denial of an otherwise timely motion. (*People v. Clark* (1992)

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[19] Erickson, *Capital Punishment at What Price: An Analysis of the Cost Issue in a Strategy to Abolish the Death Penalty* (1993) p. 24, <http://www.deathpenalty.org/downloads/Erickson1993COSTSTUDY.pdf> (as of February 27, 2013).

3 Cal.4th 41, 110-111 [a necessary continuance must be granted if a motion for self-representation is granted]; *People v. Bigelow* (1984) 37 Cal.3d 731, 741, fn. 8 [continuance should be granted to allow for necessary preparation after granting of timely *Faretta* motion].) And as has been repeatedly identified in California jurisprudence, timeliness is not established by some "Pythagoraean 'secret magic of numbers'" (*People v. Ruiz, supra,* 142 Cal.App.3d at p. 790), but upon an evaluation of "the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*People v. Lynch, supra,* 50 Cal.4th at p. 723.)

Plainly put, the record before the trial court did not support its decision to deny appellant the right to represent himself. Appellant's *Faretta* motion, although made close to the time set for selection of the jury, was not designed to delay or disrupt the trial, and granting his motion would not, in fact, have unjustifiably disrupted the trial or caused an obstruction of justice. Appellant was entitled under *Faretta* to proceed pro se, and the trial court unjustifiably denied him that right in violation of the Sixth and Fourteenth Amendments.

Even assuming, arguendo, that this Court were both to find that the motion was properly deemed untimely, and that *People v. Windham*, *supra*, 19 Cal.3d 121, is not inconsistent with *Faretta*, the trial court nonetheless abused its discretion in denying appellant's motion for self-representation. When an untimely request for self-representation is made, the trial court must inquire first into "the specific factors underlying the request" and then should consider other factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow

the granting of such a motion." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.) Under these criteria, the trial court abused its discretion in denying appellant's *Faretta* motion.

The trial court explicitly addressed only one of these factors – the delay that would likely result from granting appellant the right to represent himself. As appellant has demonstrated, his motion was not an attempt to "unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton*, *supra*, 48 Cal.3d at p. 852.) Indeed, the trial court never made any such finding, holding only that granting the motion would cause a delay. Under *Windham*, the overriding focus of the trial court in exercising its discretion must be on the reason for, and specific factors relating to, the defendant's request, once it has been determined that this request was untimely. Here, the trial court never challenged appellant's stated reasons for asserting his right to proceed pro se, i.e., that he was dissatisfied with trial counsel's performance during the *Phillips* proceedings, and with trial counsel's failure to adequately investigate the case and refusal to investigate potential witnesses to support a defense of third party culpability. (1 RT 220-221.)

Appellant voiced specific requests with regard to potential witnesses, and specific complaints about counsel's representation. Unlike the defendant in *Windham*, appellant did not express satisfaction with his attorney's competence. (*People v. Windham*, *supra*, 19 Cal.3d at p. 125 & fn. 3.) Moreover, unlike the defendant in *Windham*, appellant had a specific defense to pursue, and specific witnesses to be investigated, both of which his attorney refused to do. (*Id.* at p. 125, fn. 1.) That the jury may or may not have found these witnesses credible is beside the point. Appellant had a right to assume responsibility for, and accept the personal

consequences of, his own defense when he was dissatisfied with appointed counsel's efforts. (*Faretta v. California*, *supra*, 422 U.S. at p. 834.) Because appellant's *Faretta* motion was prompted by specific and documented disagreements with his attorney, the trial court abused its discretion in denying him the right to represent himself.

It is well settled that, when as is the case here, "the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) As has been discussed at length above, appellant made his request as soon as was practicable after counsel's "anemic" cross-examination at the *Phillips* hearing (1 RT 226, 11 RT 2137), and the subsequent meeting with counsel in which he rejected the possibility of a third party culpability defense and informed appellant the defense would rely on counsel's cross-examination. (1 RT 222.)

The other factors to be considered under *Windham* did not militate against self-representation. In *People v. Nicholson* (1994) 24 Cal.App.4th 584, the court reviewed the relevant *Windham* factors and found that the trial court's denial of an untimely motion to proceed pro se in a special circumstance murder case was an abuse of discretion. Similar to appellant's case, in *Nicholson* trial counsel declined to put on a defense, there was no prior proclivity to substitute counsel, and the trial itself was relatively short and not complex. (*Id.* at pp. 591-592.) The *Nicholson* court gave each of these factors significant weight in finding the trial court abused its discretion in denying the motion to proceed pro se. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [the trial court abused its discretion in denying mid-trial *Faretta* motion, where the record was devoid of any indication that the request to proceed pro se was made for purpose of delay,

the defendant showed no prior proclivity to substitute counsel, the record reflected a profound disagreement between defendant and counsel in trial strategy and there was no indication that self-representation would obstruct the orderly administration of justice].)

Although it is true that in *Nicholson* the pro se defendants did not seek a continuance, significantly the court noted "[t]he trial court's discretion to deny a motion made at the commencement of trial or later exists to 'prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'" (*People v. Nicholson, supra*, 24 Cal.App. 4th at p. 593, citations omitted.) As noted previously, the use of the qualifier "unjustifiably" means that the issue is not whether there is any delay at all, but the length and reason for the delay. Moreover, in both *Rogers* and *Nicholson* the courts emphasized that regardless of whether the motion is timely or untimely, courts must still adhere to the underlying directive of *Faretta* that the state may not "constitutionally prevent a defendant from 'controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant.'" (*People v. Nicholson, supra,* 24 Cal.App.4th at p. 595, citing *People v. Windham, supra,* 19 Cal.3d at p. 130.)

In sum, even if the *Windham* test controls this case, the trial court abused its discretion. Appellant sought the right to represent himself for a legitimate reason, i.e., a documented conflict with his attorneys about strategy in trial preparation, and reasonable dissatisfaction with his attorney's performance. The time appellant requested to prepare his case was not extensive, and still would have had the case proceeding to trial well within the average time for a capital case in Los Angeles County in this

time period. Moreover, there was no reason to believe that granting appellant's motion for self-representation would cause any disruption, as there were no particular concerns about witness availability, or the potential unavailability of aged or ill witnesses. Under these circumstances, the trial court's denial of appellant's *Faretta* motion, which forced him to proceed to trial in a capital case with counsel he did not want, and without the presentation of the defense he *did* want, was an abuse of discretion.

D. The Erroneous Denial Of The Right Of Self-Representation Requires Reversal

The deprivation of a defendant's right of self-representation under *Faretta* is not subject to harmless error analysis and requires automatic reversal. (*McKaskle v. Wiggins* (1984) 465 U.S. 166, 177, fn. 8; *Faretta v. California*, *supra*, 422 U.S. at p. 806; *People v. Joseph, supra*, 34 Cal.3d at p. 948.) This is logical since the right of self-representation is embodied within the structure of the Sixth Amendment and structural error defies harmless error analysis. As stated by the court in *United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 150, the "erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as 'structural error.' [Citation omitted]".) Thus, the trial court's error in denying appellant's *Faretta* motion mandates reversal.

Because *Windham* holds that a defendant's untimely assertion of the right of self-representation is not a right based on the federal Constitution, intermediate appellate courts in this state have held that any error attendant to denying this right is subject to analysis under *People v. Watson* (1956) 46 Cal.2d 818. (See, e.g., *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058.) As discussed below, however, this view is flawed and automatic reversal should follow when a

trial court errs in denying self-representation pursuant to *Windham*'s abuse of discretion standard.

People v. Rivers, *supra*, 20 Cal.App.4th 1040, is the case most commonly cited for the rule that the *Watson* test applies to a denial of a self-representation request asserted after the start of the trial. In *Rivers*, the trial court denied a *Faretta* motion as untimely without engaging in any of the analysis required by *Windham*. Consequently, the record was devoid of any evidence which would have permitted a reviewing court to conclude that the trial court acted properly. Therefore, the appellate court found that the trial court erred in denying the request for self-representation. (*Id.* at pp. 1048-1049.) The court then concluded that because the right affected was not a constitutional right, but rather a right based on the case law, the rule of automatic reversal did not apply. The court analogized to this Court's holding in *People v. Crandell* (1988) 46 Cal.3d 833, addressing the erroneous failure to appoint advisory counsel, and utilized the harmless error standard of *Watson* rather than a reversible per se standard. (*People v. Rivers*, *supra*, 20 Cal.App.4th at pp. 1053-1053.)

It is difficult to understand how the *Rivers* court arrived at this conclusion given the nature of the *Faretta* error and the *Crandell* holding. First, the denial of self-representation is not the type of error that is a proper subject for harmless error analysis, which is why both the United States Supreme Court and this Court have held that reversal is automatic when a defendant's *Faretta* rights have been violated. Like the consequences resulting from denial of the right to counsel of choice, the harm resulting from the denial of self-representation is " necessarily unquantifiable and indeterminate . . . ." (*United States v. Gonzales-Lopez*, *supra*, 548 U.S. at p. 150.) Even if the right to self-representation is not unqualified if the

request is untimely, the nature of the right itself is not altered by the juncture of the trial at which it is asserted. If the nature of the right has not changed, the type of harm analysis does not change, despite the fact that the way to measure whether the error itself occurred may be different. In other words, the fact that the trial court may have the discretion to engage in an analysis of additional factors in determining whether to grant a mid-trial request for self-representation does not change the impact of its decision to grant or deny self-representation. The *Rivers* court was wrong to assume otherwise.

Second, the *Rivers* opinion is problematic in relying on *Crandell*, an inapt analogy, to arrive at its conclusion. In *People v. Crandell*, *supra*, 46 Cal.3d 833, the trial court had denied a request for advisory counsel based on the mistaken belief that such a right did not exist, and, therefore, the error was the trial court's failure to exercise its discretion to grant advisory counsel. This Court used a harmless error standard because it found the trial record contained sufficient facts to show that if the trial court had exercised its discretion and denied the defendant's motion, it would not have been an abuse of discretion. (*Id.* at p. 864.) In other words, the error on the part of the trial court was in believing that such a right did not exist, and the harmless error standard was not being applied to the result of that error – the impact of the failure to appoint advisory counsel – but to the fact that the trial court's erroneous belief was harmless because the trial record revealed facts such that even if the trial court understood the right existed, it still would have ruled against defendant.

The result in *Crandell* must be compared to the result in *People v. Bigelow*, *supra*, 37 Cal.3d 731, to fully understand the *Rivers* court's misperception. In *Bigelow*, the trial court also mistakenly believed there

was no right to advisory counsel, but the record there contained enough facts for this Court to determine that if the trial court had denied the request on the record, rather than on its misperception of the law, it would have been an abuse of discretion. Because of that, the error was found to be reversible per se, based on this Court's acknowledgment of "the impossibility of assessing the effect of the [error] upon the presentation of the case." (*Id.* at pp. 745-746.) In doing so, the court analogized the error to the denial of the right of self-representation. (*Id.* at p. 745.)

Indeed, appellant's formulation of the proper prejudice standard is the same as the one summarized by the *Crandell* court. It noted that the reversal per se standard applies if the trial court's denial of the defendant's request would have been an abuse of discretion, but the harmless error standard applies if the trial court's denial would not have been an abuse of discretion. (*People v. Crandell*, *supra*, 46 Cal.3d at pp. 863-864.) This is the correct rule, and the rule set forth in *Rivers* is not. Under the correct standard, if the trial court erred by denying appellant's request for self-representation, the guilt and penalty phase verdicts must be set aside.

Even if this Court chooses to apply a harmless error test which considers the result of the incorrect ruling, reversal is warranted. This is not a case like *People v. Rogers*, *supra*, 37 Cal.App.4th 1053, where the erroneous denial of self-representation was held harmless because through defense counsel's representation the defendant was convicted of "the lesser included offense of attempted voluntary manslaughter and was acquitted of two counts of assault with a firearm upon a peace officer" despite strong prosecution evidence. (*Id.* at p. 1058.) Such a beneficial verdict in light of the evidence did not happen here. Appellant was convicted of all counts and allegations charged and was sentenced to death. Appellant could not

have fared any worse had he represented himself.

Moreover, there is a reasonable probability that he would have done better representing himself, particularly in the penalty phase. One of the prosecutor's major arguments in penalty was that appellant "had crossed the line" because of his long criminal history, and had thus forfeited his right to live. (11 RT 2167, 2169, 2173, 2184.) This type of argument dehumanizes appellant by making him no more than the sum of his alleged conduct. Had appellant represented himself, and given the jury an opportunity to see him as something more than the history of his alleged conduct, he could have effectively defused the prosecution's argument, and asserted his own worth and humanity to the jury.

This analysis is supported by the decision in *People v. Nicholson*, *supra*, 24 Cal.App.4th 584. As noted above, the *Nicholson* court held that the trial court abused its discretion in denying the defendants' mid-trial *Faretta* motion in a prosecution in which they were convicted of murder with a special circumstance. Despite apparently strong evidence of the defendants' guilt, the Court of Appeal found the error to be prejudicial under the *Watson* standard:

> Had Nicholson and Goldsberry been permitted to control their own fate, the evidence against them would have been no less overwhelming. But we simply cannot discount the fact that it might have been to their advantage to conduct voir dire and to present opening statements and closing arguments, thereby giving the jury an opportunity to hear from them (without the inconvenience of cross-examination). (Cf. *People v. Tyner*, *supra*, 76 Cal.App.3d at p. 356; *People v. Herrera*, *supra*, 104 Cal.App.3d at p. 175.) While it seems safe to say the defendants could not under any circumstances have been acquitted, they might have been able to avoid a true finding on the special circumstance allegation.

(*Id.* at p. 595.) In the same way, this Court should find that in this case the erroneous denial of self-representation was not harmless and requires reversal of the guilt and penalty phase verdicts.

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II. THE TRIAL COURT'S REFUSAL TO RELIEVE COUNSEL BASED ON THE SHOWING OF INADEQUATE REPRESENTATION REQUIRES REVERSAL

A. Introduction

At the April 29, 2001 final "check in" date prior to trial, appellant notified the court that there was a "conflict between me and my attorney." (1 RT 218.) At the subsequent *Marsden* hearing,[20] appellant complained that his counsel had failed to make contact with a witness, appellant's girlfriend, who had information in support of a defense of third party culpability and that counsel refused to "put up" a defense to the crimes charged. (1 RT 222.) During the brief hearing, counsel conceded that he refused to have any further contact with appellant's girlfriend, despite knowing that she had "helpful" information (1 RT 221), and that counsel did not, in fact, plan to put on an affirmative defense, but rather to "cross-examine" prosecution witnesses. (1 RT 222.) The court failed to conduct an adequate inquiry, never explicitly asking counsel if he or his investigator had actually spoken to the witness specifically about the third party culpability information. Counsel's failure to initiate an investigation when made aware of evidence in support of a possible third party culpability defense, including his refusal to make efforts to contact the witness, alerted the court to the inadequacy of trial counsel's representation and required further inquiry by the court. The trial court's failure to do so, and to grant the *Marsden* motion was an abuse of discretion and violated appellant's rights to assistance of counsel under the Sixth Amendment and due process under the Fourteenth Amendment, and Article I, section 15 of the California

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[20] *People v. Marsden* (1970) 2 Cal.3d 118, 124.

Constitution. (*People v. Abilez* (2007) 41 Cal.4th 472, 490-491; *People v. Marsden*, *supra*, 2 Cal.3d at pp. 123-126.)

B. Factual Background

Appellant clearly articulated that the basis of his conflict with his attorney was the inadequacy of his counsel's representation based on his failure to investigate a third party culpability defense:

The Court:	The courtroom is clear. There is no one in the courtroom except the court staff, the bailiffs, Mr. Coleman and Mr. Wright. Okay. Mr. Wright, what is the conflict that you have with Mr. Coleman?
The Defendant:	I have a witness that has got some information, a witness to help me in my case. And my attorney [sic] refusing to call her back, or to call her to get this information. Plus, I don't see where – where the defense is being put up on my behalf.
The Court:	Okay. Mr. Coleman, do you wish to respond to that?
Mr. Coleman:	Your honor, the witness Mr. Wright is speaking of is his girlfriend. When I took this case on, I have spoken to her or talked to her numerous times throughout this case. But it got to a position where I felt that she was what I refer to as an intermeddler in the case. And I have indicated to Mr. Wright that is his [sic] girlfriend, and I am not

discussing anything with her anymore.

He did indicate that she had some information. She said that all along. Nothing helpful has come forward. I had my investigator contact her. She made some calls over to my investigator's office and never gave us any information.

And as I refer to it, she is an officious intermeddler as far as I am concerned. And I indicated to her if she have [sic] any information, she can give it to my investigator. And that hasn't happened, and I don't have any faith that she has any information in regards to that.

The Court: Mr. Wright, what kind of information does she have?

The Defendant: The addresses of the people that was – that supposed to had did one of these crimes, supposed to be a witness that come forth and bring up their names. I don't have them.

The Court: Why hasn't she given them to your defense attorney?

The Defendant: She have [sic] called numerous times to the investigator and to Mr. Coleman. Nobody has returned her calls.

The Court: Why not just have her come into court, and she can give the addresses to the prosecution – to the defense attorney.

Mr. Coleman: She could have given it to him, your honor, and he could have given it to the investigator. That hasn't happened either.

The Court: You mentioned something else, I am sorry, Mr. Wright.

The Defendant: There is no defense being put up on my behalf.

The Court: Mr. Coleman.

Mr. Coleman: Your honor, as far as I went over the case numerous times with Mr. Wright. I went over it again with him on Thursday, and I outlined to him what our defense would be. And basically through cross-examination of the witnesses.

And I pointed out to him what I thought would be helpful to us in the testimony and various witnesses, particularly Mr. Willie Alexander at the preliminary hearing testified on our behalf.

And that is where I stand in regards to that.

The Court: Mr. Wright, do you wish to say anything further about this issue, about the witness, or about the defense in this case?

The Defendant: No. I already stated everything.

The Court: Okay. Why don't we get the prosecutor back in.

(1 RT 220-223.)

Despite counsel's failure to refute appellant's claim that he had failed to investigate the third party culpability defense, and the court being on notice from counsel that his defense would be limited to cross-

examination of identification witnesses (1 RT 222), the court failed to determine what steps counsel had taken to obtain the information from the witness, and why counsel had failed to investigate a potential third party culpability defense.

C. The Trial Court Abused its Discretion in Denying Appellant's Motion for Substitution of Counsel

When a defendant informs the court that he believes his appointed counsel is providing inadequate representation and for that reason would like to discharge his counsel and substitute another attorney, the trial court must allow the defendant to explain the basis for his belief and provide specific examples of trial counsel's inadequacies. (*People v. Abilez, supra,* 41 Cal.4th 472, 487.) If the record establishes that at trial appointed counsel "is not providing adequate representation or that counsel and appellant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result," upon review appellant is entitled to relief. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245; *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1025 [summary denial of defendant's motion for new counsel violated Sixth Amendment]; *Hudson v. Rushen* (9th Cir. 1982) 686 F.2d 826, 829 [same].) Put another way, "[t]he decision to allow a substitution of attorney is within the discretion of the trial judge unless there is sufficient showing that the appellant's right to the assistance of counsel would be substantially impaired if his present request was denied." (*People v. Smith* (1985) 38 Cal.3d 945, 956, citation and internal punctuation omitted.)

1. The Trial Court Abused its Discretion in Denying Appellant's Motion for Substitution of Counsel Because the Record Established that Counsel's Performance Was Deficient

In the instant case, the trial court properly allowed the defendant to explain the basis of his dissatisfaction with his attorney, and to relate specific instances of the attorney's inadequate performance. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) However, the court erred in failing to act on the information it received. Appellant informed the court that he was dissatisfied because trial counsel had failed to investigate the case generally, and had specifically failed to obtain the name of the person who was the actual perpetrator of one of the crimes with which he was being charged. Trial counsel conceded that he had not obtained information from a witness regarding a potential third party culpability defense, and that he was not investigating third party culpability in appellant's case. Because the record established that counsel's performance was constitutionally inadequate, it was error for the trial court to deny appellant's motion for substitution of counsel.

The law is well established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland v. Washington* (1984) 466 U.S. 668, 690.) In other words, "counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." (*Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1456.) Counsel is deemed to have rendered ineffective assistance "where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1226, quoting *Sanders*, *supra*, 21 F.3d at p. 1456.)

Appellant's complaint was precisely this.

The primary basis for appellant's motion was that trial counsel had failed to make contact with a witness – appellant's girlfriend – who had information on third party culpability witnesses. (1 RT 221.) The record establishes that although trial counsel apparently had some initial contact with the witness, he did not refute appellant's claim that his girlfriend's calls regarding the third party culpability defense were not returned. Counsel's excuse for not getting the information from the witness was his assessment that she was an "officious intermeddler" and his unsubstantiated opinion that the witness had no helpful information. (1 RT 221.) Counsel's assumption – for which he provided no basis to the court – that the witness did not have useful information does not excuse his failure to investigate. (*Rios v. Rocha* (9th Cir. 2002) 299 F.3d 796, 806 [counsel's choice to not investigate a misidentification defense based on his belief that witnesses would identify his client as the shooter was unreasonable].) Counsel's aspersions of the witness, unsupported by facts, are woefully inadequate to excuse counsel's failure to fulfill his constitutional obligations. Counsel's failure to conduct a reasonable investigation rendered his trial strategy uninformed and thus inadequate. (*Sanders v. Ratelle*, *supra*, 21 F.3d at p. 1456 [counsel's failure to "listen to critical information from a key exculpatory witness regarding the basis of his client's most important defense cannot be deemed a permissible strategy"].)

The trial court here knew that counsel had not investigated and was not presenting a third party culpability defense, instead presenting the defense "basically through cross-examination of witnesses." (1 RT 222.) Knowing that counsel had failed to conduct an adequate investigation into the third party culpability defense by failing to obtain a witness name, the

trial court was aware that counsel's decision to not present a third party culpability defense was not an informed decision. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691.) In *People v. Abilez*, *supra*, 41 Cal.4th at p. 487, this Court reasoned that the trial court's denial of the motion to substitute counsel was proper because trial counsel provided a tactical reason for not personally contacting witnesses, trial counsel's investigator had contacted numerous witnesses and trial counsel had prepared a 110-page synopsis of the investigation. In contrast, here the record was unclear as to whether either counsel or his investigator ever asked appellant's girlfriend for the names of the third party culpability witnesses, or conducted any other investigation as to the identity of the culpable third party. A choice of defense made after a less than reasonable investigation is itself unreasonable. (*Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 980.)

In *People v. Berryman*, this Court reasoned that "it was not unreasonable" for the trial court to deny the *Marsden* motion when the court's inquiry revealed the grounds alleged by the defendant were insufficient or unsupported. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) The corollary to this rule must be that when the grounds are both supported and sufficient, as in the instant case, failure to appoint new counsel is unreasonable, and the trial court abuses its discretion in doing so. This is particularly true in this case, where counsel not only conceded that he refused to have any further contact with a witness who had relevant information to a third party culpability defense, but also made plain that he had no intention of conducting any further independent investigation to obtain information about this potential defense, relying instead solely on

cross-examination of prosecution witnesses. Although counsel does not have an obligation to pursue every possible or fanciful defense, trial counsel's failure to make contact with a witness who purportedly had information supportive of a third party culpability defense is clearly deficient performance. (*In re Hardy* (2007) 41 Cal.4th 977, 1019-1021 [counsel's decision not to interview witnesses based solely on review of police reports is unreasonable]; *People v. Ledesma* (1987) 43 Cal.3d 171, 222 [counsel has an obligation to independently investigate the facts of the case]; *People v. Jones* (2010) 186 Cal.App.4th 216, 236 [counsel's failure to locate witnesses to corroborate defendant's statements renders defense constitutionally inadequate]; *In re Edward S.* (2009) 173 Cal.App.4th 387, 407 [counsel's failure to investigate statements of potentially exculpatory witnesses renders representation constitutionally inadequate]; *People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212 ["standard of reasonable competence requires defense counsel to diligently investigate the case"].) Having failed to conduct an adequate investigation, counsel's decision to forego a third party culpability defense was plainly inadequate, as California case law makes clear that counsel has an obligation to conduct an adequate investigation examining the facts of the case and possible defenses before selecting a defense strategy. (*In re Gay* (1998) 19 Cal.4th 771, 790; *In re Visciotti* (1996) 14 Cal.4th 325; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1133.)

Further, the colloquy between trial counsel and the court reflects a basic misunderstanding of counsel's basic obligation to fully investigate a case, as both parties tried to put the onus on the witness to provide the information to counsel, rather than on counsel to obtain it. That the witness herself did not herself pursue other means to get the information to counsel

when her calls were not returned does not excuse counsel's failure to investigate. As this Court has reasoned, "[c]ounsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts" even when confronted with an uncooperative or obstreperous client. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 222.) Counsel's "first duty to investigate" is not obviated or diminished because witnesses other than the defendant are difficult, evasive or reluctant. (*In re Hall* (1981) 30 Cal.3d 408, 424-430 [counsel's belief that witnesses would be uncooperative does not excuse failure to investigate].)

Moreover, the trial court's actions here cannot properly be cast as a credibility determination. As noted above, although trial counsel stated he had spoken to the witness at some point, he did not dispute appellant's statement that neither he nor his investigator had returned the witness's calls. Unlike the attorney in *People v. Smith*, who responded point by point to defendant's complaints, describing in detail what he and the two defense investigators had done to prepare for trial, trial counsel here did not provide any information to the trial court about witnesses he had interviewed, or make any attempt to dispute the evidence of a failure to investigate. (*People v. Smith* (1993) 6 Cal.4th 684, 688.) Indeed, trial counsel never said that either he or his investigator had specifically asked the witness for the third party culpability witness information. Because trial counsel's statements to the court did not contradict appellant's assertion that neither counsel nor his investigator had returned the witness's calls to obtain the number of the third party culpability witness, the trial court's decision cannot be properly be deemed a credibility determination.

2. The Trial Court Abused its Discretion by Failing to Conduct an Adequate Inquiry

Because the record establishes that counsel's representation was inadequate, the refusal to appoint substitute counsel was error, and requires reversal. (*People v. Abilez, supra,* 41 Cal.4th at p. 488.) However, even if this Court were to find that the information before the trial court did not establish that appellant's right to assistance of counsel was substantially impaired, the record was sufficient to alert the court of the need to engage in a more substantial inquiry of counsel. This Court has long recognized the affirmative duty of the trial court to inquire on the record into the bases for the motion for substitution of counsel, and that the failure to do so is error. (See *People v. Burgener* (1986) 41 Cal.3d 505, 547, and cases cited therein, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743.) For example, in *People v. Fierro* (1991) 1 Cal.4th 173, 204-206, this Court found no *Marsden* error because "the court carefully inquired into defendant's reasons for requesting substitution of counsel" and found "there was no basis to conclude that counsel was not providing effective assistance or that a breakdown in the attorney-client relationship had occurred such that defendant's right to effective assistance would be substantially impaired." (Accord, *People v. Memro* (1995) 11 Cal.4th 786, 857.)

The trial court here failed to conduct the careful inquiry mandated by this Court in *Fierro*. During the colloquy with the court, appellant maintained that both his attorney and the investigator refused to talk to his girlfriend in order to obtain from her the information relevant to the third party culpability defense. (1 RT 221.) Trial counsel stated that he had spoken to appellant's girlfriend early on in the trial, that he now refused to

speak to her, and that he had asked his investigator to contact her, but he never clarified whether his investigator ever made contact with the witness, or what steps the investigator took to make contact with the witness. (1 RT 222.) Most significantly, the trial court never clarified with counsel whether anyone from the defense team had actually made contact with the witness in an attempt to obtain the third party culpability information – a critical fact in establishing the adequacy of counsel's representation and one that was not resolved by the statements on the record. (*In re Jones* (1996) 13 Cal.4th 552, 566-567 [defense counsel ineffective for, inter alia, failing to contact witness who had information that third party was actually culpable for the crime charged].)

The trial court erred in failing to ascertain *why* counsel had not called the witness back nor conducted the necessary investigation to identify the potential exculpatory witnesses. Having learned that trial counsel had not pursued the investigation, the trial court erred by failing to determine whether this was a "knowledgeable election" by counsel:

> It is recognized that the objection is frequently made to the inadequacy of counsel. This objection seldom has merit because the decision of the attorney is normally made after due consideration on the trial tactics to pursue in the interest of his client. The court's inquiry, of course, is not to ascertain defense counsel's reasons for his decision for not following procedure requested by the defendant. The inquiry should be limited to whether the attorney made a knowledgeable election on the subject.
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> . . .
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> In the case before us, appellant, in the judge's chambers, directed the court's attention to specific important instances of alleged inadequacy of his representation, i.e., the existence or nonexistence of stab wounds and other pertinent evidence that could have been established by hospital records. The court ordered the trial to proceed without inquiry into

counsel's reason for not producing the physician or his hospital records.

(*People v. Groce* (1971) 18 Cal.App.3d 292, 296-297; see *People v. Penrod,* (1980) 112 Cal.App.3d 738, 747 [in reviewing motion for substitution of counsel based on trial counsel inadequacy, the trial court should conduct a sufficient inquiry to determine whether trial counsel made an informed tactical choice].) As this Court has explained, in order for the inquiry to be sufficient, the trial court must ascertain whether counsel's action or inaction "was a matter of discretion or neglect." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1095.) The import of an adequate inquiry was underlined in *Barnett,* in which this Court noted that although the trial court had addressed with trial counsel many of the alleged deficiencies, one alleged deficiency had not been addressed in the colloquy. However, because the trial record established that the concern was ill-founded, there was no error. (*Barnett, supra,* 17 Cal.4th at p. 1096, fn. 30.)

The court's suggestion that the witness come to court and provide the information to counsel fails to address the gravamen of appellant's complaint – that counsel was not adequately investigating the facts of the case and had failed to obtain critical information of a third party culpability witness. (1RT 222.) Having been informed of a serious allegation regarding counsel's alleged inadequacy, and counsel having confirmed that the witness had not been contacted and the investigation had not been conducted, the court's focus properly should have been on counsel's state of mind in failing to pursue the investigation. As this Court explained in *People v. Penrod, supra,* 112 Cal.App.3d 738, when a defendant's allegation would, if true, render counsel's representation constitutionally ineffective it is incumbent upon the trial court to engage in a more thorough inquiry to

determine the basis for the attorney's conduct. (*Id* at p. 747, fn. 2.) In *People v. Cruz* (1978) 83 Cal.App.3d 308, the trial court allowed the defendant ample time to air his dissatisfaction with the public defender's office, specifically his concern that the office had failed to investigate prior charges against him, but failed to ask the public defender to respond to the allegations. The court of appeal found the failure to inquire to be error, reasoning that "[i]f defendant's allegations were true, he would have surely been denied effective representation in the present action; denial of a right he is constitutionally guaranteed." (*People v. Cruz*, *supra*, 83 Cal.App.3d at pp. 317-318.)

Similarly, in the instant case the trial court failed to directly ask counsel if he or his investigator had made contact with appellant's girlfriend in an attempt to get the name of the exculpatory witness prior to making the decision to eschew putting on a defense, a fact which if true would render counsel's representation inadequate. That the court could identify alternative means that counsel could have employed to obtain information from the witness, but did not in fact utilize, is only relevant insofar as it reflects counsel's inadequacies.

D. The Trial Court's Error In Denying the Motion to Substitute Counsel and In Failing to Make an Adequate Inquiry Requires Reversal

In his motion for substitution of counsel, appellant clearly established that his trial counsel was providing inadequate representation by failing to investigate a third party culpability defense. Appellant has also shown that the trial court's inquiry was insufficient because it does not provide an adequate record of trial counsel's motivation. Both of these errors require reversal because the state cannot meet its heavy burden of

establishing beyond a reasonable doubt that the trial court's error in denying the motion for substitution of counsel did not contribute to the verdicts that resulted in a judgment of death. (*People v. Marsden, supra*, 2 Cal.3d at p. 126; *People v. Chavez* (1980) 26 Cal.3d 334, 348–349; *Chapman v. California* (1967) 386 U.S. 18, 24.)

The primary basis of appellant's *Marsden* motion was trial counsel's failure to contact appellant's girlfriend to obtain the name of a potential third party culpability witness. Foregoing any investigation into third party culpability, counsel relied solely on cross-examination of prosecution witnesses and the testimony of Willie Alexander, who was present at the scene of the homicide at 580 Williams Street, but did not identify appellant as the shooter. (6 RT 1049.) Given the evidence against appellant that was presented by the prosecution, there is no way that the state can prove beyond a reasonable doubt that had appellant been provided constitutionally adequate representation, and the investigation and presentation of third party culpability evidence, that the verdicts would not have been different.

The evidence of appellant's guilt was far from overwhelming. As the prosecutor himself explained, the primary evidence linking appellant to the crimes was the testimony of eyewitnesses (6 RT 1223-1224), whose testimony was fraught with problems. First, all of the eyewitnesses who identified appellant were admitted drug dealers, each of whom acknowledged that the violence arose during the course of a narcotics exchange. (See, e.g., 5 RT 867 [Priest testifies he and Martin were selling marijuana and cocaine and appellant came to buy cocaine]; 6 RT 1127 [Martin understood that appellant came to the apartment to buy narcotics]; 4 RT 755-756 [Ralph testifies that appellant came to the house to buy narcotics].) Given their admitted involvement in illegal activity, each of

these witnesses was uniquely vulnerable to real or perceived pressure from the prosecution to provide testimony that was consistent with the prosecution's theory of the case.

Moreover, the identifications themselves were suspect and contradictory. None of the witnesses identified appellant as the perpetrator until after they saw his photo following his arrest in an unrelated case, however each witness admitted in their trial testimony that at the time of the attacks they knew who appellant was and where he lived. (5 RT 866, 897 [Priest had known appellant for three or four months, knew his address]; 6 RT 1139 [Martin had known appellant for eight months and had been to his apartment]; 5 RT 792 [Ralph did not pat appellant down when he came into the house to buy cocaine because he knew appellant].) Additionally, as to Counts 1 and 2, Priest testified that he was under the influence at the time he observed the shooter because he had been drinking malt liquor and tequila while watching football at the apartment. (5 RT 888.) The strength of Priest's identification is further called into question because he identified the shooter as appellant only by his silhouette and voice. (5 RT 891, 895). The identification of appellant by Ralph as the perpetrator of the crimes charged in Counts 6 and 7 is called into question by Alexander's contradictory testimony that appellant was not the person who shot him. (6 RT 1049.) The strength of Ralph's identification of appellant as the shooter is further undermined by Ralph's testimony that he did not actually see Curtis or Alexander being shot. (4 RT 764); Ralph's prior statements that more than one person was involved in the shooting (6 RT 1170, 1172); and the physical evidence which indicated there was another shooter, a fifth person, present at Williams Street (7 RT 1365-1366, 1388, 1390).

The only other evidence linking appellant to the charged crimes was

ballistics evidence, which was highly attenuated and fraught with problems. First, the prosecution presented evidence linking ballistics recovered from both crime scenes and a victim to a gun found in the apartment where appellant was arrested. There was no evidence, however, linking appellant to the gun. (6 RT 1027-1028.) Second, the bullets recovered during the autopsy of Curtis and from the crime scenes were made for use in a semi-automatic weapon (5 RT 947, 949, 950), and the recovered weapon was a revolver. Despite the testimony of Dale Higashi, the government's ballistics expert, that Peo. 15, the revolver, was "capable" of firing the semi-automatic ammunition, this fact casts doubt on the connection of the weapon to appellant. (5 RT 948, 952.) Third, Higashi testified that he matched a *bullet* found at Martin and Priest's apartment (5 RT 952) to Peo. 15, the revolver, but the testimony of the officer who collected evidence from that crime scene was that only a *bullet fragment* was recovered. (6 RT 1003.)

Given the weak and internally contradictory nature of the evidence against appellant, it cannot be established beyond a reasonable doubt that counsel's inadequacies in failing to investigate and present a defense did not contribute to the verdicts against appellant, and reversal is required. (*Neder v. United States* (1999) 527 U.S. 1, 18 [harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"].)

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III. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL

A. Introduction and Factual Background

The evidence against appellant at the guilt phase was not strong. The primary evidence in the prosecution's case was the eyewitness identification testimony of Ralph, Priest and Martin. This testimony was problematic, both because of questions about the credibility of the witnesses themselves, who had admitted they were engaged in criminal activities for which they were not prosecuted, and because of the numerous internal contradictions in the witnesses' testimony and statements. In order to strengthen its guilt phase case, the prosecution presented inadmissible and highly prejudicial evidence which severely biased the jury against appellant and led to a conviction based not on the evidence presented but on the perceived character and history of appellant.

The prosecutor elicited from witness Toni Wright prejudicial testimony that had been ruled inadmissible regarding appellant's prior use of a gun. Additionally, the prosecutor sought to introduce evidence through an expert witness, Detective Bly, that appellant had been in prison for a "long, long time" prior to this trial. This evidence prejudiced the jurors against appellant, allowing them to convict not on the basis of the evidence presented, but because of the type of person they believed appellant to be.

The impact of the prosecutor's misconduct was to deprive appellant of his federal and state constitutional rights to due process, counsel, a fair trial, an impartial jury, confrontation, equal protection, and a reliable guilt verdict. (U.S. Const. 5th , 6th and 14th Amends.; Cal. Const., art. I, §§ 1, 4, 7, 15, 16, & 17.) Accordingly, the guilt determination must be reversed. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Hill* (1997) 17

Cal.4th, 820-821.)

B. The Special Role Of The Prosecutor And The Standard Of Review

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 or she 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 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 peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents 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.) Put differently: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord *United States v. Blueford* (9th Cir. 2002), 312 F.3d 962, 968; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 (dis. opn. of Douglas, J.) ["The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to

vindicate the right of people as expressed in the laws that give those accused of a crime a fair trial"].)

Misconduct by a prosecutor may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the due process clause of the Fifth and Fourteenth Amendments. (*Darden v. Wainwright*, *supra*, 477 U.S. at pp. 178-179; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill*, *supra*, 17 Cal.4th at p. 819, internal quotations omitted.)

In addition, a prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury," even if such action does not render the trial fundamentally unfair. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823 & fn.1; accord *People v. Smithey* (1999) 20 Cal.4th 936, 961.)

C. Guilt Phase Misconduct

Although this Court has made it clear that a showing of bad faith is not required for a claim of prosecutorial misconduct, as discussed above, in this case statements made by the prosecutor suggest that the Los Angeles County District Attorney charged appellant with capital murder to retaliate against him for having had a prior murder conviction overturned in federal court. In order to assure a conviction in this relatively weak case, the

prosecution presented highly prejudicial evidence to the jury, hoping that by convincing the jury of appellant's bad character, the jury would convict him regardless of the weak evidence.

The capitally charged murder in this case involved a single murder at a crack house. When the trial court inquired as to the prosecution's choice to charge this as a special circumstance case and seek the death penalty, the district attorney began his answer by pointing to appellant's prior murder conviction. According to the district attorney's analysis:

> but as I indicated to the court the last time we were here, in 1993, Mr. Wright was sentenced to life in prison without the possibility of parole, as the result of a murder that he was convicted of. There were two defendants on that murder. The evidence was basically the same as to both defendants. The conviction was affirmed by the California Court of Appeal. The California Supreme Court refused to hear the defendant's appeal and habeas corpus petitions were denied in state court.
>
> Each of the defendants then filed a habeas corpus petition in US District Court. One went to one Judge, one went to another Judge. The issues were basically the same.
>
> Mr. Wright's co-defendant on that case is still serving life without the possibility of parole. Mr. Wright's habeas corpus petition went to a very outspoken Judge who is very outspoken against the death penalty, even though that was not a death penalty case, and very outspoken about the way California state courts deal with prosecuting murder cases.
>
> That Judge not only granted Mr. Wright's habeas corpus petition, but he found him

factually innocent so that he couldn't be retried.
(1 RT 76-77.)

Far from accepting the federal court's judgment, the Office of the Los Angeles County District Attorney lashed out at appellant, doing all it could to make sure a man they believed had wrongly been set free would this time be sentenced to death. In order to overcome the evidentiary weakness of the case against appellant in the guilt phase, the prosecution presented highly prejudicial, inadmissible evidence in an attempt to convince the jury to find appellant guilty based not on the evidence presented but out of bias against him based on his perceived character and criminal history. Considered either singly, or in combination with one another and the other errors that occurred in this case, reversal is required.

1. Questioning and Elicitation of Evidence from Toni Wright That She Observed Appellant Point a Gun at Someone, a Subject That Had Been Ruled Inadmissible

The prosecutor sought to introduce at the guilt phase the testimony of Toni Wright that appellant shot her. (5 RT 965.) The prosecutor argued that evidence that Ms. Wright was shot by appellant with a small dark-colored revolver within days of the incident in Pomona which led to the recovery of the revolver was relevant to the issues of intent and identity. (5 RT 966.) The defense objected, noting that there was nothing in the offer of proof to show that Toni Wright could identify the gun that was used to shoot her. (5 RT 970.) The defense correctly pointed out that "this is the district attorney's effort to try to bootstrap some evidence that is tremendously prejudicial to my client and will have little or no probative value in regards to the charges that he is on trial for." (*Ibid.*)

After hearing the prosecutor's offer of proof, the court made the

following ruling:

> As far as Toni Wright, I would allow her to come in to testify only that the day before she saw – she knows that the defendant had a black handgun.
>
> I do not believe her testimony as far as the incident itself should come in. I don't think there is sufficient similarity under 1101(b) to the other incidents. And I think that the prejudice far outweighs the probative value or any relevance.
>
> It is just – it is too much, quite frankly for the amount of relative material in there. But she can come in and say she saw him hold a black handgun.

(5 RT 971.)

In direct contravention of this ruling, within the first five questions the prosecutor twice asked if Ms. Wright observed appellant "point the gun" at someone else.

> Q: On March the 22nd of the year 2000, did you see William Wright with a small dark colored handgun.
>
> A: Yes.
>
> Q: Did you see him point that gun at somebody?
>
> A: Yes.
>
> Q: Could you point him out for the ladies and gentlemen of the jury.
>
> A: He's right there.

The Court: Indicating William Wright, the defendant in this case.

Q: By Mr. Monaghan: When you saw him point the handgun at somebody, was that in the City of Ontario?

A: Yes.

Q: And that was not –

Mr. Coleman: Your honor, may we approach, I have an objection.

(6 RT 1098.)

Defense counsel objected, noting that the prosecution had exceeded the boundaries of the court's ruling, and sought a mistrial. (6 RT 1099.) The court denied the motion, finding simply that any error was harmless. (6 RT 1100.)

The court's ruling was in error. The prosecutor here failed to abide by the court's explicit prohibition concerning the elicitation of evidence of appellant's use of the handgun, and his failure to do so constituted misconduct. (*United States v. Shapiro* (9th Cir. 1989) 879 F.2d 468, 471-472; *People v. Bonin* (1988) 46 Cal.3d 659, 689 ["It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations.]"], overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn.1.) The prosecutor's original proffer was that appellant's use of the handgun against Toni Wright was admissible under Evidence Code section 1101, subdivision (b). After considering the proffer and the defense argument, the court ruled that evidence of appellant's use of the gun was not admissible, finding that it was not sufficiently similar and that the "prejudice far outweighs the probative value or any relevance." (5 RT 971.) However, the court also ruled that evidence that appellant

possessed a black handgun the day before the Ontario incident was admissible, so long as it was limited to his possession of the gun. (*Ibid.*)

In just five brief questions, the prosecutor managed to violate both the spirit and letter of this ruling. Rather then focusing on appellant's possession of a black handgun, the prosecutor's questions purposefully elicited testimony that appellant was using a gun, twice asking if the witness had seen him "point it" at someone. These questions directed the jury to consider precisely the evidence the court had deemed too prejudicial for the guilt phase – that appellant was the type of person who used guns against people. This type of unfettered propensity evidence encouraged the jurors to convict appellant based not on the charged conduct, but instead on the type of person they believed him to be.

2. Questioning and elicitation of speculative evidence that appellant may have been in prison for a long, long time was improper and prejudicial

Detective Bly of the Los Angeles County Sheriff's Department testified as an expert witness on gangs. Bly's testimony focused on his knowledge of Los Angeles area gangs, and the Duroc Crips in particular. Bly's testimony first focused on the Duroc Crips, identifying them as a street gang from the City of Duarte. (6 RT 1008-1011.) Detective Bly testified that he had spoken to "numerous Duroc Crip members that were suspects of crimes, victims of crimes and witnesses to crimes." (6 RT 1009.) The detective then answered hypothetical questions posed by the prosecutor in an attempt to establish that certain of the charged crimes had been committed for the benefit of the street gang the Duroc Crips. (6 RT 1011-1013.) Detective Bly then opined that appellant was a member of the Duroc Crips, based on his admission to membership in the gang (6 RT 1013) and his tattoos. (6 RT 1014-1016.)

Under cross-examination, Detective Bly confirmed that he had never spoken to appellant, had not reviewed any gang-related photographs or writings from appellant, and had not taken part in any way in the investigation of the case. (6 RT 1017-1019.)

The following exchange took place between trial counsel and the witness:

Q: Now have you ever interviewed my client, Mr. Wright?

A: No, sir, I don't believe so.

Q: So you have no personal, you have had no personal contact with him as a Duroc gang member?

A: I don't believe so.

Q: Now you indicated that you have met a number of Duroc gang members, is that correct?

A: Yes, sir.

Q: Approximately, how many?

A: Over a hundred say a hundred to 200.

(6 RT 1017-1018.)

On redirect, the prosecutor asked the following question:

Q Sir, if there is a particular member that is not in the community for a long, long time, you might not come in contact with him; is that correct?

A: Correct

Q: If he is living somewhere else or if he is

incarcerated perhaps or something like that, you would know; is that correct?

Mr. Coleman: Your honor, I have an objection. May we approach?

(6 RT 1020.)

The defense objected to the prosecution's question, arguing that it was improper because it suggested to the jury that appellant had spent a substantial period of time in prison. (6 RT 1020.) The prosecutor attempted to justify his question by arguing,

> I never on direct asked this man if he had personal contact with Mr. Wright. Counsel on cross, for whatever reason, chose to ask that. Once he asked that, I simply have a right to inquire of Mr Bly, if someone is not in the community, I didn't say simply in custody, I said if someone is not in the community, living someplace else or in custody, you wouldn't be coming in contact with him.

(6 RT 1020-1021.)

The trial court ruled that the questions were proper both because of the cross-examination and because the prosecutor was not "honing in on it." (6 RT 1021.) The trial court's ruling was error because the district attorney's questions were an improper attempt to "rehabilitate" a witness who had not been attacked on cross-examination.

Trial counsel's questions did no more than reiterate and clarify the witness's testimony on direct, and cannot reasonably be interpreted as attacking Bly's credibility. On direct examination Bly did not testify to any personal knowledge of appellant's involvement with the Crips, despite interviews with "numerous gang members" and participation in a joint task force to target and talk to gang members; review of extensive information on the Duroc Crips, including, "many police reports" regarding Duroc Crip

gang members; probation and parole reports of Duroc Crip gang members and the testimony of other experts about the Duroc Crips; and review of photographs and writings seized from Duroc Crip gang members during searches conducted pursuant to search warrants and parole and probation searches. (6 RT 1009-1010.). The reasonable inference from Bly's direct testimony was that he had no personal knowledge of appellant's membership in the Duroc Crips.

Counsel's cross-examination elicited no new information regarding Bly's knowledge of appellant. Counsel's cross did no more than clarify points that had been raised explicitly or implicitly on direct. On cross Bly agreed with the implicit concessions made in his direct that he had never interviewed appellant, and that he had no independent knowledge that appellant was a member of the Duroc Crips, and Bly refined somewhat the number of Crips he had talked to. (6 RT 1017-1018.)

If the jury wondered why, given Bly's extensive knowledge of the Duroc Crips, he did not know appellant, all the facts that undergird this question were raised by the prosecution on direct: despite Bly's numerous interviews and extensive review of written materials he claimed no personal knowledge of appellant's membership in the Duroc crips. Moreover, the prosecutor specifically elicited from Bly in his preliminary hearing testimony that he did not "personally know Mr. Wright." (1 CT 192.) Because the prosecutor had put this evidence into the record of the proceedings, and conceded the point in the direct examination at trial, the defense cannot reasonably be said to have opened the door through its questions. The prosecutor's question implying that appellant had spent a "long, long time in prison" served no purpose other than to prejudice the jury against appellant through consideration of evidence that was not part of

the trial record.

Even if appellant did open the door such that the prosecutor should have been allowed to rehabilitate Detective Bly as to why he did not know appellant personally to be a member of the Duroc Crips, the questions asked were improper because they asked the jury to speculate based on highly prejudicial unproven facts. The prosecutor was well aware that evidence of appellant's prior incarcerations was highly prejudicial in this case, as appellant had previously sought and, without opposition by the prosecutor, been granted a motion to bifurcate the prior conviction. (2 CT 374, 445.) If the prosecutor felt that Bly needed to be rehabilitated and given an opportunity to explain why he did not have personal knowledge of appellant's gang membership, he should have sought guidance from the court as to how such evidence might be introduced without unduly prejudicing appellant.

D. The Misconduct Was Prejudicial and Made the Guilt Trial Fundamentally Unfair

These errors were not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) The cumulative effect of the above-described misconduct was to violate appellant's rights to due process of law, and a fair jury trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *People v. Bell* (1989) 49 Cal.3d 502, 534; *People v. Hill, supra*, 17 Cal.4th at p. 819; *Boyle v. Million* (6th Cir. 2000) 201 F.3d 711, 717 [cumulative prejudice from prosecutorial misconduct will compel reversal even if no single act of

misconduct would do so].) Where, as in the present case, prosecutorial misconduct deprives a defendant of rights guaranteed by the United States Constitution, review is required under the standard of *Chapman v. California, supra*, 386 U.S. at p. 24, and reversal is mandated unless the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Bolton,* (1979) 23 Cal.3d 208, 214-215 fn. 4; *People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Barajas* (1983) 145 Cal.App.3d 804, 810-811.) This respondent cannot do. The prosecution's proof in this case was far from overwhelming. (6 Witkin Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, 45, pp. 506-507 [in a close case, i.e., one in which the evidence is evenly balanced or sharply conflicting, a lesser showing of error will justify reversal than where the evidence strongly preponderates against the defendant]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 ["'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]"].)

The linchpin of the prosecution's case was eyewitness testimony that was internally contradictory, all from admitted drug dealers with prior felony convictions. To convict appellant of murder and robbery, the prosecutor had to persuade the jury to accept the dubious testimony of the eyewitnesses – evidence that the prosecution knew was weak. The weakness of the identification evidence was heightened by the underlying unexplained oddity of each of the witnesses' failure to identify appellant as their attacker until they "recognized" him subsequent to his arrest on an unrelated charge, despite the fact that each witness admitted to having known appellant for weeks or months prior to the attack, and specifically knowing appellant's name, address and street moniker. The only other

evidence offered to prove appellant's guilt was ballistics evidence that the prosecutor conceded did not actually link appellant to the crime. (6 RT 1224. ["[I]n the people's mind, this is substantially an eyewitness identification case. Because if we rely just on the firearm alone without the identification, the court probably wouldn't let it go to the jury"].) The prosecutor's misconduct considered singly and collectively infected the trial with such fundamental unfairness as to deprive appellant of due process. The misconduct also violated appellant's Sixth Amendment confrontation clause and Eighth Amendment reliability requirements, and requires reversal of the judgment.

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IV. THE PROSECUTOR IMPROPERLY VOUCHED FOR THE CREDIBILITY OF THE SOLE EYEWITNESS AGAINST APPELLANT ON THE MURDER CHARGE WHEN HE ELICITED TESTIMONY FROM MARIO RALPH THAT HE HAD INTRODUCED RALPH TO HIS DAUGHTER

A. Procedural and Factual Background

After prosecution witness Mario Ralph testified on direct examination that appellant was the person who had shot him, Phillip Curtis, and Willie Alexander, the following exchange between Ralph and the prosecutor took place:

Q: You and I have talked about this case on several occasions; is that correct?

A: Yes.

Q: Have I ever allowed you to read the reports of any of the interviews you have had with the police?

A: No.

Q: Have I ever allowed you to read your . . . testimony at the preliminary hearing?

A: No.

Q: But you and I have talked about the case?

A: Yes we have.

(4 RT 781.)

During cross-examination, defense counsel followed up on the above questioning by the prosecutor:

Q: Mr. Ralph, yesterday when the district attorney was asking you questions, [he] asked you if you had read any reports or preliminary hearing transcripts in this case, correct?

A: Yes, sir.

Q: And you indicated that you had not; is that correct?

A: Yes, sir.

Q: The district attorney also asked you if you had talked with him on a number of times, correct?

A: Yes, sir.

Q: And you indicated you had, correct?

A: Many times we have talked.

Q: Approximately how many times?

A: Every time I went to court.

Q: And when he talked to you, did he talk to you about your testimony?

A: No.

Q: Did he talk to you about basketball?

A: No.

Q: What did you talk about?

A: Mainly how I was doing. And sometimes I asked him certain things on, you know, what's going on. And I guess like sometimes I told him that I don't want to be here involved in this. I wished at the last testimony I told y'all, the last courtroom, y'all could have taken that and let me live my life. I don't want to be doing this.

Q: You remember testifying in a preliminary hearing?

A: Yes, sir.

Q: You [were] on a witness stand and you remember . . . testifying, the district attorney stopped the testimony, carried you out and talked to you and brought you back and put you on the stand; did that happen?

A: Yes, sir.

(5 RT 805-806.)

On redirect examination, the prosecutor revisited the subject:

Q: "Now you were asked a number of questions about . . . conversations we have had. You have come to court a number of times; is that correct?

A: Yes.

Q: But this is the second time you have actually testified?

A: Yes.

Q: And again, when I say second time, I should probably correct myself, just so the record is correct. You were here yesterday and testified yesterday?

A: Yes.

Q: You testified at the preliminary hearing?

A: Yes.

Q: So this is the second proceeding but this is actually the third time, the third day you have been upon the stand?

A: Yes.

Q: Now each time the case has been set . . . you have come to court and the judge would tell you what day you would have to return; is that correct?

A: Yes.

Q: And I would be there on those occasions; is that correct?

A: Yes.

Q: And we would have general conversations?

A: Yes.

Q: I asked you about your health?

A: Yes.

Q: How work is going, things like that?

A: Yes.

Q: And on one occasion did I introduce you to my daughter?

A: Yes, you did.

(5 RT 824-825.)

At a sidebar, defense counsel moved for a mistrial on the ground that the prosecutor had introduced evidence of his personal relationship with Ralph. (5 RT 826.) The court denied the motion, ruling that the "questions on cross-examination went to the area of conversations between the prosecutor and the witness. He is entitled to go into what the conversations were, whether they were innocent or whether they directed the witness to testify in a certain way." (*Ibid.*) Defense counsel agreed, but argued that evidence of the prosecutor's having introduced Ralph to his daughter had "nothing to do at all with the case." The court responded, "You asked the witness what the subject was. This is part of the subject . . . so he can cover all areas that were discussed." (*Ibid.*) Counsel argued that the disputed evidence had no relevance other than to "bolster this witness's credibility by showing he would go so far as to introduce [Ralph] to his family members."

(5 RT 826-827.) The court responded, "I think you are right in and of itself, that would be improper, but it's an overlap area, and I think he's entitled to, in his effort to rehabilitate the witness, to go into every area that they discussed. Otherwise the area, it's open for, you know, any type of inference by the jury. So the objection is overruled." (5 RT 827.)

The trial court's ruling was error; admission of the improper evidence of vouching violated appellant's rights.

B. The Prosecutor's Eliciting of Evidence That He Had Introduced Ralph To His Own Daughter Was Improper Vouching

Improper vouching generally "involves an attempt to bolster a witness by reference to facts outside the record." (*People v. Huggins* (2006) 38 Cal.4th 175, 206, internal quotations omitted.) Thus, a prosecutor engages in improper vouching by creating the impression that the prosecutor or the government has taken steps, outside the record, to compel, assure, or guarantee a witness's truthfulness at trial. (*People v. Frye* (1998) 18 Cal.4th 894, 971; *United States v. Brown* (9th Cir. 1983) 720 F.2d 1059, 1073-1074.) A prosecutor's misconduct amounts to federal constitutional error when it "so infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070, internal quotations and citation omitted; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.) A prosecutor's misconduct violates state law when it involves "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Donnelly v. DeChristoforo, supra* 416 U.S. at 642, internal quotations and citation omitted.) A prosecutor is prohibited from vouching for the credibility of a witness based on his or her personal experiences or beliefs, or on other evidence outside the record. (*People v.*

Frye, *supra*, 18 Cal.4th at p. 971.)

Moreover, a prosecutor commits misconduct by intentionally eliciting inadmissible testimony (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380), and the prosecutor has a duty to see that his or her witness "volunteers no statement that would be inadmissible and [be] especially careful to guard against statements that would also be prejudicial." (*People v. Schiers* (1971) 19 Cal.App.3d 102, 113, internal quotations omitted.) As such, a prosecutor's questioning of a witness that elicits bolstering or vouching testimony regarding matters otherwise outside the record constitutes misconduct. (*People v. Turner* (2004) 34 Cal.4th 406, 432-433; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 242 [prosecutor's asking a defendant if other witnesses were lying was misconduct].)

In *People v. Turner*, for example, the prosecutor engaged in impermissible vouching for the credibility of his witnesses at trial when he vouched for their honesty during voir dire and opening statements, and he elicited vouching testimony from the experts during the trial. (*People v. Turner*, *supra*, 34 Cal.4th at p. 433.) The prosecutor in that case, who had previously been a defense attorney, asked one of the experts, "[Y]ou know me to have been a defense attorney for a lot of years, right? . . . In fact, I used to consult with you? . . . And you know I have respect for your honesty and integrity, do you not?" The witness answered in the affirmative to all of the questions. (*Id.* at p. 432.) This Court found that the prosecutor had vouched for the credibility of the experts using facts outside the record – mainly his personal relationship with the experts and his prior use of them when he was a defense attorney. (*Id.* at p. 433.)

Here, too, the prosecutor improperly vouched for his witness's character when he elicited from Ralph that Ralph had been introduced to his

daughter. This fact was unrelated to the crimes for which appellant stood trial and referred to matters outside the record regarding the prosecutor's personal relationship with Ralph. Such evidence implied that if Ralph was good enough to be introduced to the prosecutor's own daughter, he must have a certain degree of trustworthiness and good character. It also suggested to the jury that if the prosecutor, who is charged with protecting the public from violent criminals, is willing to introduce his own daughter to Ralph, Ralph must not be the violent person or dangerous gang member the defense implied he was given his drug-dealing with Curtis and Alexander, who were gang members. The evidence also served to counterbalance evidence of Ralph's prior conviction for a drive-by shooting, among other things. In sum, the evidence suggested to the jury that if Ralph was trustworthy enough to be introduced to the prosecutor's own daughter, he was trustworthy enough as the only eyewitness to the events surrounding the murder.

The prosecutor's conduct in this case was so egregious that it infected the trial with such unfairness that it denied appellant federal due process. At the very least, the vouching was a deceptive or reprehensible method employed in an attempt to persuade the jury to accept Ralph's testimony, amounting to a state law violation.

C. The Defense Did Not Open The Door To Evidence That The Prosecutor Introduced Ralph To His Daughter

The trial court erroneously concluded that the prosecutor's question about his daughter was within the scope of the defense's cross-examination of Ralph – that in essence, the defense had opened the door to such questioning. It was the prosecution, however, not the defense, who first elicited evidence that Ralph and the prosecutor had many discussions before

trial. During direct examination, the prosecutor asked Ralph, "You and I have talked about this case on several occasions; is that correct?" Ralph responded, "Yes." (4 RT 781.) Then, after the prosecutor confirmed that he had not provided Ralph with any police reports or preliminary hearing transcripts before trial, he repeated the question, "But you and I have talked about the case?" and Ralph again answered, "Yes we have." (4 RT 781.) Unmistakably, the prosecutor was the first to raise the issue of discussions between him and this witness, and the scope of that issue was limited to discussions "about the case."

When defense counsel followed up on this line of questioning, he asked whether the prosecutor had discussed with Ralph his testimony, and Ralph said, "No." Apparently sensing some recalcitrance in Ralph, defense counsel asked, "Did he talk to you about basketball?" and when Ralph again answered in the negative, counsel asked, "What did you talk about?" Ralph answered, "Mainly how I was doing. And sometimes I asked him certain things on, you know, what's going on. And I guess like sometimes I told him that I don't want to be here involved in this. I wished at the last testimony I told y'all, the last courtroom, y'all could have taken that and let me live my life. I don't want to be doing this." (5 RT 805-806.) Thus, with the exception of the rhetorical question about basketball, defense counsel's questions were within the scope of the prosecutor's initial line of questioning – i.e., what about this case the prosecutor discussed with Ralph. And certainly, Ralph's answers were within that scope as well. According to Ralph, they talked about Ralph's well-being, which was case-related given the injuries he sustained during the events related to his testimony. They also discussed Ralph's questions about what was "going on," (presumably in the case), and they discussed Ralph's reluctance to

testify.

Thus, the court erred when it concluded that the question about the prosecutor's daughter was within the scope of the issues raised by the defense. The defense did ask Ralph what he had discussed with the prosecutor, but this was in response to the *prosecutor's* having elicited that he and Ralph discussed the case many times. Moreover, Ralph's response to the defense's question of what they discussed also was limited to case-related content. The prosecutor's follow-up question about introducing his daughter to Ralph had nothing to do with the subject matter at issue. Nor did defense counsel's question about whether they discussed "basketball" broaden the scope of the inquiry. Ralph simply said "no," to this question, and when asked what they did talk about, he relayed what they had discussed – his health, what was "going on," and Ralph's desire not to testify.

Accordingly, the question about the prosecutor's daughter was not necessary to "rehabilitate" Ralph, as the trial court concluded. (5 RT 827.) Ralph's description of his discussions with the prosecutor was not damaging and needed no rehabilitation. Ralph's statement that he would discuss how he was doing with the prosecutor painted the prosecutor in a humane light and triggered no need for rehabilitation. Ralph's testimony that they discussed his questions about what was "going on" was in no way damaging and in need of rehabilitation. Finally, Ralph's statement that they discussed his not wanting to testify was very favorable to the prosecution, because it suggested that Ralph would rather not have to testify against appellant, and that he had nothing to gain by doing so. Certainly, this statement did not require any rehabilitation.

In sum, the defense did not open the door to the question about the

prosecutor's daughter because the prosecutor was the first to introduce the topic of his discussions with Ralph. Moreover, no rehabilitation of Ralph was needed on that point, and even if it was, the question about the prosecutor's daughter went beyond the scope of defense counsel's cross-examination. As such, the court erred in finding that the question fell within the "overlap area" between improper bolstering and permissible re-direct examination. (5 RT 827.) Once the court agreed with the defense counsel that he was "right" that the evidence "in and of itself . . . would be improper" the court should have found misconduct, and taken measures to address the harm that it caused.

D. The Grant Of A Mistrial Would Have Been The Only Effective Remedy, But If An Admonition Would Have Cured The Harm, A Request From Counsel For An Admonition Would Have Been Futile, And The Court Had A Sua Sponte Duty To Admonish The Jury

This Court reviews a trial court's ruling on a motion for mistrial for abuse of discretion. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128.) A trial court should grant a motion for mistrial when "a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 282, internal quotations omitted.) In other words, a mistrial is warranted if the court "is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) Here, the defense made the necessary showing of prejudice. Counsel argued that a mistrial was required because the prosecutor's question unfairly bolstered Ralph's testimony "by showing [the prosecutor] would go so far as to introduce [Ralph] to his family members." (5 RT 826-827.) The court responded, "I think you are right in and of itself, that would be improper . . . ." (5 RT 827.) Thus, the court agreed

that the evidence tended to bolster Ralph's testimony, though it erroneously concluded that the evidence was nonetheless admissible because the defense had invited the prosecution's question.

Had the court correctly found that the prosecutor committed misconduct, it likewise should have granted a mistrial, because an admonition would not have cured the harm. An instruction to the jury to disregard evidence that the prosecutor introduced Ralph to his daughter would have only repeated and highlighted the vouching testimony. The jurors could not "unlearn" the fact that the prosecutor had introduced Ralph to his daughter, and any admonition that they disregard such evidence would have merely repeated, and therefore emphasized, the evidence. In effect, the evidence was the proverbial bell that could not be unrung, given the importance of this particular witness. (*People v. Hill* (1998) 17 Cal.4th 800, 845-846.)

Indeed, the trial court itself had previously recognized that the prosecution's case hinged on Ralph's testimony; after the direct examination of Ralph and over the prosecutor's objection, the court let defense counsel start cross-examination of Ralph the following morning, explaining, "If this weren't such an important witness . . . I would feel otherwise about it. I think it is important that he gets his full shot." (4 RT 782-783.) Thus, the court recognized how crucial Ralph's testimony was to the determination of appellant's guilt or innocence. Had the court found error, mistrial would have been the only appropriate remedy under these particular circumstances.

But the court made no finding on whether mistrial was the appropriate remedy, because it found that no misconduct occurred. As such, any request by counsel for an admonition at that point would have

been futile; the court was not about to admonish the jury to disregard testimony that it expressly ruled admissible. And in any event, when counsel moved for a mistrial, he informed the court of prejudice he deemed incurable; in ruling on the mistrial motion, the court had a duty to decide whether the prejudice could be cured "by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) It was therefore incumbent on the court to provide any necessary admonition.

E. Appellant Was Prejudiced By The Prosecutor's Unfair Bolstering Of The Sole Eye Witness Against Him On The Murder Charges

Ralph was the only eyewitness to the shooting incident during which Curtis was killed, and Ralph himself was a shooter during that incident. As such, Ralph's testimony that appellant killed Curtis was crucial to the prosecution's case against appellant, and the prosecutor's vouching for Ralph's testimony unfairly impacted the verdict. Without Ralph's testimony inculpating appellant, the case against appellant was thin, at best.

Although criminalist Dale Higashi testified that the .32 caliber bullets found in the crack house had been fired from the revolver found in the apartment where appellant was arrested, the revolver was not found on appellant's person; rather it was under a couch cushion, making its connection to appellant less certain. (6 RT 1027-1028.) Nor was any guilt phase evidence presented to show that appellant had any relationship to the apartment where the gun was found, other than that he was arrested there.

Furthermore, Higashi testified that the recovered .32 caliber bullets were actually designed for use in a semi-automatic weapon, not a revolver. (5 RT 948.) And even though Higashi stated that a .32 caliber bullet could be fired from a revolver, the fact that the bullets were not designed for that purpose may have caused at least one juror to doubt Higashi's conclusion

that the bullets were fired from the revolver. Moreover, although Higashi testified that the revolver had also fired the "bullet" found at Martin and Priest's apartment (5 RT 952), Officer Collazo testified that he had recovered only a bullet *fragment* there. (RT 1003.) Again, this inconsistency could have caused at least one juror to question the reliability of Higashi's conclusions. Additionally, as defense counsel argued to the jury, Higashi provided little to no factual basis for his conclusions. (7 RT 1383.)

Furthermore, the evidence also tended to show that a fifth person, who was also an alleged shooter, was likely in the Williams Street crack house during the shootout that resulted in Curtis's death. (7 RT 1365-1366, 1388, 1390.)

Thus, Ralph's eyewitness testimony inculpating appellant as the lethal shooter during the crack house shoot-out was the linchpin of the prosecutor's case on Counts 5, 6 and 7. Indeed, the trial court recognized the importance of Ralph's testimony to the prosecution's case when it described Ralph as "such an important witness." (4 RT 782-783.) Indeed, both the prosecution and the defense dedicated a significant portion of their closing arguments to discussing Ralph's testimony and his credibility. (7 RT 1331-1335, 1357 [prosecution]; 7 RT 1361, 1364, 1366-1378, 1388, 1390 [defense]; 7 RT 1393, 1395-1396, 1397, 1398-1399, 1400, 1403-1404, 1406 [prosecution].)

Without a doubt, Ralph's testimony was crucial to the prosecution's case, and as such, any vouching for or bolstering of this witness's testimony unfairly tipped the scale toward the prosecution. Ralph suffered from significant credibility and character issues, not the least of which was his previous involvement in a drive-by shooting. The prosecutor impermissibly

quelled the jurors' likely distrust of Ralph by eliciting evidence that he had introduced Ralph to his own daughter. In so doing, he unfairly vouched for and bolstered Ralph's testimony, on which the entire murder case relied.

The misconduct therefore prejudiced appellant under either the federal or state standards for prejudice. Had the jury not heard the prosecutor's improper vouching for Ralph's character and credibility, a reasonable probability exists that at least one juror would have rejected Ralph's testimony, and refused to convict appellant of Counts 5, 6, and 7. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) For the same reasons, the error was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18.) Reversal is therefore required.

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V. THE ERRONEOUS ADMISSION OF TESTIMONY ABOUT NEGATIVE FINGERPRINT EVIDENCE BOLSTERED THE PROSECUTION'S CASE AND DENIED APPELLANT A FAIR TRIAL

At the close of its case in chief, the prosecution sought to introduce the testimony of a "negative fingerprint" expert. (7 RT 1244.) As the prosecutor explained in his proffer, this testimony was offered to counter the common story line on television shows like C.S.I. that inculpatory evidence is always recovered from crime scenes, and explain that identifiable latent fingerprints are not readily recovered from crime scenes. (7 RT 1258.) Prior to this testimony, there had been no evidence introduced regarding fingerprints – indeed there had been no mention of fingerprints. Defense counsel objected, pointing out that the proffered testimony was irrelevant to the evidence received in the case. (*Ibid.*) The court ruled that the evidence was admissible, reasoning that the prosecution should be allowed to "shut down any areas of concern by the jurors." (7 RT 1259.) The trial court's ruling was erroneous and admission of the evidence violated appellant's right to a fair trial.

A. Procedural And Factual Background

As its final witness in the case-in-chief, the prosecution called Peter Kergil, a forensic identification specialist for the Los Angeles Sheriff's Department. (7 RT 1244, 1256.) Offered by the prosecution as an expert in "negative fingerprints" (7 RT 1258), Kergil explained his extensive training and experience in latent fingerprint collection, processing and analysis. (7 RT 1256-1258.) Upon hearing Kergil's testimony that he did no work on this case and did not know the facts of the case (7 RT 1257), counsel objected to the testimony:

Mr. Coleman: Your Honor, I object to the testimony of

this witness based on relevancy. This witness has testified he did no work at all on this case. And I don't know if there has been any fingerprint evidence. There has been nothing introduced in regard to fingerprint evidence in this case, and I would ask that his testimony be excluded.

The Court: Mr. Monaghan?

Mr. Monaghan: Judge, I put a negative fingerprint expert on in every case I try. You read the jury questionnaires and you look at the TV programs the jurors watch. And some of the favorites are C.S.I., Law and Order. Shows such as that where fingerprints are being lifted on any substance all the time. That is just not the reality at all.

His testimony is very brief. Mr. Kergil will testify that prints are lifted off a firearm approximately 9 to 10 percent of the time. That in his experience it is extremely unusual to get a fingerprint off a casing or a bullet.

He will explain briefly why in fact – I don't believe he has ever lifted one off a casing in all the years he has worked.

The first thing that will happen when they go back to jury deliberation, Judge, is the jurors will start talking about fingerprint evidence. Even though neither of us mentioned the word, we did get into GSR the other day, and they will say "If Mr. Wright was in that apartment, they would have put evidence on his fingerprints were on the gun." That is

my experience in trying cases.

The Court: Mr. Coleman?

Mr. Coleman: I will submit it, your honor.

The Court: I am going to overrule the objection. The people are required to prove it beyond a reasonable doubt. And if they want to shut down any doors of concern by the jurors, I think that is fine.

Also it seems to me, that if anybody is going to argue fingerprints, that this gives them basis in fact to do that.

(7 RT 1258-1259.)

Testifying as a "negative fingerprint expert," Kergil informed the jury that identifiable latent prints are recovered from evidence approximately 30% of the time. (7 RT 1260.) Kergil explained the difficulties in collecting identifiable latent prints, as well as the factors that might prevent the collection of any latent prints at all. (7 RT 1260-1262.) He testified that studies have established that latent prints are recovered from firearms only eight to ten percent of the time, and explained the particular characteristics of firearms that make it difficult to recover latent prints. (7 RT 12363.) Finally, Kergil testified that although he had processed "a lot" of casings, he had only recovered a very minimal number of latent prints from any casings. (7 RT 1265.) Finally, the prosecutor, while standing at the podium, posed the following hypothetical:

Q: If you were to print this podium and you lifted my print, then you could say for sure that at some point in time I had touched this podium, would that be a fair statement?

A: Yes.

Q: But simply because you printed this podium and didn't lift my print, that doesn't mean I never touched it, does it?

A: No, it does not.

(7 RT 1266.)

No testimony was received at any point during appellant's trial of any attempts to recover latent prints from any evidence introduced or referenced in appellant's trial.

B. The Proffered Negative Fingerprint Evidence Was Irrelevant

Like all evidence, an expert's testimony must address some disputed fact. Evidence Code section 210 makes this requirement clear: "relevant evidence" must have a "tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action." To be relevant, there must be an "evidentiary link" based on the particular facts of the case between the proffered evidence and an issue at trial. (*People v. Champion* (1995) 9 Cal.4th 879, 921, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.) Expert testimony is subject to the same relevance analysis: "[C]learly, the admissibility of expert testimony on a given subject must turn both on the nature of the particular evidence and its relation to a question actually at issue in the case." (*People v. Bledsoe* (1984) 36 Cal.3d 236, 246.)

In *People v. McAlpin* (1991) 53 Cal.3d 1289, this Court explained that expert testimony that explains how survivors of trauma may recant, delay reporting, or otherwise engage in conduct that appears counterintuitive to a juror is relevant when offered to rehabilitate the

testimony of a witness. (*Id.* at p. 1302.) A corollary to this rule is that such evidence is irrelevant if it is not "targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394 [trial court erred in admitting the expert testimony of a psychologist on the Child Sexual Abuse Accommodation Syndrome (CSAAS), in the absence of a proper foundational showing of need to rebut popular misconceptions undermining the victims' credibility].) The danger addressed by *Bowker*, *Bledsoe* and *McAlpin* is that in the absence of the proper foundational showing, the expert testimony, instead of being used to explain a perceived, but arguably inaccurate deficiency in the prosecution's case, will be improperly relied upon by the jury to prove the existence of a fact.

That is precisely what happened in the instant case. Prior to the testimony of the negative fingerprint expert, the absence of fingerprints was not an issue before the jury. Because nothing in the defense case suggested to the jury that the absence of fingerprints constituted a deficiency in the prosecution's case, the expert testimony was irrelevant. Admission of expert testimony that has an insufficient evidentiary link to the facts of the case does little more than provide the jury a basis to speculate, and should be excluded. (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1335 [expert's testimony that explained nystagmus generally but failed to address the evidence before the jury was irrelevant and should have been excluded].) Here, admission of the "negative fingerprint" testimony encouraged the jury to speculate that there *was* evidence that connected appellant to the crime scene, but the limitations of latent fingerprint analysis prevented the jury from learning of this inculpatory evidence.

The prosecutor's concern that the jury might improperly consider the

absence of fingerprint evidence in its deliberations was amply addressed by standard jury instructions which admonish the jurors that they must "determine what facts have been proved from the evidence received in the trial and not from any other source" (CALJIC 1.00; 7 CT 1941), and did not justify the admission of irrelevant and prejudicial evidence.

C. The Introduction Of The Irrelevant Evidence Denied Appellant A Fair Trial And Requires Reversal

The improper admission of the negative fingerprint evidence violated standards of California law and denied appellant his rights to due process of law under both the federal and state constitutions. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15; *People v. Partida* (2005) 37 Cal.4th 428, 439.) The trial court's erroneous rulings admitting this evidence also denied appellant his state and federal constitutional rights to a fundamentally fair trial and a reliable judgment of death. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

The United States Supreme Court has recognized that due process can be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (per curiam).) Here, the prosecution was allowed to bolster its weak evidentiary case by introducing irrelevant and speculative evidence that was not linked to any issue in the case. Admission of the evidence rendered appellant's trial fundamentally unfair and violated his right to due process.

Appellant was also deprived of the state-created protections of Evidence Code sections 210, 350, and 352, and, as a result, was subsequently deprived of his right to reliable fact-finding in a capital case

under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333.) The inclusion of the irrelevant and speculative evidence distorted the fact-finding process to such an extent that the resulting verdict could not have possibly possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The due process violation requires that appellant's conviction and death verdict be reversed unless respondent can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 403.) Even if introduction of the negative fingerprint evidence is state law error only, the conviction must be reversed because there is a reasonable probability that a more favorable result would have been reached in the absence of the admission of this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The linchpin of the prosecution's case was eyewitness testimony that was internally contradictory, all from admitted drug dealers with prior felony convictions. To convict appellant of murder and robbery, the prosecutor had to persuade the jury to accept the dubious testimony of the eyewitnesses – evidence that the prosecution knew was weak. The weakness of the identification evidence was heightened by the underlying unexplained oddity of each of the witnesses' failure to identify appellant as their attacker until they "recognized" him subsequent to his arrest on an unrelated charge, despite the fact that each witness admitted to having known appellant for weeks or months prior to the attack, and specifically knowing appellant's name, address and street moniker. The only other

evidence linking appellant to the crime was ballistics evidence that the prosecutor conceded did not actually link appellant to the crime. (6 RT 1224. ["[I]n the people's mind, this is substantially an eyewitness identification case. Because if we rely just on the firearm alone without the identification, the court probably wouldn't let it go to the jury."]) The irrelevant expert testimony distracted the jurors from the weakness of the prosecution's case, and encouraged them to speculate that the absence of fingerprint evidence somehow proved the prosecution's case. The admission of this testimony lightened the prosecutor's burden because it allowed the jurors to speculate that there was evidence connecting appellant to the evidence recovered at the crime scenes that just couldn't be discerned though the use of latent fingerprint analysis. The trial court's ruling was based on the prosecution's having the burden of proof beyond a reasonable doubt, but this evidence lightened that burden in violation of *In re Winship* (1970) 397 U.S. 358.

Accordingly, both the guilt convictions, special circumstances and death judgment must be reversed.

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VI. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING CIRCUMSTANTIAL EVIDENCE VIOLATED STATE LAW, AS WELL AS APPELLANT'S RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND A RELIABLE DETERMINATION OF HIS GUILT OF A CAPITAL OFFENSE, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Procedural Background

During the discussion between the court and counsel regarding jury instructions, the court raised the issue of whether it should instruct with CALJIC No. 2.01, "Sufficiency of Circumstantial Evidence-Generally." The court noted that its prior practice had been to give both Nos. 2.01 and 2.02, "Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State," but that recent case law had said this was error, and that only one or the other should be given. (6 RT 1222.) The court explained that it had left CALJIC No. 2.01 in the instruction packet because it "thought there was quite a bit of circumstantial evidence. Specifically . . . the recovery of the gun and the bullets that were found at various locations and the decedent's body, according to the expert, matching the gun that it was fired from." (6 RT 1222.) The court added, "That and also assuming that they accept Mr. Priest's testimony, essentially he said he saw, he heard the defendant. And from that, circumstantially, he decided that it was the defendant, although he glimpsed at something from the back of the sides. All that I think is circumstantial evidence, but I'm open to argument." (6 RT 1222.)

The prosecutor argued that he was not substantially relying on circumstantial evidence, and that he did not want CALJIC No. 2.01 given. Defense counsel asked the court to give the instruction. (6 RT 1223.) The

prosecutor said that the case was not a circumstantial evidence case but rather was an eyewitness identification case. He agreed, however, that "the firearm evidence certainly is an important part of the People's case." (6 RT 1223-1224.) The prosecutor argued that CALJIC No. 2.01 would conflict with CALJIC No. 2.91 regarding eyewitness identification. (6 RT 1223.)

The court said that it was "on the fence" about whether to give the instruction, and had no strong opinion one way or the other. After taking the matter under submission, the court ultimately concluded that the circumstantial evidence was "tangential or corroborative," and that the case was really about whether the jury could believe the eyewitnesses. The court also agreed with the prosecutor that the instruction was inconsistent with the eyewitness identification instruction CALJIC No. 2.91. (6 RT 1232-1233.) Thus, the court decided to give CALJIC No. 2.02 rather than CALJIC No. 2.01. (6 RT 1233.)

B. Applicable Law

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt "standard plays a vital role in the American scheme of criminal procedure." (*In re Winship*, *supra*, at p. 363.) It gives substance to the presumption of innocence (*ibid.*), and lies at the heart of trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]).

Where circumstantial evidence is reasonably susceptible of two interpretations, one of which favors guilt and the other favors innocence,

the proof beyond a reasonable doubt and presumption of innocence standard requires jurors to apply the latter interpretation. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933; *People v. Wiley* (1976) 18 Cal.3d 162, 174-175; *People v. Gould* (1960) 54 Cal.2d 621, 629; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 549; see also 3 Witkin Cal. Evid.4th (2000) Presentation, §142, p. 202.)

As such, a court must give CALJIC No. 2.01 sua sponte in cases where the prosecution has "substantially relie[d]" on circumstantial evidence for proof of guilt.[21] (*People v. Rogers* (2006) 39 Cal.4th 826,

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[21]CALJIC No. 2.01 provides:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.
>
> If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other

(continued...)

885.) "Conversely, the instruction need not be given when circumstantial evidence is merely incidental to and corroborative of direct evidence, due to the 'danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 676.) The court should give the instruction, however, unless "the problem of inferring guilt from a pattern of incriminating circumstances is not present." (*People v. Rogers*, *supra*, 39 Cal.4th at p. 885.)

Moreover, in capital cases, the need for careful guidance in assessing evidence is particularly acute given the "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; see also *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase verdicts in capital cases require heightened reliability].) As the Supreme Court has emphasized, in a capital case, "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Appellant acknowledges that this Court held in *People v. McKinnon*, *supra,* 52 Cal.4th at p. 676, that there is no federal constitutional violation for failure to give a circumstantial evidence instruction when a reasonable doubt instruction is given, following *Holland v. United States* (1954) 348 US 121, 140, but submits that the omission of the instruction in the instant case does implicate appellant's federal constitutional rights.

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[21](...continued)
interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

C. The Instruction Was Necessary For The Jury To Decide Count 1 Because The Evidence On That Count Was Entirely Or Predominantly Circumstantial

Martin testified that after the robbery, appellant told him to lay down and not look up. About a half minute after he lay down, Martin heard a gun shot, and immediately blacked out. (6 RT 1131-1132, 1143-1145.) Martin did not see who shot him, but assumed that the shot was fired from outside the front door of the apartment. (6 RT 1145, 1148.) Also, although he did not see who shot him, he identified appellant a month later from a photo lineup as the person who shot him. (6 RT 1135.)

Priest also did not see who shot Martin. He was sleeping "face down" on the living room floor after a day of heavy drinking when he heard a person he later identified as appellant speaking to Martin. (5 RT 863, 888, 895, 6 RT 993.) Priest heard the man say he was not "bullshitting" and then felt himself stabbed. (5 RT 864-865.) About two or three minutes later, he heard gun shots. (5 RT 889.) After the gunshots, he heard the front door open. (5 RT 864, 884.) Although he initially said that he actually saw the man leaving the apartment after the shooting (5 RT 865, 884), he agreed that he had previously testified that he did not see who had entered or exited the apartment. (5 RT 894-895.) He clarified that he saw only a silhouette leaving the apartment, but that he recognized appellant's voice as the person who had been speaking with Martin. (5 RT 884, 889.) Even if the person Priest saw was appellant, however, Priest unambiguously testified, "I didn't see the shooting. I did not see the shooting." (5 RT 900.) Nonetheless, Priest identified appellant a month later from a photo lineup as the person who shot Martin. (5 RT 880.)

In light of Priest's and Martin's testimony, the jury had to infer guilt

from a pattern of incriminating circumstances as follows: Martin heard a shot but did not see who shot him, and Priest only heard the gunshots; no one witnessed the shooting. The shooter must have been appellant because appellant was at the apartment to rob, appellant had assaulted Priest, appellant had told Martin to lay down before the gunshots, and a silhouette was seen leaving the apartment thereafter. Thus, although some direct evidence linked appellant to the apartment and the assault on Priest (i.e., Martin's testimony that appellant stabbed Priest), the jury had to rely on circumstantial evidence to find that appellant was the person who shot Martin.

Moreover, although Martin identified appellant as the person who shot him, he too arrived at this conclusion by circumstantial evidence, because he never saw the shot and blacked out immediately thereafter. Thus, although the prosecution's case relied on"eyewitness identification," the evidence was circumstantial, not direct evidence as the prosecutor claimed. Because it is undisputed that Martin did not see the shooter, his identification of appellant as the shooter relies on a series of inferences. The instant case is distinguishable from those in which the witness saw the crime, saw who did it, and the only question was whether the witness had identified the right person. In that situation, the case would be a direct evidence case where circumstantial evidence of the defendant's crimes merely corroborates the identification. (See, e.g., *People v. Williams* (1984) 162 Cal.App.3d 869, 872-876 [CALJIC No. 2.01 not required where accomplice testified that appellant committed crime with him and circumstantial evidence merely corroborated that direct evidence].) Nor was there any other direct evidence, such as a confession. (See, e.g., *People v. Wright* (1990) 52 Cal.3d 367, 406 [instruction not warranted where

circumstantial evidence corroborated the direct evidence of defendant's confession]; *People v. McKinnon*, *supra*, 52 Cal.4th at p. 676 [same].)

Here, where neither witness saw the shooting and the identification of appellant was necessarily based on *circumstantial* evidence perceived by the victim, the identification itself was likewise circumstantial evidence. Moreover, the prosecution also relied on a significant amount of other circumstantial evidence – namely the gun possession and ballistics evidence. By no means was the prosecution's case on Count 1 comprised "wholly or largely of direct evidence of the crime." (*People v. McKinnon*, *supra*, 52 Cal.4th at p.676.) The reverse was true; the case was built primarily on circumstantial evidence, and as such, a sua sponte instruction on CALJIC No. 2.01 was required. (See, e.g., *People v. Rogers*, *supra*, 39 Cal.4th at p. 885 [instruction required in case involving murder of prostitute where the only evidence of guilt was defendant's confession to the killing a different prostitute, and his possession of the gun that killed both women].)

Even if the identification of appellant as the shooter or the identification of appellant as the person in the apartment could be considered direct evidence that appellant shot Martin, the evidence was very weak, given that, again, neither Priest nor Martin saw appellant shoot Martin. And in any event, despite the fact that they claimed they knew appellant and therefore knew he was the assailant, they did not identify appellant until a month after the events at issue. Moreover, Priest was by all accounts passed out drunk on the floor when the events unfolded.

As such, the prosecution relied heavily on evidence that a month after the incident, appellant was found in possession of the gun that fired the shots at Martin. Thus, this was not a case where the court had no duty to instruct under CALJIC No. 2.01 because the circumstantial evidence was

merely "incidental to and corroborative of the direct evidence." (*People v. McKinnon*, *supra*, 52 Cal.4th at p.676.) Even if the firearm evidence could be seen as "corroborative" of the shaky testimony given by Martin and Priest, it was by no means "incidental" to that testimony. Indeed, even the prosecutor agreed that "the firearm evidence certainly is an important part of the People's case." (6 RT 1223-1224.) During closing argument, after discussing the many problems with the eyewitnesses, the prosecutor argued that the gun possession and ballistics evidence was "very strong" evidence corroborating the eyewitness testimony. (7 RT 1337.) As such, even if the gun possession and ballistics evidence was corroborative, it was not "merely" so, and it certainly was not "incidental." The prosecutor needed that evidence to convict appellant of the attempted murder of Martin and therefore "substantially relied" on that evidence, requiring an instruction on CALJIC No. 2.01.

D. The Instruction Was Necessary For The Jury To Decide Count 3 Because Although The Prosecution Presented *Some* Direct Evidence On That Count, It Nonetheless Substantially Relied On Circumstantial Evidence

Regarding Count 3, the direct evidence that appellant stabbed Priest was problematic for the prosecution, to say the least. Martin and Priest, who were drug dealers (5 RT 866, 888; 6 RT 1127), contradicted each other significantly as they each testified to the events, which cast doubt on the veracity of their statements.

For example, Martin testified that after he heard the gun shot, he blacked out. (6 RT 1131). When he regained consciousness, he walked over to Priest, who had remained lying asleep on the floor after being stabbed by appellant. (6 RT 1142.) Martin woke Priest up, and then called the police. (6 RT 1133,1147.) According to Priest, who had essentially

passed out from drinking, he was awake from the time that appellant entered the apartment, but remained lying on the floor and listening to the conversation, even after he had been stabbed. (5 RT 888.) Priest claimed that after he saw the silhouette leave the apartment, he got up, checked on Martin, and *he* then called 911. (5 RT 868, 892, 906.)

Officer Seminara testified that Priest told him that on the night of February 17, he fell asleep on the living room floor and was awakened by the sound of gunshots. (6 RT 1176-1177.) Priest told Seminara that he had no idea how he had been stabbed. (6 RT 1177.) Moreover, Priest told Officer Assef that on the night in question he was asleep on the floor and was awakened by what sounded like two gunshots, then felt a sharp pain in his back. Believing he had been shot, he remained face down on the floor until the police arrived. (6 RT 1211.) According to Seminara, Priest insisted that when he awoke, the suspect had already fled. (6 RT 1177.)

Nonetheless, Priest testified that he had always known that appellant was the person who stabbed him and shot Martin, but he never told the police anything about appellant being his assailant. (5 RT 894, 897.) As for Martin, he told an officer that he had known his assailant for about a year, and that the assailant was a Crip gang member, who went by the name "Mad." (6 RT 1182, 1184.) Martin never told the officer where appellant lived. (6 RT 1185.) But both Priest and Martin testified that from the time of the incident they knew the assailant and they knew where he lived. (5 RT 865-866, 883, 893-894.) Until they saw appellant on television a month later, however, they never identified appellant or told the Long Beach Police Department where he could be found. (5 RT 893-894; 6 RT 1139.) This was true despite the fact that Martin had been to appellant's apartment in the past. (6 RT 1139.) Despite knowing the exact location where his

purported shooter lived, Martin told the police the suspect lived "around the corner somewhere." (6 RT 1139-1140.)

Given the significant credibility problems with Martin and Priest, the prosecution needed the circumstantial ballistics evidence to connect appellant to the Chestnut Avenue apartment and to the crimes against Martin and Priest. Again, the prosecutor acknowledged how important that evidence was to his case, and he used that evidence to compensate for the significant credibility problems raised by Martin's and Priest's testimony. (6 RT 1223-1224.) As such, the circumstantial evidence in this case was not merely "incidental to and corroborative of the direct evidence." (*People v. McKinnon*, *supra*, 52 Cal.4th at p.676.)

E. The Instruction Was Necessary For The Jury To Decide Counts 5 and 6 Because The Evidence On Those Counts Was Almost All Circumstantial

A guilty verdict on the murder of Curtis (Count 6) and the shooting of Alexander (and the attached enhancements) (Count 5) also required the jury to infer guilt from a pattern of circumstances. Instruction with CALJIC No. 2.01 was therefore required on those counts. Ralph testified that after appellant knocked on the door of the crack house where Ralph was sleeping, Ralph heard him say, "[W]here is the dope at?" (4 RT 759.) The next thing Ralph heard was a gunshot, followed by one or two more gunshots. (4 RT 763.) As Ralph walked into the room where the shooting took place, he saw that both Alexander and Curtis had been shot. (4 RT 764.) Appellant was standing in the middle of the room when Ralph entered. (5 RT 796, 840.) Thus, Ralph's identification of appellant as the shooter was based entirely on circumstantial evidence, i.e., because appellant was the person in the room where Curtis and Alexander were shot, he must have been the person who shot them. Because Ralph did not

actually see who shot Alexander and Curtis, and concluded that appellant was the shooter based on circumstantial evidence he perceived, his identification of appellant as the shooter was itself circumstantial evidence. Thus, as with Martin's and Priest's testimony discussed above, Ralph's testimony was not direct evidence of the shooting of Curtis and Alexander.

As for Alexander, he testified that he had never seen appellant before, and appellant was *not* the person who shot him. (6 RT 1049.) He identified appellant's photo as the shooter during a photo lineup, but only because Ralph told him who to pick. (6 RT 1064, 1066, 1068-1069.) Detective Guenther said that when he showed Alexander the lineup, Alexander stared at number 3, and said that "looks like" the person who shot him, Curtis and Ralph. (6 RT 1204.) Guenther did not say that Alexander said the person in the picture *was* the person who had shot the men, only that he looked like the person. (6 RT 1204.) As such, the jury had to infer that because the photo of appellant "looked like" the person who did the shooting, appellant must have in fact *been* the person who did the shooting.

Thus, all of the testimony on Counts 5 and 6 presented circumstantial evidence from which the jury had to infer guilt from a pattern of incriminating circumstances. Instruction on CALJIC No. 2.01 was therefore required.

Moreover, as discussed above in subsection C, even if the identifications of appellant as the shooter of Alexander and Curtis could be considered direct evidence that appellant shot those men, that evidence was very weak, given that Ralph did not see the shooting, and Alexander testified at trial that appellant was *not* the shooter. Thus, the firearm and ballistics evidence was not merely "incidental to and corroborative of the

direct evidence." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 676.) The prosecutor categorized that evidence as very important to his case, and he used that evidence to compensate for the significant credibility problems that Ralph and Alexander posed. (6 RT 1223-1224; 7 RT 1337.) The circumstantial evidence went beyond mere corroboration, and it was not merely incidental to the shaky testimony of the prosecution's witnesses. As such, the prosecutor "substantially relied" on that evidence to convict appellant of the murder of Curtis and attempted murder of Alexander, and the court had a sua sponte duty to instruct with CALJIC No. 2.01.

F. The Failure To Instruct On The Sufficiency Of Circumstantial Evidence Prejudiced Appellant

Due to the absence of direct evidence and/or the weakness of such evidence against appellant, the failure to instruct on CALJIC No. 2.01 was prejudicial. Among other things, the jury was not informed that if the "circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, [it] must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt." This was crucial given the uncertain nature of the gun possession and ballistics evidence. Although Higashi testified that the .32 caliber bullets found in the crack house had been fired from the revolver found in the apartment where appellant was arrested, the gun was not found on appellant's person; rather it was under a couch cushion, making its connection to appellant speculative. (6 RT 1027-1028.) Nor was any guilt phase evidence presented to show that appellant had any relationship to the apartment where the gun was found, other than that he was arrested there. Thus, one reasonable interpretation of that evidence was that the gun was

not appellant's, and he did not necessarily possess it during the events in question. This is especially true since the gun was found about a month after the events at issue. Because this interpretation pointed toward innocence, had the jurors been properly instructed, they would not have considered the evidence as part of the prosecution's case against appellant. Without that evidence, the jury was left with the wildly divergent accounts of the events offered by drug dealers Martin and Priest as it related to Counts 1 and 2; at least one juror could have concluded that such shaky evidence did not prove appellant's guilt beyond a reasonable doubt.

Likewise, the case against appellant on Counts 5 and 6 was weak at best without the gun and ballistics evidence. Alexander said appellant was *not* the shooter and Ralph did not see the shooting of Curtis and Alexander. Moreover, Ralph had also told the police that more than one suspect was present during the events; he said that some "smokers from Duroc" had "done this," (6 RT 1170, 1172), and evidence suggested that a fifth person in the Williams Street house was the shooter (7 RT 1365-1366, 1388, 1390).

Thus, at least one juror could have concluded that the prosecution did not prove appellant's guilt beyond a reasonable doubt on those counts. As such, the error was not harmless beyond reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18), and a reasonable probability exists that the outcome at trial would have been different (*People v. Watson* (1956) 46 Cal.2d 818, 836).

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VII. THE INSTRUCTION TO THE JURY THAT THE DEGREE OF WITNESS CERTAINTY IN HIS IDENTIFICATION POSITIVELY CORRELATES TO THE RELIABILITY OF THE IDENTIFICATION RESULTED IN AN UNRELIABLE VERDICT AND REQUIRES REVERSAL OF THE GUILT PHASE CONVICTION

The trial court instructed the jury with CALJIC No. 2.92 "Factors to Consider in Proving Identity by Eyewitness Testimony," which provides in relevant part:

> In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of defendant, including but not limited to, any of the following: [¶] . . . [¶] The extent to which the witness is either certain or uncertain of the identification.

(7 CT 1950.)

This instruction violated appellant's right to due process and a fair trial by erroneously informing the jurors that the degree of certainty claimed by an eyewitness *at trial* was a relevant factor to consider in assessing the accuracy of that eyewitness identification testimony. CALJIC No. 2.92 is based, in part, on an erroneous interpretation of United States Supreme Court law establishing that a witness's level of certainty demonstrated at the initial *confrontation* (identification procedure) is a relevant factor for the trial court to consider in determining the admissibility of evidence. (*Neil v. Biggers* (1972) 409 U.S. 188.) The reasoning and analysis underlying *Neil* is plainly inapplicable to a witness's testimony and presentation at trial. Furthermore, the proposition in CALJIC No. 2.92 that the level of witness certainty *at trial* is an indication of accuracy lacks scientific support and is factually erroneous. This instruction to the jury to rely on an irrelevant factor in its evaluation of the eyewitness testimony allowed appellant to be convicted upon proof of less than beyond a reasonable doubt, and violated

appellant's due process rights. (*In re Winship* (1970) 397 US 358, 363, 364.)

This instruction directs the jury to consider an irrelevant factor, as the certainty expressed by a witness at trial is not rationally related to the accuracy of the identification. Under the facts of this case in particular, where each of the eyewitness identification witnesses had numerous pressures on them to "perform" at trial, given their extensive history of criminal conduct and their desire to please the prosecution to avoid criminal liability, such an instruction permitted the jury to rely on the witness's presentation at trial to determine the reliability of the prior identification. Further, the misinstruction violated the due process clause of the Fourteenth Amendment by presenting the jury with an unconstitutional permissive inference that allowed the jury to convict upon proof less than beyond a reasonable doubt. Whether viewed as state law or federal constitutional error, the erroneous instruction was prejudicial and requires reversal of the judgment.

A. CALJIC No. 2.92 Incorrectly Expresses The "Certainty" Factor From *Neil v. Biggers*

In *Neil v. Biggers*, *supra*, 409 U.S. 188, the United States Supreme Court considered whether the initial out-of-court confrontation (show-up) between a crime victim and a single suspect violated the defendant's due process rights. The *Neil* court enumerated the factors to be considered by a trial judge in assessing whether an identification procedure was sufficiently reliable so that evidence was admissible under the Constitution. The court indicated that under the "totality of the circumstances test,"

> the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the

> accuracy of the witness' prior description of the criminal, *the level of certainty demonstrated by the witness at the confrontation,* and the length of time between the crime and the confrontation.

(*Neil v. Biggers, supra,* at pp. 199-200; italics added.) The "certainty" referred to in *Biggers* is therefore that degree of confidence that a witness expresses at the initial confrontation (lineup or one-person show-up) between the witness and the suspect, not the level of confidence expressed by the witness at trial.

Further, numerous courts, including this Court, have judicially confirmed what common sense teaches, i.e., that the level of certainty demonstrated by a witness after several pre-trial identification procedures and under the conditions of trial may have very little to do with the actual recollection of the witness and a great deal to do with the suggestive features of the trial environment and of the established tendency of witnesses to defend their prior assertions of identity, whether accurate or not. (See, e.g., *Simmons v. United States* (1968) 390 U.S. 377, 383-384 [eyewitnesses exposed to picture of accused retain image of photo rather than person actually seen, reducing trustworthiness of subsequent identifications]; *Perry v. New Hampshire* (2012) __ U.S. __, __ [132 S.Ct. 716, 732] (dis. opn. of Sotomayor, J.) ["[a]n eyewitness who has made an identification often becomes convinced of its accuracy" even if derived from suggestive circumstances, and is uniquely resistant to the "ordinary tests of the adversary process"]; *People v. Bustamante* (1981) 30 Cal.3d 88, 98, abrogation on other grounds recognized in *People v. Johnson* (1992) 3 Cal.4th 1183, 1222-1223 [once identifications are made, witness' decisions may well become irreparable, even if erroneous]; *People v. Gould* (1960) 54 Cal.2d 621, overruled on another ground in *People v. Cuevas* (1995) 12

Cal.4th 252, 257 [identification made in court after suggestions of others and circumstances of trial may intervene to create a fancied recognition in the witness' mind].)

In *Perry v. New Hampshire*, *supra*, 132 S.Ct. 716, the United States Supreme Court's most recent decision on eyewitness identification, the American Psychological Association filed a brief as amicus curia. The Association told the Justices:

> In *Biggers* and *Manson*, this Court enumerated five factors relevant to the probable accuracy of an eyewitness identification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson* [*v. Brathwaite* (1977)] 432 U.S. [98,] 114 (citing *Biggers*, 409 U.S. at 199-200). As shown by the discussion in the text, most of these factors are indeed relevant to probable accuracy – with the notable exception of witness certainty, see infra n.14. But given that notable exception, and given the plethora of other accuracy-related factors that researchers have identified since *Biggers* and *Manson*, APA urges the Court, in an appropriate case, to revisit the *Manson* framework so as to bring it in line with current scientific knowledge.

(Brief for Amicus Curiae American Psychological Association in Support of Petitioner, *Perry v. New Hampshire,* 2011 WL 3488994 (U.S.) (Appellate Brief), at 13, n. 8.) Footnote 14 adds:

> Jurors' evident belief that eyewitness confidence correlates with accurate identifications was once shared by many in the judiciary. Indeed, in *Biggers* this Court stated, albeit without citing any scientific authorities, that confidence is an indication of accuracy. See 409 U.S. at 199-200. Subsequent research, however, has called this notion into very serious question. As one report concluded, "[t]he outcomes of empirical studies, reviews, and meta-analyses have converged

> on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29." Brewer et al., The Confidence-Accuracy Relationship in Eyewitness Identification, 8 J. Experimental Psychol. Applied 44, 44-45 (2002). Even these various correlation figures are likely overestimates, moreover, because the confidence of eyewitnesses in actual cases, unlike in controlled experiments, may be infected by positive feedback received in the investigative process (for example, an officer stating during a photo array or line-up, "good, you identified the suspect"). See *supra* n. 6; see also Wells et al., 7 Psychol. Sci. in Pub. Int. at 45; Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374 (1998). Indeed, witness confidence can be affected by a host of factors that have no relation to reliability. See, e.g., Wells & Quinlivan, 33 Law & Hum. Behav. at 11-12.

(*Id.*, at 18, n. 14.) While the *Perry* Court did not specifically address the topic of certainty as a reliable correlate for accuracy, Justice Sotomayor in her dissent noted, apparently based upon the recent science, that "confidence is a poor gauge of accuracy." (*Perry v. New Hampshire, supra,* 132 S.Ct. at p. 739 (dis. opn. of Sotomayor, J.).)

Although not specifically addressing certainty, the Supreme Court in *Perry* did once again confront the tension between the due process guarantee of a fair trial and the issues presented by the introduction of eyewitness identification evidence, which the court described as fallible and potentially unreliable. (*Perry v. New Hampshire, supra,* 132 S.Ct. at p. 728.) In rejecting a broad rule for the prohibition of all potentially unreliable eyewitness identifications, regardless of any improper law enforcement activity, the Supreme Court expressly identified the importance of "eyewitness specific jury instructions" in assisting the jury in

fulfilling its critical role in determining the reliability of the eyewitness identification evidence. (*Id.* at pp. 728-729.) Clearly, in order for jury instructions to effectively guide the jury, and to insure that every fact necessary is proven beyond a reasonable doubt, they must instruct the jury to consider facts that positively correlate to reliability.

The instruction used here, which directed the jury to evaluate the reliability of the witness identification by examining the certainty expressed by the witness at trial, not only misstated the certainty factor identified by the high court in *Biggers,* it also instructed the jury to examine a factor that has repeatedly been found in the scientific literature and in the courts to be an *unreliable* factor in appropriately and accurately evaluating eyewitness testimony.

B. CALJIC No. 2.92 Improperly Reinforces The Commonly Held Misperception That Eyewitness Confidence Indicates Reliability

The assertion that witness confidence, especially as expressed at trial, is an indication of accuracy in eyewitness identification is unsupported.[22] Some courts, therefore, have recognized that substantial doubt exists regarding the confidence-to-accuracy relationship that jury instructions express. (See, e.g., *United States v. Bartlett* (7th Cir. 2009) 567 F.3d 901, 906 (["An important body of psychological research undermines

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[22] See, e.g., Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?* (2001) 42 Canadian Psychology 92, 93 ("eyewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence."); Kassin, *The General Acceptance Of Psychological Research On Eyewitness Testimony: A Survey Of Experts* (1989) 44 Am Psychologist 1089 (majority of psychologists surveyed agreed that confidence is not a indicator or accuracy).

the lay intuition that confident memories of salient experiences . . . are accurate"]; *United States v. Brownlee* (3rd Cir. 2006) 454 F.3d 131, 141-142; *State v. Henderson* (N.J. 2011) 27 A.3d 872, 888-889; *People v. LeGrand* (NY 2007) 867 N.E.2d 374, 376, 380 [lack of correlation between witness confidence and accuracy of identification generally accepted by relevant scientific community]; *Commonwealth v. Jones* (1996) 423 Mass. 99, 110, fn. 9; *State v. Long* (Utah 1986) 721 P.2d 483, 490.)

The "confidence equals accuracy" equation suggested by CALJIC No. 2.92 is prejudicial because it reinforces and exploits a common lay juror misconception about the eyewitness process.[23] Surveys conducted of the general public in the United States also indicate there is a substantial erroneous lay belief that confidence predicts accuracy.[24] As a result of the strongly held lay misconception that confidence equals accuracy, a defendant is likely to be convicted based upon a confidently expressed eyewitness identification, even if the identification is erroneous and despite the fact the witness may have been impeached.[25] Therefore, the incorrect

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[23] See, e.g., Kassin & Barndollar, *The Psychology Of Eyewitness Testimony: A Comparison Of Experts And Prospective Jurors* (1992) 22 J. Applied Psychology 1241 (51% of prospective jurors believed confidence indicates accuracy).

[24] See Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications* (1983) 7 Law & Human Behavior 19-30; Schmechel et al, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence* (2006) 46 Jurimetrics 177, 198-199.

[25]See Wells & Loftus, Eyewitness Testimony: Psychological Perspectives (1984) p.155; Penrod & Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation* (1995) 1 Psych. Pub.

(continued...)

portion of CALJIC No. 2.92, which is not supported by current scientific consensus, should have been modified to delete the erroneous reference to the correlation between witness confidence and witness accuracy.

C. This Court Should Reconsider Its Prior Caselaw On CALJIC No. 2.92 And Witness Certainty

In *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232, this Court rejected the argument that the witness certainty factor should have been deleted from CALJIC No. 2.92. However, in *Johnson* the court interpreted the argument in light of uncontradicted defense expert testimony that witness confidence in identification does not positively correlate with its accuracy. The court reasoned, in part, that the trial court was not permitted to instruct the jury to view the evidence "through the lens" of the expert's testimony, though the jury remained free to accept her testimony. (*Ibid.*; see also *People v. Ward* (2005) 36 Cal.4th 186, 213 [no sua sponte duty to modify "level of certainty" language in CALJIC No. 2.92; assuming error, it was harmless due to strength of identification testimony and expert testimony regarding the lack of correlation between witness certainty and identification accuracy].)

The conclusion reached in *Johnson* is not applicable here for several reasons. First, the authorities referenced above demonstrate the lack of a correlation between witness confidence and accuracy such that CALJIC No. 2.92 affirmatively misleads jurors. Second, there was no expert testimony on the topic at appellant's trial to counterbalance the misinformation in CALJIC No. 2.92. Without expert testimony, appellant's jury was simply instructed to consider a factor that negatively correlates to the underlying

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reliability of the eyewitness identification. (*Perry v. New Hampshire*, *supra*, 132 S.Ct. at p. 732 (dis. opn. of Sotomayor, J.).)

Moreover, this Court should reconsider its reasoning in *Johnson* in light of the growing recognition of the irrelevance of the certainty of the testifying witness to the reliability of the identification. (*Perry v. New Hampshire*, *supra*, 132 S.Ct. at p. 732, (dis. opn. of Sotomayor, J.).) *Johnson* relied upon this Court's prior ruling in *People v. Wright* (1988) 45 Cal.3d 1126, approving of the use of eyewitness identification jury instructions which "focus the jury's attention on facts relevant to its determination" and disapproved instructions which explained the effects of the various factors. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1230, citing *People v. Wright*, *supra*, 45 Cal.3d at pp. 1141-1142). The *Johnson* court analyzed the argument that witness certainty should not have been included as a factor in the jury instruction as focusing on the effect of the factor rather than the relevance of the factor. Because certainty is not a relevant factor, that is, it has been shown to have no correlative relationship to the reliability of the identification, this Court should reconsider its reasoning in *Johnson*.

In *Young v. Conway* (2d Cir. 2012) 698 F.3d 69, the court of appeals explained in detail why witness certainty is not relevant as an indicator of accuracy, and the growing legal and psychological consensus regarding the lack of correlation between confidence and accuracy:

> '[M]ock-juror studies have found that confidence has a major influence on mock-jurors' assessments of witness credibility and verdicts.' Neil Brewer & Gary L. Wells, *The Confidence–Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target–Absent Base Rates,* 12 J. Experimental Psychol.: Applied 11, 11 (2006). Yet scientific research suggests that

> 'eyewitness confidence is a poor postdictor of accuracy.' Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?,* 85 J. Applied Psychol. 542, 548 (2000). Because eyewitnesses sincerely believe their testimony and are often unaware of the factors that may have contaminated their memories, they are more likely to be certain about their testimony. *See United States v. Bartlett,* 567 F.3d 901, 906 (7th Cir.2009) (explaining that the 'problem with eyewitness testimony is that witnesses who *think* they are identifying the wrongdoer—who are credible because they believe every word they utter on the stand—may be mistaken'). And because jurors confound certainty and accuracy, cross-examination is less likely to be effective in discrediting eyewitnesses. Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross–Examination,* 36 Stetson L.Rev. 727, 772 (2007); *Henderson,* 208 N.J. at 234–37, 27 A.3d 872; *see also People v. LeGrand,* 8 N.Y.3d 449, 458, 835 N.Y.S.2d 523, 867 N.E.2d 374 (2007) (noting that scientific research relating to correlation between confidence and accuracy, effect of post-event information on accuracy, and confidence malleability is 'generally accepted by social scientists and psychologists working in the field').

(*Id.* at pp. 88-89.)

Because the certainty of the witness's identification cannot be shown to correlate to the accuracy of the identification, it is not a relevant factor for the jury to consider, and consideration of this factor by appellant's jury violated his due process rights. For all these reasons, the court should reconsider its holding in *Johnson* regarding the accuracy-certainty correlation, which is, in any case, inapplicable to appellant.

D. The Instructional Error, Which Violated Appellant's State and Federal Constitutional Rights, Was Prejudicial and Reversal Is Required

A conviction which is obtained through the use of unreliable evidence violates federal due process and the parallel provisions of the

California Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284; U.S. Const., 14th Amend.; Cal.Const., art. I, § 7, 15 & 16.) The conviction in the present case violates federal due process because it is the result of an instruction directing the jury to consider an irrelevant factor, witness certainty, in assessing the reliability of the identification. Since there was no evidence to support the correctness of this proposition and since scientific studies have shown this to be a common, yet dangerous, misconception, reversal is required.

The instruction was also erroneous under the Eighth and Fourteenth Amendments and parallel provisions of the California Constitution, requiring that the procedures leading to a death sentence must aim for a heightened degree of reliability. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

The error was prejudicial. The prosecutor's case relied primarily on the eyewitness identification testimony. (6 RT 1223.) As he explained, the jury's verdict would ultimately depend on their evaluation of the credibility of Martin, Priest, Ralph and Alexander (*Ibid.*) The defense at trial was that appellant was not responsible for the acts of violence with which he was charged, and that each of the witnesses who testified that they recognized him as the perpetrator were testifying falsely. However, because each of the witnesses who identified appellant knew him from prior encounters, their false identification was nonetheless quite certain – they knew who appellant was, they were simply lying about what they had seen him do. The instruction's directive that the jury should consider the certainty of the identification thus misdirected the jury to consider a factor that was wholly irrelevant, and which correspondingly lightened the prosecution's burden of

proving the reliability of the identifications beyond a reasonable doubt.

As to the William Street incident, trial counsel argued "the identification that was made of my client is not reliable . . . but it's not because Mario Ralph didn't know who did the shooting. I think he did know and yet and still he knows it wasn't my client and continues to say it was my client." (7 RT 1361.) As to the Chestnut Avenue incident, counsel argued that Priest's original statement that he did not see who stabbed him was correct, and that his identification of appellant was a lie.

> So here he is lying when he is identifying my client. Then he says the person was a neighbor and he knew him four or five months, and the person lived in building 327 on Chestnut. If he knew right where my client lived, why did he wait a month afer the incident, after he saw a picture of my client on the news walking around to the house where my client was supposed to have lived.

(7 RT 1378.) Counsel argued that Martin's identification was similarly suspect. "And again his testimony was that he knew where Mr. Wright lived but he never took the police over there and directed them to the place until after Mr. Priest told him that he saw the person on television, and that was the person that lived over in that apartment building." (7 RT 1381-1382.)

Overall, the thrust of the defense case was that Ralph, Priest and Martin were lying when they testified that appellant was the shooter. Because all three of the witnesses knew appellant, each witness's identification of appellant was very certain. However, the defense theory was that this certainty was not based on a specific recollection of appellant as the perpetrator, but on their prior knowledge of appellant. The jury

would have reasonably followed the instructions and relied on the witness's certainty as to appellant's identity to nonetheless find the false identification to be reliable.

Although counsel never clearly identified a single, clear motivation for the witnesses to fabricate their testimony, there was ample evidence in the record to undermine the reliability of the witnesses' testimony that appellant was responsible for each of the attacks. Ralph was the only witness who identified appellant as the perpetrator of the Williams Street attack. During his testimony, Ralph admitted that he had lied in his testimony at the preliminary hearing. (5 RT 814.) Ralph also testified that he had engaged in numerous illegal acts including narcotics dealing (5 RT 789), being a felon in possession of a firearm (5 RT 765), and destruction of evidence (5 RT 778-779). Despite these acts, Ralph was not charged with any crimes. Consideration of both Ralph's admission to lying and his clear motive to testify in a manner consistent with the prosecution's theory in order to avoid prosecution for his admittedly illegal acts suggests that Ralph's identification of appellant as the shooter was suspect and unreliable.

Priest and Martin both admitted to engaging in narcotics sales (5 RT 866, 6 RT 1127) and being ex-felons in possession of a firearm (5 RT 867). Similarly to Ralph, neither was charged with any crimes as a result of their admitted illegal activity. There were also significant inconsistencies in Martin and Priest's testimony, suggesting problems in recollection. Martin testified that after appellant left he went over to Priest to check on him, and then called the police (6 RT 1143), and Priest testified that it was he who went and checked on Martin and then it was he who called the police (5 RT 868). Additionally, Priest testified that he was intoxicated at the time he

was stabbed (5 RT 888), and that he never actually saw appellant, only a silhouette (5 RT 884). All of these factors call into question the reliability of the identification testimony of both Priest and Martin.

An additional factor calling into question the reliability of each of the witnesses' identification was the testimony of each that they knew appellant, knew his name, and knew where he lived, and yet failed to provide any of this information to the police. Martin testified that he had known appellant for about eight months, and appellant had been to his house before and he had gone to appellant's apartment but had not gone inside. (6 RT 1139.) Priest testified that appellant was a neighbor of his, and Priest had known him for about three or four month. (5 RT 865-866.) Ralph testified that he had only known appellant a week, but had seen him at least three times during the week. (5 RT 792.) Despite this, none of the witnesses identified appellant as their attacker until after they saw his photograph subsequent to his arrest on an unrelated crime. Further, none of the witnesses provided any explanation as to why they had failed to identify appellant at the time of the crime.

In the instant case, the jury was presented with substantial evidence which called into question the reliability of the eyewitness identifications. As the prosecutor noted, had the jury disbelieved this evidence, there would not have been sufficient evidence to link appellant to the crime. (6 RT 1224 ["Because if we rely just on the firearm alone without the identification, the court probably wouldn't let it go to the jury"].) However, the instruction to consider the witness's certainty in the identification improperly supported the reliability of the identification and prejudiced appellant by allowing the jury to believe the eyewitness identification testimony from a witness they otherwise would have rejected. The instructional error unfairly bolstered

the government's case and undermined appellant's defense of false identification. Thus, there is no basis for the government to satisfy its heavy burden of proving beyond a reasonable doubt that the trial court's instructional error did not contribute to the jury's verdicts. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The error was prejudicial even if judged against the state standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837 [reasonable probability that error or misconduct contributed to the outcome].) There was more than a "reasonable chance" or an "abstract possibility" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715), that the jury would have conducted a more careful analysis of the prosecution's eyewitness testimony and concluded that there was at least a reasonable doubt of appellant's guilt, had it not received a judicial instruction suggesting that it weigh the certainty of the identification of appellant in assessing the accuracy and reliability of the evidence.

The use of witness confidence as a factor to be used by jurors in assessing the accuracy of eyewitness testimony should be disapproved and appellant's convictions should be reversed.

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VIII. THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

At the conclusion of the guilt phase of the trial, the court instructed the jury on felony murder. (CALJIC No. 8.21; 7 CT 1952.) The jury found appellant guilty of murder in the first degree. (8 CT 2007.)

Appellant contends that the instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. It is appellant's contention that the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder, thus he could not be convicted of first degree murder.[26]

Count Six of the information accused appellant as follows: "On or about March 21, 2000, in the County of Los Angeles, the crime of STREET GANG MURDER, in violation of Penal Caode Section 187(a), a Felony, was committed by WILLIAM LEE WRIGHT. (1 CT 219.) Both the statutory reference ("section 187 of the Penal Code") and the description of the crime ("murder") establish that appellant was charged exclusively with second degree malice-murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Penal Code section 187, the statute cited in the information, defines

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[26] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count 6 of the information was an entirely correct charge of second degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree felony-murder in violation of Penal Code section 189.

second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[27] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[28]

Because the information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter];

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[27] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[28] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death is murder of the first degree. All other kinds of murders are of the second degree."

People v. Murat (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto* [(1883)] 63 Cal.165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[29] It has many times

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[29] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot

(continued...)

> been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box* (2000) 23 Cal.4th 1153,

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both include another crime and be included within it.

1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder, murder during the commission of a felony, or murder while lying in wait, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[30]

The greatest difference is between second degree malice-murder and

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[30] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.)[31]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree

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[31] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder and the instruction on torture murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder must be reversed.

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IX. A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF DUE PROCESS

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the bedrock principle at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.) Instructions violate these constitutional requirements if there is a reasonable likelihood that the jury understood them to allow conviction based on proof insufficient to meet the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.02 [circumstantial evidence regarding mental state] 2.21.1 [discrepancy in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony] and 2.27 [sufficiency of one witness]. (7 CT 1945-1948.) These instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) Because the instructions violated the federal Constitution in a manner that

can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. McKinnon, supra,* 52 Cal.4th at pp. 677-678 [CALJIC Nos. 2.21.2, 2.22, 2.27]; *People v. Famalaro* (2011) 52 Cal.4th 1, 36 [CALJIC Nos. 2.21.2, 2.22, 2.27]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059 [CALJIC Nos. 2.22, 2.27].) Nevertheless, he raises them here in order to preserve the claims for federal review, if necessary and respectfully urges this Court to reconsider those decisions.

A. The Instruction on Circumstantial Evidence In the Modified Version of CALJIC 2.02 Given In This Case Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given a modified version of 2.02 that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (7 CT 1945-1946 [CALJIC 2.02, Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State].)[32] This instruction

[32] The version of 2.02 given in the appellant's case read as follows: The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the comission of the act. However, a finding of guilt as to any crime or special circumstance or special allegation may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state, but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you

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advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (7 CT 1945-1946) This instruction informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This instruction undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California, supra*, 491 U.S. at p. 265; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)[33]

First, this instruction compelled the jury to find appellant guilty using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364 [due process requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged].) This instruction directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (7 CT 1945-1946.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near

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[32](...continued)
must accept the reasonable interpretation and reject the unreasonable.

[33] Although defense counsel did not object to the giving of these two instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§ 1259; see *People v. Famalaro*, *supra*, 52 Cal.4th at p. 35.)

certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally-mandated one.

Second, the circumstantial evidence instruction required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instruction created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

This instruction had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find appellant guilty of the charged counts unless he came forward with evidence reasonably explaining the incriminatory evidence presented by the prosecution. Under this erroneous instruction, the jury was required to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. (7 CT 1945-1946.) This instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215,

citing *In re Winship*, *supra*, 397 U.S. at p. 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 702-703.)

Here, this instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (7 CT 1945-1946) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. The jury instruction at issue informed the jury that if it found that the defendant was a dealer in secondhand merchandise who bought or received stolen property under circumstances that should have caused him to make a reasonable inquiry of the seller's legal right to sell the same, it should presume the defendant bought or received such property knowing it to be stolen, unless from all the evidence it had a reasonable doubt that the defendant knew the property was stolen. (*Id.* at pp. 495-496.) Because the jury could have interpreted the instruction to mean that the prosecution's case on the issue of knowledge was established as a matter of law unless the defense raised a reasonable doubt, this Court found constitutional error. (*Id.* at p. 504.) Accordingly, this Court should invalidate the instruction given in this case, which required the jury to presume all elements of the crimes that were supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21.1, 2.21.2, 2.22 and 2.27 Also Violated the Reasonable Doubt Standard

The trial court gave four other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.1 (Discrepancies in Testimony); 2.21.2 (Witness Wilfully False); 2.22 (Weighing Conflicting Testimony) and 2.27 (Sufficiency of Testimony of One Witness). (7 CT 1947-1948).[34] Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 authorized the jurors to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (7 CT 1947.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a

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[34] As noted previously, although defense counsel did not object to these instructions, appellant's claims are still reviewable on appeal. (See § 1259 and *People v. Famalaro, supra,* 52 Cal.4th at p. 35.)

"probability" standard is "somewhat suspect"].)[35] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

> Furthermore, CALJIC No. 2.22 provided as follows:
> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(7 CT 1947.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary

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[35] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, which found no error in an instruction that arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (7 CT 1948) was likewise flawed. The instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the disputed offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, as indicated above, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. While recognizing the shortcomings of some of the instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. (See, e.g., *People v. Solomon* (2010) 49 Cal.4th 792, 826-827 [collecting cases].) The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings* (1991) 53 Cal.3d 334, 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire, supra,* 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden* (1994) 9 Cal.4th 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin, supra,* 471 U.S. at p. 322 ["[l]anguage that merely

contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

D. Reversal Is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Reversal is also required because proof on all of the charged counts and special circumstance allegations relied on circumstantial evidence, unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here. Because these instructions distorted the jury's consideration and use of circumstantial

evidence and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's convictions and the death judgment must be reversed.

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X. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, 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. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens,* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained 22 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained 12 qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme 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 United States Constitution.

B. The Broad Application of Penal Code Section 190.3(a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 8 CT 2083-2085.) 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. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a).

(*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of other criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25

Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Blakely v. Washington (*Blakely*) (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (*Ring*) (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (*Apprendi*) (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury first had to make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 8 CT 2086-2087.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33

Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].)

Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (8 CT 2083-2087), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with thefederal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto,*

supra, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual

punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 8 CT 2085-2086.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra,* 25 Cal.4th at pp. 584-585.) Here, the prosecution presented extensive evidence of unadjudicated criminal activity allegedly committed by appellant, including mayhem, robbery, extortion, and kidnaping and argued that these unadjudicated crimes constituted a "boulder" on the aggravating side of the scales. (12RT: 2476-13RT: 2711; 15RT: 3123.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be

made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 8 CT 2086.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*,

supra, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the

rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life imprisonment without the possibility of parole is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a

likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.)

However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook,* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 8 CT 2084) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th

491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85, factors (d) [mental or emotional disturbance], (e) [victim participation], (f) [moral justification], (g) [duress or domination], (i) [age of defendant], (j) [minor participation].) The trial court failed to omit those factors from the jury instructions (8 CT 2084), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (8 CT 2083-2085.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 257, 288-289. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational

aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme 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., intercase proportionality review. (See *People v. Fierro, supra,* 1 Cal.4th at p. 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes in violation of the equal protection clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation

must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider them.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (See, e.g., *People v. Cook* , *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

XI. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Even if this Court finds that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of both guilt and penalty phase proceedings, compels the conclusion that Wilson was denied a fair trial at both phases, and warrants reversal of the judgment of conviction and sentence of death because the state will not carry its burden of proving that the cumulative effect of the errors was harmless beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; see *People v. Lindberg* (2008) 45 Cal.4th 1, 54; *People v. Riggs* (2008) 44 Cal.4th 248, 330; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may

nevertheless be so prejudicial as to require reversal'"]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)

Aside from the erroneous termination of appellant's self-representation, which requires a per se reversal, the series of guilt phase errors doomed appellant's ability to fairly present his case to the jury, and denied him his right to a fair trial. Without overwhelming evidence of appellant's guilt, the jury's verdict turned on the evaluation of the credibility of the eyewitness testimony of Priest, Martin, Alexander and Ralph. The trial court's errors had a cascading effect, undermining appellant's ability to present his defense and improperly bolstering the prosecution's case. Initially, the trial court's error in failing to grant appellant's motion to relieve his attorney forced appellant to go to trial with a counsel he no longer believed in, and who refused to present any credible defense to the charges. The prosecutor engaged in misconduct that improperly biased the jury against appellant, leading to a conviction based not on the jury's evaluation of the evidence of appellant's guilt for the charged crimes, but out of a belief that appellant was a bad person who was likely to commit crimes like those charged here.

The trial court's errors in instruction further compounded these errors. The jury was not properly instructed in how to evaluate the circumstantial evidence, which improperly lightened the prosecution's burden. Additionally, the jury was directed to consider an irrelevant factor in its evaluation of the reliability of the eyewitness identification evidence. The trial court's errors in instruction were a further blow to appellant's already impaired ability to present his defense, being bound to counsel who refused to investigate his defense. The improperly-introduced negative

fingerprint evidence also served to bolster the prosecution's case, imbuing the prosecution's theory with the imprimatur of authority.

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed.

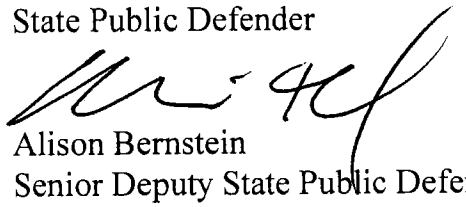
CONCLUSION

For the reasons stated, the judgment must be reversed in its entirety.

Dated: March 28, 2013

Respectfully submitted,

Michael J. Hersek
State Public Defender



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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE8.630(b)(2))

I, Alison Bernstein, am the Senior Deputy State Public Defender assigned to represent appellant, *William Lee Wright, Jr.*, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 51,643 words in length excluding the tables and certificates.

Dated: March 28, 2013

Alison Bernstein

DECLARATION OF SERVICE BY MAIL

Re: People v. Wright

Cal. Supreme Ct. No. S107900
(Los Angeles Co. Sup. Ct. No. KA048285-01)

I, Jon Nichols, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
300 S. Spring Street
North Tower, Suite 5001
Los Angeles, CA 90013

William Wright, #T-59840
CSP-SQ
3-AC-51
San Quentin, CA 94974

Judge Norman Tarle, Dept. 5
Santa Monica Courthouse
1725 Main Street
Santa Monica, CA 90401
ATTN: LYNNE LANE

Each said envelope was then, on March 28, 2013, sealed and deposited in the United States mail at Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed this March 28, 2013, at Alameda County, California.

DECLARANT