No. CRIM. S016883

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JARVIS J. MASTERS,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Vol. II

Automatic Appeal from the Superior Court of Marin County
Case No. 10467
Honorable Beverly B. Savitt, Judge

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CASE No. S 016883

IN THE
SUPREME COURT OF CALIFORNIA

PEOPLE v. JARVIS J. MASTERS

APPELLANT'S OPENING BRIEF

Vol. II

PART TWO: OTHER SIGNIFICANT GUILT PHASE ARGUMENTS

VII. THE DENIAL OF JUDICIAL USE IMMUNITY, COUPLED WITH RESTRICTIONS ON EXAMINATION OF THE PROSECUTOR'S MOTIVES, WAS PREJUDICIAL CONSTITUTIONAL ERROR

Having denied Masters' motion for a lineup and all opportunity to put on his version of the case, the District Attorney and the trial court still retained the ability to grant Richardson and/or Drume immunity in order to allow their testimony to be heard.

A. FACTUAL AND PROCEDURAL BACKGROUND

During the preliminary hearing, following Richardson's assertion of his Fifth Amendment privilege, appellant moved for a grant of judicial use immunity as a matter of fundamental fairness, if the prosecutor would not grant Richardson use immunity pursuant to Penal Code section 1324. (PHRT 14832-37)[55] The prosecutor both declined to agree to immunity and objected to the grant of judicial immunity. (PHRT 14838, 14843)

Masters sought a hearing to establish his right to judicial immunity as discussed in *People* v. *Sutter* (1982) 134 Cal.App.3d 806 (and later in *Jeffers* v. *Ricketts* (9 Cir. 1987) 832 F.2d 476, 479, *rev'd on other grounds*

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55 Section 1324 authorizes the granting of use immunity upon the application of the prosecutor.

(1990) 497 U.S. 764). *See also United States* v. *Bautista* (9 Cir. 1975) 509 F.2d 675, 677 (due process may require immunity for defense witness if prosecution has awarded it to prosecution witness). (PHRT 14846-48) He also noted that the provisions of Proposition 8 established as a policy the admission of relevant evidence in criminal proceedings. (PHRT 14817) He sought to establish both (1) that his interest in the Richardson testimony outweighed any possible burden immunity would impose on the state; and (2) that the prosecutor's refusal to grant immunity amounted to prosecutorial misconduct due to the grants of immunity only to prosecution witnesses. (PHRT 14849-51) In his offer of proof, Masters noted that the prosecution immunized Willis and offered immunity to another inmate named by Willis, Donald Carruthers, for testimony consistent with the prosecution theory of the case, and that no charges had been filed against Richardson, yet the prosecution was refusing to immunize him despite no visible burdens on the state in their refusal. (PHRT 14834-49)

The magistrate agreed to a hearing, and the first witness for the defense was prosecutor Edward Berberian. (PHRT 14852) Berberian testified that he had a conversation with Richardson's attorney, McGill, regarding immunity, but Richardson refused to make a tape-recorded, discoverable statement. (PHRT 14852-58; 14874) Berberian assured McGill that any statement given by Richardson would not be used against him. (PHRT 7681)

Berberian also testified that although he recognized that Richardson never mentioned Masters' name among the conspirators, he "would not grant Mr. Richardson or any witness immunity on that set of facts and circumstances," because he could not corroborate Richardson's statement and might be inviting him to lie on the stand, free of worry if he chose to lie. (PHRT 14859-60)

Berberian stated that he did not interpret the failure of Richardson's statement to include Masters in the Burchfield murder planning group as favorable to Masters. (PHRT 14860-62) Berberian also stated again that he told Richardson's attorney that if Richardson gave a taped statement, it would not be used against him. (PHRT 14863)

Asked whether the prosecution's evidence did not in fact corroborate Richardson, Berberian stated that if he believed that Richardson established through corroborated evidence that Masters was not part of the conspiracy, he would not merely grant immunity to Richardson, he would dismiss the case against Masters. (PHRT 14865)

The hearing then took a strange turn. The magistrate disallowed response to the next, crucial question: whether Berberian would be willing to grant Richardson immunity to present potentially exonerating evidence even if Berberian were still prosecuting Masters. (PHRT 14866) The defense was, nonetheless allowed to elicit Berberian's admission that immunity was offered to BGF co-conspirator Carruthers because his

statement inculpated Masters. (PHRT 14867-68) The magistrate then prevented Masters from asking two crucial questions: (1) whether the prosecutor had any intention of prosecuting Richardson, and (2) what, if any, burdens a grant of immunity would entail. (PHRT 14872-74) The court also disallowed questions on whether, if the defense called Richardson at trial, the prosecutor would offer him immunity. (PHRT 14876)

Apparently exasperated by questions he felt were beyond the scope of permissible inquiry, the magistrate terminated the hearing, reversed his decision to grant the hearing, and struck all of Berberian's testimony. (PHRT 14878) The magistrate denied Masters' further request to question the prosecutor about the burdens, if any, a grant of judicial immunity would impose, and a request to question the other prosecuting attorney, Ms. Kamena, Carruthers' attorney, and Richardson's attorney. Significantly, the magistrate also denied a request for production of writings pertaining to prosecution grants of immunity. (PHRT 14879)

Masters then explained that what was at stake was not only prosecutorial misconduct, but elucidation of the interests of the State in the denial of use immunity to Richardson, so that this could be balanced against the interest of Masters in having his testimony. (PHRT 14880)

Nevertheless, the magistrate, having cut the heart out of the defense attempts to establish a prima facie case of prosecutorial miscon-

duct, or of establishing what the burdens might be on the state if immunity were granted, denied the motion for immunity for Richardson. (PHRT 14883-84)

The 995 Motion and Trial Ruling

In the trial court, appellant raised the issue of the denial of immunity in his section 995 motion to dismiss. (CT 535-47) The trial court noted that prosecutor Berberian had, in his testimony stricken by the magistrate, indicated that his standard for granting immunity was whether or not there was corroboration. The trial court indicated that *it* would have considered Willis' description of Masters, which nearly fit Richardson, as corroboration. (8/8/88 RT 56) Nevertheless, the court denied the section 995 motion as it related to the magistrate's denial of use immunity. (*Id.* at 72)

The issue arose anew in mid-trial, when the People sought an Evidence Code section 402 hearing to preclude both evidence of Richardson's appearance and a grant of judicial immunity to him. (CT 4868 *et seq.*) The court indicated its intention not to grant judicial immunity to Richardson (RT 14709), despite the fact that it had, pretrial, recognized the state's disinterest in prosecuting Richardson. (1/9/88 RT 12)

B. THIS CASE SATISFIES THE *SMITH* STANDARDS FOR JUDICIAL USE IMMUNITY

In *People* v. *Hunter* (1989) 49 Cal.3d 957, 974, this court declined to decide whether or not there were some situations in which judicially conferred use immunity might be necessary to vindicate a defendant's rights to compulsory process and due process. This was justified by the fact that the offer of proof in *Hunter* did not meet the standards set forth in *Government of Virgin Islands* v. *Smith* [hereafter, *Smith*] (3 Cir. 1980) 615 F.2d 964. In subsequent cases, the court has similarly declined to decide the question, citing the *Smith* factors as not having been met in those cases. See e.g., *People* v. *Lucas* (1995) 12 Cal.4th 415, 460; *In re Williams* (1994) 7 Cal.4th 572, 610; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 619.

In contrast, the instant case *does* meet the *Smith* standards, which limit the use of judicially conferred immunity as follows: (1) the proffered testimony must be essential; (2) there must be no strong governmental interests which countervail against a grant of immunity; (3) the defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and (4) essential to the defendant's case; and (5) immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory,

cumulative or it is found to relate only to the credibility of the government's witnesses. *Smith, supra*, 615 F.2d at 972.

In this case, (1) the proffered immunity was crucial to Masters' defense that he was not involved in the planning committee, that he was not the BGF "Chief of Security" in C-section, and that he did not play a role in sharpening the knife. Indeed, he had no way of proving that negative proposition other than by the statements of others, like Richardson and Drume, who claimed involvement. In addition, (2) there was no discernable governmental interest in denying immunity; five years had passed since the crime and the government had repeatedly indicated that they had no interest in prosecuting Richardson. The showing had been made that the Richardson and Drume statements were both (3) clearly exculpatory and (4) essential to Masters' case. And (5), the Richardson statement implicating himself, Willis, and Woodard but explicitly excluding Masters, in conjunction with Willis' description of the unidentified co-conspirator, and Richardson's statement to Broderick Adams that the State was charging someone else for what he had done, were clearly exculpatory, were not cumulative, and related to far more than the credibility of a government witness. It related directly to Masters' innocence. The Drume statement implicating himself as a co-planner, sharpener, and "Chief of Security," and specifically excluding Masters, was also clearly exculpatory, and not cumulative.

Both statements, moreover, were unambiguously exculpatory. Given Willis' mis-description of Masters, which fit Richardson, Richardson's admission of his involvement was unambiguously exculpatory, especially since he leaves Masters out of the co-conspirator's group and told Broderick Adams that someone else was being charged for his role in the Burchfield murder. *See supra* at 84. Similarly, Drume's statements that Masters was not involved; that he, Drume, served as Chief of Security; and that he sharpened the knife and served as Chief of Security, are not ambiguous.

The instant case, therefore, clearly meets the *Smith* standards for granting judicial use immunity even in the absence of prosecutorial misconduct. The final question left unanswered in *Hunter*, *Lucas*, *Williams*, and *Cudjo* is therefore presented: Are there situations, such as the one presented here, in which either the defendant's Fifth or Sixth Amendment rights or the prosecutor's failure to evenhandedly administer the immunity power require reversal? As explained below, the answer is yes.

C. MASTERS HAD A DUE PROCESS RIGHT TO JUDICIALLY-DECLARED USE IMMUNITY

In *Hunter*, *supra*, this court agreed with the defendant that "the prosecutor's duty is to administer the immunity power evenhandedly, with a view to ascertaining the truth, and not as a partisan engaged in a legal game." 9 Cal.3d at 974-5. This cannot be squared with the fact that

Willis' immunity agreement included a promise from the prosecutor to write to the Department of Corrections so that Willis could gain, in exchange for his testimony, up to a one year reduction in his prison sentence.[56] (RT 13134-37) In contrast, the State offered no such benefits to defense witnesses. Masters was thus denied equal protection and his due process right to a fair trial by a prosecutor's refusal to grant immunity without a valid reason to do so, while offering substantial benefits to his own witnesses.

Almost all of the reasons cited by courts for not granting use immunity over the objection of a prosecutor relate to potential prosecution of the co-conspirator witness – a factor not present in this case. For example, in *People* v. *Sutter*, *supra*, 134 Cal.App.3d 806, the first reason given for upholding a denial of use immunity was that the "obstacles to a successful prosecution" of the immunized witness are increased by the "heavy burden" the People would carry to show that its evidence was not tainted by the earlier evidence. Similarly, the prosecution would be forced to narrow its cross-examination in order to limit the taint. *Id.* at 816-817, citing *United States* v. *Turkish* (2 Cir. 1980) 623 F.2d 769. In

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[56] Such a benefit is provided by Penal Code section 2935 and its implementing regulations, 15 California Code of Regulations section 3034, which provide in relevant part: "(h) . . . Up to 12 months reduction of sentence may be awarded for . . . (3) [p]roviding sworn testimony in judicial proceedings involving prosecution of a felony offense which occurred within the prison."

the instant case, however, there was, five years after the event, no indication that the prosecution had any interest in prosecuting Richardson. Indeed, the trial court questioned the state's ability to use Richardson's admissions and relied upon the state's disinterest in prosecuting Richardson in support of its decision not to admit Richardson's out-of-court statement. (1/9/89 RT 12)[57] Thus, even if in the usual case the fear expressed regarding the prosecution's "burden" is valid, it is not so where the burden has already been assumed and the People have shown no inclination to prosecute the witness.

Another reason cited for denying use immunity is that co-defendants could immunize each other, and then each immunized witness could exonerate his co-conspirators at their separate trials by falsely

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[57] Although the court, in the original hearing, acknowledged that Richardson's statement was a "statement against interest" (12/13/88 RT 7), the court later, in the hearing on the motion for reconsideration, stated:

> I think particularly interesting was the argument of the district attorney in his papers that Richardson's statements were not against his penal interest because he was not – there was no intention of using it against him. And as a matter of fact he was not Mirandized.
>
> (1/9/89 RT 12)

If the court was right the first time, that the statement *was* against Richardson's penal interest, then section 1230 applies and the statement should have been admitted. If the court was right the second time, that it *was not* against his interest, then the principle reason for denying judicial use immunity disappears.

accepting sole responsibility. *Sutter*, *supra*, 134 Cal.App.3d at 817. Again, whatever validity this argument has in most contexts, it is nugatory here, where Richardson did not face prosecution. There is also absolutely no basis for believing that the State would also immunize Masters. So *Sutter* simply doesn't apply.

Third, the fear is expressed that an immunity decision would, by requiring a court to examine pre-trial all of the facts and circumstances surrounding the government's investigation, unreasonably drain judicial resources. *Id.* at 817, citing *United States* v. *Thevis* (5 Cir. 1982) 665 F.2d 616, 640. Again, however, this simply does not apply in the instant case, where the court had intimate knowledge of the prosecution's case – necessary for the court's *in camera* decisions regarding the government's repeated claims of privilege for prison records – and where there was no indication that Richardson could or would be prosecuted.

Sutter also cites *Turkish* (623 F.2d at 774-775) for the proposition that "a criminal proceeding is not 'symmetrical' as the prosecution and defense have different rules, powers and rights." 134 Cal.App.3d at 816. In early August, 1982, however, when *Sutter* was decided, the provisions of Proposition 8 had only recently gone into effect, and the provisions of the later Proposition 115 were still but a prosecutor's dream. Proposition 8's, "Truth in Evidence" provision has now been held to require admission of defense evidence to the same extent as it requires admission of

prosecution evidence, *People* v. *Taylor* (1986) 180 Cal.App.3d 622, 632; see also *In re Lance W.* (1985) 37 Cal.3d 873, 887, n.7; *People* v. *Lankford* (1989) 210 Cal.App.3d 227, 237. And Proposition 115's provision for reciprocal discovery has similarly moved the process toward the symmetry lacking at the time in this Court, while requiring a civil trial court to seek prosecutorial concurrence with a proposed grant of immunity, also explained that the protection of prosecutorial interests "lies not in any rigid requirement of a prosecutorial request for immunity but in the more general condition . . . that the granting of immunity not 'unduly hamper' subsequent criminal prosecutions." *Daly* v. *Superior Court* (1977) 19 Cal.3d 132, at 147. Granting immunity to Richardson could not possibly hamper, unduly or not, a prosecution the government had no intention of undertaking.

Where, as in this case, a grant of immunity is virtually "costless to the government . . . [a]ny interest the government may have in withholding immunity . . . would be purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity." *Smith*, *supra*, 615 F.2d at 973, and n.15.

Affirmative Reasons for Granting Judicial Use-Immunity

There are also affirmative reasons for a judicially-declared grant of use immunity. To begin with, there is California precedent for judicially-declared immunity, though it has arisen in different contexts. In *Tarantino*

v. *Superior Court* (1975) 48 Cal.App.3d 465, 469-470, a defendant who appeared to lack mental competence to stand trial was held to be immune from use of his statements to two psychiatrists appointed by the court to examine him. In *People* v. *Coleman* (1975) 13 Cal.3d 867, 889-892, this court held that a defendant's statements at a pre-trial parole revocation hearing could not be used against him at trial except for purposes of impeachment or rebuttal in limited circumstances. Although styled an exclusionary rule, this amounts to a judicial grant of at least partial immunity. Similar grants of judicial immunity can be found in *People* v. *Superior Court (Kaufman)* (1974) 23 Cal.3d 421, 428-429 (court is vested with jurisdiction to grant immunity to deponent in civil fraud case brought by the People); and *Byers* v. *Justice Court* (1969) 71 Cal.2d 1039, 1049, 1056-1057 (vacated on other grounds in *California* v. *Byers* (1971) 402 U.S. 424) (authorizing judicial grant of immunity to compel disclosure by driver involved in hit-and-run accident). A further policy consideration is found in the repeated statements in our cases that the essential task of a criminal trial is to search for truth. *See, e.g.*, *Miller* v. *Superior Court of San Joaquin County* (1999) 21 Cal.4th 883, 900; *People* v. *Mayfield* (1997) 14 Cal.4th 668, 766; *People* v. *Barton* (1995) 12 Cal.4th 186, 196. If that is so, then the means to facilitate that task should be expanded, not constricted.

Cases have repeatedly held that a defendant's rights to the state's evidence in order to allow the presentation of witnesses on his own behalf and to confront and cross-examine witnesses should generally prevail over an insufficiently strong state interest. *See, e.g.*, *Roviero* v. *United States* (1957) 353 U.S. 53, 60-62 (defendant's right to identity of informant); *Jencks* v. *United States* (1957) 353 U.S. 657, 672; *Brady* v. *Maryland* (1963) 373 U.S. 83, 87 (suppression by prosecution of evidence favorable to defendant violates due process); *Chambers* v. *Mississippi*, *supra*, 410 U.S. 284, 295-298, 302 (evidentiary rule should not be mechanically applied to deny defendant due process right present evidence); *Washington* v. *Texas* (1967) 388 U.S. 14, 23 (Sixth Amendment right to compulsory process violated by state statute prohibiting defendant from calling accomplice as witness); *Davis* v. *Alaska* (1974) 415 U.S. 308, 319-320 (right to cross-examine outweighs state's right to protect anonymity of juvenile offenders).

This court has recognized that the United States Supreme Court is " 'particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with defendant's ability to secure a fair trial.' " *People* v. *Hansel* (1992) 1 Cal.4th 1211, 1221, quoting *Wardius* v. *Oregon*, *supra*, 412 U.S. at 474, n.6. In this case, the magistrate's and trial court's denial of use immunity while prosecution witnesses received immunity and reduced imprisonment

(*supra* at 203-204 and n. 56) insured an unlevel playing field for Masters. Given the absence of any discernable state interest in preventing it – other than, of course, the will to win the case – Masters had a due process right to judicial use immunity.

Sixth Amendment Right to Use Immunity

In addition, Masters' Sixth Amendment rights to compulsory process, and to confrontation, support judicially-declared immunity where, as here, the defendant's need for exculpatory evidence outweighs the state's interest in limiting a defendant's access to such evidence. *Davis* v. *Alaska*, *supra*, 415 U.S. 308; *Washington* vs. *Texas*, *supra*, 388 U.S. 14, 19 (right to offer testimony of witnesses and to compulsory process means "right to present a defense, [and] the right to present defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"). If the defendant has a fundamental right to present evidence, he must also have a right to judicially-declared immunity, if that is what is necessary to vindicate his right, and the state's interests are minimal.

In *United States* v. *Carman* (9 Cir. 1977) 577 F.2d 556, 561, the Ninth Circuit, while denying an absolute right to witness immunity, posed the key issue as whether the defendant was denied a fair trial. Here, where the only sources of evidence in support of his defense of non-

involvement in the conspiracy were denied immunity, Masters was manifestly denied a fair trial.

D. THE COURT'S REFUSAL TO ALLOW MASTERS TO ESTABLISH PROSECUTORIAL MISCONDUCT, COUPLED WITH THE PEOPLE'S REFUSAL TO IMMUNIZE INDIVIDUALS THEY HAD NO INTENTION OF PROSECUTING, REQUIRED GRANTING THE DEFENSE 995 MOTION

In *Smith*, *supra*, the Third Circuit set forth another ground for granting judicially-declared immunity: prosecutorial misconduct in the failure to even-handedly grant immunity to defense as well as government witnesses. 615 F.2d at 968, cited with approval in *United States* v. *Lord* (9 Cir. 1983) 711 F.2d 887, 891; see also *United States* v. *Westerdahl* (9 Cir. 1991) 945 F.2d 1083, 1986 (defendant need not show that testimony would be clearly exculpatory or essential, only that it would be relevant); *Jeffers* v. *Ricketts* (1987) 832 F.2d 476, 479 (grant of immunity to four state witnesses and not to defense witness made out prima facie case of prosecutorial misconduct).

The *Smith* opinion begins with the proposition that, under certain circumstances, due process may require the judicial granting of use immunity. 615 F.2d at 968, citing *United States* v. *Herman* (3 Cir. 1978) 589 F.2d 1191, 1203-1204, *cert. denied* (1979) 441 U.S. 913. *Herman* conditioned the remedy on a showing that the government's decision not to grant immunity was made " 'with the deliberate intention of distorting

the judicial fact-finding process.' " *Id.* Moreover, immunity granted under this theory does not require showings either that the witness' testimony is clearly exculpatory or otherwise essential to the defendant's case. *Id.* at 969, n.7. The latter, of course, has been shown in this case.

The Ninth Circuit has noted that where two eyewitnesses tell conflicting stories but only the one testifying for the government is granted immunity, the defendant is denied " 'any semblance of a fair trial.' " *United States v. Westerdahl*, *supra*, 945 F.2d at 1087, citing and quoting *United States* v. *Brutzman* (9 Cir. 1984) 731 F.2d 1449, 1452. Thus, the question is whether or not the prosecutor's discretion was withheld in this case with the intent to distort the fact-finding process.

The bare facts make out a prima facie case that is hard to rebut. The prosecution's offers of immunity to prosecution witnesses Willis and Carruthers, while withholding it from all of the proposed defense witnesses, including most clearly Richardson, despite no evidence of any intention to prosecute those witnesses – despite, indeed, promised immunity by the Department of Corrections which probably precluded prosecuting Richardson – are damning evidence of intent to distort the fact-finding process. The magistrate, however, compounded the prejudice by preventing Masters from asking questions directly material to the issue of intent: whether the prosecutor would be willing to grant Richardson immunity to testify consistent with his statements to Ballatore

regarding the absence of Masters from the planning meetings (PHRT 14876), and what other offers of immunity had been considered and what other witnesses had come forward seeking immunity. (PHRT 14869-72)

Denial of Motion to Dismiss on These Grounds

The trial court acknowledged that Willis' description of Masters, which appeared to be a description of Richardson, supplied the necessary corroboration of Richardson's statement. (8/8/88 RT 56) The court nevertheless denied Masters' Penal Code section 995 motion raising this issue. This denial compounded the error.

A motion to dismiss pursuant to section 995 is to be granted when it appears that a defendant has been denied a substantial right at the preliminary hearing stage of criminal proceedings. *Jennings* v. *Superior Court*, *supra*, 66 Cal.2d 867, 874. As in *Jennings*, the substantial right embodied in the magistrate's refusal in this case to grant immunity — indeed, in its refusal to even allow the defense to make out a prima facie case of prosecutorial misconduct concerning grants of immunity — amounted to a denial of Masters' right to present a defense. 66 Cal.2d at 875-876. A defendant at a preliminary hearing must be permitted to "introduce evidence tending to overcome the prosecution's case or establish an affirmative defense." *Id.* at 880.

The court's denial, then, of Masters' section 995 motion to dismiss, as it related to the magistrate's denial of use immunity (*Id.* at 72), was error, as was its later denial of immunity during trial.

Whether viewed from the perspective of the denial of the section 995 motion, in which the prejudice standard of *People* v. *Pompa-Ortiz*, *supra*, 27 Cal.3d 519, 529, is invoked, or simply as trial error, the failure to grant immunity was prejudicial under any standard. Masters was prevented from introducing the only evidence available to him showing that he was not involved in the Burchfield murder. There was not, indeed, in the words of *Westerdahl* and *Brutzman*, *supra*, "any semblance of a fair trial."

VIII. OTHER EVIDENTIARY RULINGS PREVENTED MASTERS FROM PRESENTING HIS DEFENSE

In addition to the errors set forth in Part I and Argument VII, *ante*, the trial court made a number of other evidentiary rulings which erected additional barriers to appellant's presentation of his defense. Primary among these were the exclusion of (1) expert testimony about inmate behavior, and (2) testimony about notes of non-BGF inmates taking responsibility for the Burchfield killing. Both lines of testimony would have lessened the impact of the BGF kites claiming responsibility for Burchfield's killing. In addition, evidence of the Crips' motive for the killing was systematically excluded, despite the fact that the lack of better evidence was entirely attributable to the State's mis-handling and destruction of evidence.

A. CRUCIAL DEFENSE EXPERT TESTIMONY REGARDING INMATE BEHAVIOR WAS ERRONEOUSLY AND PREJUDICIALLY EXCLUDED

The State's theory of the case was that Sergeant Burchfield had been killed as part of a BGF plan. In seeking to prove this theory, the State relied both on documents showing the existence of the BGF and on documents purportedly authored by BGF members Woodard, Masters, and Johnson in accepting responsibility for Burchfield's death.

To diminish the incriminating force of the admissions written by the defendants to the effect that "we leave one of the enemy dead" and other similar statements, the defense offered the expert testimony of criminologist and sociology Professor John Irwin. (RT 15059) Professor Irwin, a former prison inmate, would have testified that due to the dynamics of the prison environment, prison inmates and gang members frequently make false claims that they have committed crimes. This allows them not only to appear "tough and strong" but to gain recognition by other inmates and gang members as well. (RT 15059) Thus, Professor Irwin's testimony was offered to explain the motivation behind the notes identified as being in the defendants' handwriting, and offered by the prosecution as tending to show guilt for the crimes charged. It would have countered the prosecution's take on these notes by explaining that in prison, as opposed to outside society, inmates will falsely admit involvement in crimes for psychological reasons related to the social dynamics of prisons and their institutional environment. (RT 15062)

The prosecution objected to this evidence based on *Kelly-Frye* and relevance. The trial court categorically refused to allow this testimony until it was first tied or related "specifically to these defendants. We're not having a sociological study in this courtroom about what happens in prisons." (RT 15066)

Ironically, or perhaps cynically, after having successfully introduced against the defendants a profusion of gang-related documents on the theory that membership in the BGF proved blind obedience and action in conformity with the BGF constitution and code, the prosecutor now self-righteously argued that expert testimony on prisoners was irrelevant because "membership in an organization does not lead reasonably to any inference as to conduct of the member on a given occasion." (RT 15070, citing *In re Wing Y.* (1977) 67 Cal.App.3d 369.) The defense pointed out that inmate-informer Willis was allowed to testify as an expert as to what BGF members believed and were taught, what documents they possessed, and how they behaved. (RT 15071-72) The trial court distinguished Willis' testimony because it "related to specific documents and evidence taken from the defendants . . . . or their co-conspirators." (RT 15072)

1. The *Kelly-Frye* Objection Was Totally Without Merit

The State objected to the Professor Irwin's testimony based on relevance and *Kelly-Frye*. While the court never ruled on the *Kelly-Frye* objection, the objection was totally without merit. The *Kelly-Frye* test applies only to "proof derived from an apparently 'scientific' mechanism, instrument or procedure" but not to expert medical or psychological

testimony. *People v. Leahy* (1994) 8 Cal.4th 587, 604-605; *People v. Stoll* (1989) 49 Cal.3d 1136, 1155-56.

2. Professor Irwin's Testimony Was Relevant to Defendant's Theory of the Case

In the past decade the United States Supreme Court has ruled on the admissibility of, and given guidance regarding expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 589, established a protocol pursuant to which the trial judges serve a "gatekeeping function" to ensure the relevance and reliability of scientific expert testimony. More recently, *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 147, clarified that the gatekeeping function applies to all expert testimony, not just scientific evidence. Under this gatekeeping function, recent Ninth Circuit cases have affirmed the relevance of expert testimony which was intended to assist the jury to better assess the veracity of a witness by explaining the relevant sociological underpinnings. In *United States v. Taylor* (9 Cir. 2001) 239 F.3d 994, 997-998, expert testimony from an academic was admitted because "the relationship between prostitutes and pimps is not the subject of common knowledge. . . . A trier of fact who is in the dark about that relationship may be unprepared to assess the veracity of an alleged pimp, prostitute, or other witness testifying about prostitution." See also *United States v. Hankey* (9 Cir. 2000) 203 F.3d 1160, 1167-1169 (testimony from gang

expert to explain consequences a gang member might suffer for testifying against defendant gang member).

These recent federal cases support the ongoing validity of and rationale of this court's holding in *People v. McDonald* (1984) 37 Cal.3d 351 (reversible error to exclude defense expert testimony on the psychological factors affecting the accuracy of eyewitness identification). In *McDonald,* this court observed that expert testimony is a "traditional way of bringing scientific information to the attention of the judicial systems," and held that experts may testify both as to facts within their special knowledge, and as to their opinions. *McDonald* clearly distinguished between expert factual testimony and expert opinion testimony. An expert is testifying about facts in discussing studies that have been conducted, data that has been collected and analyzed, and the findings of studies or experiments. *Id.* at 367, n. 12. Factual expert testimony is admissible if the evidence is relevant to the issues and the witness qualifies as an expert. *Id.* at 365-367; Evidence Code sections 210, 720. An expert is testifying as to an opinion when applying the expert facts to the specifics of the case. *Id.* Expert opinion testimony must also be sufficiently beyond common experience so as to assist the trier of fact. *Ibid.*; Evidence Code section 801(a).

The expert testimony offered in this case was primarily factual and would have provided empirical evidence that prisoners regularly claim

responsibility for deeds they have in fact not committed. Such testimony was relevant to support a belief that the defendants in this case were boasting falsely when they laid claim to the Burchfield killing.

This empirical expert testimony was admissible because Professor Irwin was qualified and the evidence was relevant to the issues, i.e., it tended to prove or disprove a material fact. Evid. Code §§ 210, 720. The trial court assumed that Professor Irwin was qualified. (RT 15074) The evidence was relevant to a better understanding of the behavior of inmates in the prison environment which then provided an empirical basis from which the jury could assess the credibility of the defendants' supposed admissions falsely inflating their culpability.

Such generalized expert evidence should have been admitted to rebut the common misperceptions about inmate behavior. Courts have admitted analogous expert witness testimony when necessary to rebut common misconceptions relevant to the case. In *People v. Humphrey* (1996) 13 Cal.4th 1073, 1096, expert testimony regarding Battered Woman Syndrome was admissible to disabuse jurors of misconceptions about domestic violence victims. In *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1302, expert evidence regarding parent's reactions to child sexual abuse was admitted to rebut common misconceptions about child molestation reporting. In *People v. Bledsoe* (1984) 36 Cal.3d 236, 246, expert evidence regarding rape trauma syndrome was admissible for the

purpose of disabusing jurors of common misconceptions as to how a rape victim might react. In *People v. Cegers* (1992) 7 Cal.App.4th 988, 999-1001, the court found an abuse of discretion in excluding expert testimony regarding a sleep disorder (Confusional Arousal Syndrome) which may have affected defendant's behavior. In *People v. Bowker* (1988) 203 Cal.App.3d 385, 390-394, expert testimony on Child Sexual Abuse Accommodation Syndrome was admissible to rebut common misconceptions about the post-abuse conduct of a child molest victim.

The analysis in *McDonald* remains helpful. In that case, the defense offered expert testimony regarding psychological studies indicating that seemingly sincere eyewitness identification was often inaccurate because of unconscious psychological factors. Here the defense offered expert testimony based on empirical studies showing that a seemingly truthful admission of guilt by a prisoner is often dissembling and motivated by psychological reasons necessitated by the prison environment. In *McDonald* the defendant was tied to the crime charged by the eyewitness testimony; in this case appellant was tied to the crime by the admissions of one prisoner (Masters) to another (Willis). As in *McDonald*, the expert testimony was not only manifestly relevant, it was crucial to the defense.

3. The Trial Court's Requirement that the Expert Testimony Relate Specifically to the Defendants Turned the Law on its Head

The trial court, in addition, erroneously erected a further foundational prerequisite for expert testimony, and in doing so turned established precedent on its head. The court scornfully refused to hear testimony of a "sociological study" unless it was predicated on direct testimony that the prison inmate witnesses in this case did in fact lie. (RT 15066) This is akin to requiring that in a case like *McDonald* expert testimony must be excluded unless the defense first shows that the eyewitnesses *in fact* were inaccurate in their identifications. No such requirement exists. Indeed, by excluding Professor Irwin's testimony unless he was going to testify as to the credibility of specific witnesses, rather than discussing the sociological setting which results in certain behavior, the trial court's ruling was the converse of what is allowed. To allow an expert to testify as to the credibility of a particular witness would usurp the jurors' function in assessing credibility. This problem is avoided by limiting the expert to general testimony which serves to assist the jury to understand the relevant factors which they might apply in their evaluation of the credibility of a particular witness. *People v. McDonald*, *supra*, 37 Cal.3d at 370-372; *People v. Page* (1991) 2 Cal.App.4th 161, 188.; *see also People v. Brandon* (1995) 32 Cal.App.4th 1033, 1053.

4. The Expert's Testimony Was No Different than that Upheld in Countless Other Gang Cases

"The use of expert testimony in the area of gang sociology and psychology is well established." *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371 (citations omitted). Such gang expert testimony is now routinely admitted in California and federal cases. *United States v. Hankey* (9 Cir. 2000) 203 F.3d 1160, 1167-1169 (testimony from gang expert to explain "code of silence" and the risk of retaliation against a gang member for testifying against another gang member); *People v. Williams* (1997) 16 Cal.4th 153, 195-196; *People v. Gardeley* (1996) 16 Cal.4th 605, 617-620; *People v. Fudge* (1994) 7 Cal.4th 1075, 1091; *People v. Gamez* (1991) 235 Cal.App.3d 957, 964-966, *overruled on other grounds* in *People v. Gardeley*, *supra*, 16 Cal.4th at 624 (expert testimony "concerning criminal street gangs in general, involving subjects such as territory, retaliation, graffiti, hand signals, and dress"); *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904-905 (expert testimony in the form of "sociological evidence" regarding the "social customs, methods of operation of gangs"); *In re Darrel T.* (1979) 90 Cal.App.3d 325, 328-329 (expert testimony of a high school security guard regarding the social habits and allegiances of various gang factions).

Logic dictates that if the behavior of non-prison gang members is so beyond the common experience of jurors that expert testimony is

routinely admissible, then, *a fortiori,* it is admissible to explain the behavior and culture of prison gangs, which are even further removed from common experience. In addition, in the years surrounding Sergeant Burchfield's murder, the conditions of incarceration in parts of San Quentin were found to be inhumane and cruel and unusual punishment. *Toussaint v. McCarthy* (N.D.Cal.1984) 597 F.Supp. 1388 *(affirmed in part and reversed in part, Toussaint v. McCarthy* (9 Cir.1986) 801 F.2d 1080, 1114). There is simply no logical basis to conclude that the sociology of inmates in that highly unusual environment was part of the common experience of most jurors.

While police officers often testify about street gang behavior, non-police experts are certainly qualified to testify about gang sociology. Evidence Code §§720 and 801. Professor Irwin has testified as an expert in prison sociology in numerous cases. In *People v. Ayala* (2000) 23 Cal.4th 225, 293-294, Irwin "provided the jury with a detailed history of California prison society over recent decades – of the informant's changing role and status, the rise and spread of prison gangs . . . ." He testified that, under certain prison conditions, certain conduct was "necessary to avoid being perceived as weak and thereafter preyed upon." *Id.* This was relevant to the defense theory of the case which required placing the relevant conduct in the context of the California prison system of the 1970's and 1980's. *Id.* Such testimony sounds a

great deal like the "sociology study" (RT 15059-74) which the trial court in our case excluded as irrelevant.

B. THE EXCLUSION OF EVIDENCE OF (1) NOTES FROM NON-BGF INMATES TAKING RESPONSIBILITY FOR THE MURDER AND (2) THEIR MOTIVE VIOLATED MASTERS' RIGHT TO PRESENT A DEFENSE

After the court excluded his principal case, appellant maintained that Sergeant Burchfield had been killed by the Crips, one of a number of in-prison gangs. As presented to the jury, a good deal of evidence supported this theory. First, correctional officer Lipton – who saw the stabbing itself – initially testified that Sergeant Burchfield was stabbed in front of cell four. (RT 11214, 11280, 11341-49, 11362) Cell four was inhabited by Eric Ephraim, an acknowledged Crip. (RT 15763-64) Second, although the prosecution's star-witness Rufus Willis claimed to be a member of the BGF, significant evidence showed that he was really a Crip and was trying to "bring down" the leadership of the BGF. (RT 14757-58, 15517-18, 15551)

Unfortunately, the trial court made numerous rulings which prevented Masters from presenting critical evidence supporting this theory. In order to prove that the Crips had a motive for killing Sergeant Burchfield, the defense sought to introduce evidence from correctional Officer McKinney that inmate Montgomery – who had been killed a year

earlier – was a Crips leader. (RT 11391) The trial court sustained the prosecution's relevancy objection. (RT 11391)

The defense then sought to support this theory by offering the testimony of Correctional Lieutenant George Kimmel. Kimmel had been involved in the collection of evidence following the killing, including a number of notes seized from prisoners in which different prisoners belonging to different prison gangs claimed responsibility for Burchfield's murder. (RT 15247-48; 15254) Kimmel specifically recalled one such note which was found in East Block that he believed was written by a Crip because of the terminology used in the note (i.e., "cuz" and "we killed the dog") and based on his familiarity with prison gangs. (RT 15256-57) Kimmel recalled reviewing at least ten similar notes. (RT 15257) He turned those notes over to those responsible for the investigation. (RT 15248, 15258-59) Kimmel never saw those notes again (RT 15248, 15258-59), and they apparently all mysteriously disappeared. (RT 14247-48, 15262-63)

The defense argued that testimony about these notes in general, and the one Lt. Kimmel believed to have been written by a Crip in particular, were relevant as tending to show that a written admission of guilt by someone in prison for the killing of a guard was a common

occurrence.[58] The fact that it was a common occurrence would tend to diminish the incriminating impact and persuasive force of the similar admissions of guilt purportedly written by Woodard and Masters – Exhibits 150C, 151A, 159C, and 176W.

The trial court refused to admit Kimmel's testimony regarding any of these notes, including the one which he believed was written by a Crip. Despite the fact that it was the State's incompetence which resulted in the destruction of the note, the court ruled that absent the note itself, or evidence as to which inmate had written that particular note, the defendants could not present any testimony about them. (RT 15251, 15262-63)

As more fully discussed below, each of these rulings constituted error. Whether considered together, or alone, the combination of these errors were another block in the wall of exclusion which prevented Masters from presenting his defense.

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[58] When the defense argued that Lt. Kimmel's testimony was relevant to show that inmates generally claimed personal credit for criminal acts committed by others, the trial court challenged defense counsel: "You're going to have an expert come in to testify on that issue?" Counsel reminded the court that they had already tried to present such expert testimony, which the court had refused to allow. The trial court repeated, "I'm going to preclude it." (RT 15265)

1. The Court Erred in Excluding Evidence that Inmate Montgomery, Recently Killed In Prison, Was a Crip Leader; Such Evidence Corroborated the Theory that the Crips Killed Sgt. Burchfield in Retaliation

As noted above, defense counsel sought to introduce evidence from Officer McKinney that inmate Montgomery, who had been killed in prison approximately one year earlier, was a Crips leader. The purpose of such evidence was, of course, to support the defense theory that the Crips had killed Sergeant Burchfield by providing a motive for the attack. The trial court ruled the evidence irrelevant. (RT 11391) Thus, although the jury knew that an inmate named Montgomery had been killed one year earlier, it did not know that he was a Crips leader. The trial court's ruling was plain error.

(a) The excluded evidence was relevant to establish Ephraim's motive

Evidence Code § 210 defines relevant evidence as evidence which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the . . . action." It is now well established that when there is direct or circumstantial evidence linking a third person to a particular crime, evidence that the third person had a motive to commit the crime is both relevant and admissible. *People v. Hall* (1986) 41 Cal.3d 826, 833.

This is precisely the situation here. There was significant evidence linking inmate Ephraim to the crime. Officer Lipton made repeated statements – before the trial – that the stabbing occurred in front of Ephraim's cell; blood was found on the bars of his cell; and a metal tip which could have been the murder weapon was found in a single shoe while a subsequent search of Ephraim's cell uncovered only three shoes. (RT 11214, 11301, 11488, 11562, 12010, 14979) Moreover, the prosecution had stipulated that Ephraim was a member of the Crips. Under these circumstances, evidence that Montgomery, an inmate that had apparently been killed in prison, was a Crips leader, was clearly relevant to establishing that Ephraim had a motive to stab Sergeant Burchfield.

(b) The admitted evidence failed to establish that Montgomery was a Crip leader killed at San Quentin, thus providing a retaliatory motive for the Crips to murder a correctional officer

Instead of the testimony which would have established the Crips' motive for murder, Officer McKinney's testimony was the subject of numerous objections which effectively prevented the introduction of the highly relevant testimony.

The relevant portions of the exchange at issue are as follows:

> "Q: [by defense counsel Sapanai] And Montgomery was a Crip leader, was he not?
>
> "Mr. Berberian: [district attorney] Objection. No foundation at this point.

"The Court: Sustained.

"Ms. Sapanai: It was well known throughout the institution that the reason Montgomery was out was because he was a Crip leader. And he was being taken to a meeting, isn't that correct, at the time he was killed?

"Mr. Berberian: Objection. Lack of foundation.

"The Court: Sustained. . . .

"Q: [by defense counsel] And one of the things you heard around the institution was that Montgomery was a major Crip leader?

"A: [by Officer McKinney] I didn't know that at the time, no.

"Q: No, but you heard that?

"A: That was sometime later.

"The Court: Later than what?

"The Witness: Than after Burchfield.

"The Court: After Burchfield. You didn't know it at the time [of the killing]?

"The Witness: Correct.

"Ms. Sapanai: [defense counsel] Do you know that now?

"A: (nods affirmatively)

"The Court: The question is 'Do you know it now."

"Mr. Berberian: Objection as to relevance.

"The Court: Sustained."

(RT 11392)

Taking this testimony as a whole, the jury heard that at the time of Sergeant Burchfield's death, Officer McKinney did *not* know that Montgomery was a Crip leader. Sometime after the homicide, McKinney "heard" that Montgomery was a Crip leader. But the jury was told it was irrelevant whether, at the time of trial, McKinney "knew" that Montgomery was a Crip leader.

From this colloquy, no reasonable juror could have known that Montgomery was, in fact, a Crip leader or even that such evidence was relevant to the case. At best, a juror could have gleaned that at some point after the killing, McKinney "heard" that such was the case.

It was not irrelevant that, at the time of trial, McKinney knew that Montgomery was a Crips leader. It was, in fact, critical. Such testimony would have established a fact which was central to the defense theory of the case. This fact was *not* established by McKinney's claim that at some point, he "heard" Montgomery was a Crip leader. There was nothing in officer McKinney's testimony which told the jury that Montgomery was, in fact, a major Crip leader.[59] No other witness testified to the fact that Montgomery was a major Crip leader and that his death gave the Crips a

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[59] Indeed, rather than admit this testimony, and in the jury's presence, the trial court ruled that whether officer McKinney now "knew" that Montgomery was a Crip leader was irrelevant. (RT 11392) This ruling vastly increased the prejudicial effect of excluding the evidence, because it effectively told the jury that current evidence as to Montgomery's actual status as a Crip leader was irrelevant. *Mann v. Dugger* (11 Cir. 1983) 844 F.2d 1446, 1457.

motive for revenge. There was other testimony that tangentially referred to those facts, but there was no direct testimony on this point. Correctional Officer Ollison testified that he could *not* remember if, during a meeting on June 9, 1985, he recalled saying that the staff knew there would be a payback for the Montgomery killing, nor did he testify that Montgomery was a Crips leader. (RT 11736-37)

Inmate Willis stated that several Crips were waiting for the anniversary of Montgomery's death to seek revenge, but he never testified that Montgomery was a major Crip leader. (RT 13184) Without knowing this fact, it was impossible for the jury to assess the strength of the motive the Crips had to kill Sergeant Burchfield.

In sum, and at most, the jury was told that Officer McKinney had at some time "heard" Montgomery was a Crip. The jury was never told that Montgomery *was* a major Crip leader. It was this fact that gave the Crips a motive to kill Sergeant Burchfield, and it was central to the defense case. Officer McKinney was not allowed to testify to this fact, and it did not come in through the testimony of any other witness. The trial court's ruling excluding this testimony was totally improper.

2. The Court Erred in Excluding Evidence that a Crip Admitted Killing Sergeant Burchfield

The trial court excluded testimony from Lt. Kimmel that he had seen a note, written by a Crips member, claiming credit for killing Ser-

geant Burchfield, offered to show that such claims of credit were common in prison. As with Professor Irwin's excluded testimony on the same point, the trial court's exclusion of this relevant and exculpatory evidence violated appellant's Sixth Amendment rights and compels reversal.

The prosecution objected to Kimmel's testimony on the basis of Evidence Code section 352, the Best Evidence Rule and lack of foundation.[60] (RT 15248) The court questioned the relevance of this testimony and refused to admit it. (RT 15265) This ruling was in error.

(a) This evidence should not have been excluded under Evidence Code § 352

"To withstand a challenge under Evidence Code section 352, evidence of a third party's culpability 'need only be capable of raising reasonable doubt of [the] defendant's guilt.'" *People v. Cudjo* (1993) 6 Cal.4th 585, 609; *People v. Hall*, *supra*, 41 Cal.3d at 833. The probative value of this testimony was its relevance to deflate some of the impact of

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[60] The prosecution did not raise a hearsay objection to this evidence. However, the court of appeal in *People v. Johnson* stated in dicta that "[t]he contents of the note were irrelevant and inadmissible hearsay in any event." Slip opinion at 50 (unpublished portion). These notes were not hearsay insofar as they were not being offered to prove the truth of the matter asserted. Evid. Code §1200; *McRae v. California Unemployment Insurance Appeals Board* (1973) 30 Cal.App.3d 89, 95, (visitors' cards were not hearsay when only being offered to prove that complaints about appellant's long hair were made). Furthermore, since the prosecution failed to raise the hearsay objection below, the objection is not preserved for appeal. *People v. Adams* (1988) 198 Cal.App.3d 10, 17.

the prosecution's evidence of writings which purported to be admissions by the defendants taking credit for this murder. (RT 15251-53) The identity of the authors of these various other notes was not particularly relevant to defendants' interest in having these notes admitted. The defendants sought to show that people in prison often write notes claiming credit for crimes they did not commit, and that they often take credit in a collective sense ("we did this"). (RT 15251-53; 15265) Lt. Kimmel's testimony would have informed the jury of this common occurrence and that several notes claiming credit for Sergeant Burchfield's death were found around San Quentin during the ensuing investigation and at least one such note appeared to have been written by a Crip. (RT 15256-59) In addition, the fact that numerous such notes were found during the murder investigation and had apparently been destroyed or lost was relevant on the issue of the institutional negligence in conducting this investigation. (RT 15262-63)[61]

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[61] In *People v. Johnson* the Court of Appeal emphasized that since the note was found in a section of the prison other than the one where the murder took place, it could not have been written by anyone with first hand knowledge of the crime, therefore it was unreliable and should not have been admitted. Slip opinion at 48-50. Like the trial court, the appellate court missed the point of this evidence. Appellant's primary interest in having the jury hear this evidence was because the jury had already heard about notes written by defendants which purportedly took credit for this crime. Had the jurors been informed of the fact that such notes are common in prisons, it would have allowed the jurors to put the defendants' notes in their proper context. Even if these notes were available, no one would have

(continued...)

(b) The former Best Evidence Rule did not warrant excluding this evidence

The "Best Evidence Rule," former Evid. Code §§ 1500 *et seq.* (Deerings, 1989), did not preclude admission of testimony regarding the lost writings.[62]

Under the Best Evidence Rule, oral testimony was admissible to prove the content of a writing when the proponent of the writing did not have a copy and the original was unavailable or had been lost or destroyed through no fault of the proponent. Former Evid. Code §§ 1501-1503, 1505. Secondary evidence of the writing was also admissible where the primary evidence consists of numerous writings and the evidence sought from them is only the general result of the whole. Former Evid. Code §1509. The vast majority of the potentially hundreds of notes claiming responsibility for Sergeant Burchfield's murder (RT

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[61](...continued)
offered them as admissions by the authors that the author was, in fact, the murderer of Sergeant Burchfield. The fact that one of the notes appeared to have been written by a Crip taking collective credit for this crime would have supported other defense evidence in support of the theory that the murder was committed by a Crip in revenge for Montgomery's death. Similarly, the appellate opinion's reliance on *People v. Frierson* (1991) 53 Cal.3d 730, 745 is misplaced. The notes and the testimony surrounding the notes were not being offered to prove the truth of the matter asserted.

[62] The "Best Evidence Rule" has been repealed and replaced by the "Secondary Evidence Rule." Evid. Code §§1520-1523. Under either Rule, the testimony regarding these lost writings should have been admitted.

15257), other than those few that were relied upon by the prosecution, were lost or destroyed before the defense ever saw them, through no fault of the defendant. Lt. Kimmel's testimony regarding the existence of these notes should have been admitted.[63]

Defendants sought to introduce this evidence to establish that notes claiming credit for crimes are common in prisons and at least one such note appeared to have been written by a Crip. Had the notes not been destroyed by the State, the defense might have been able to discover who wrote some of these notes and had other evidence to support their defense. Instead, the defense was limited to offering the fact that Lt. Kimmel saw and recalled reading many such notes which were found during the investigation. Nothing further was required to satisfy the Best Evidence Rule.

Nor was foundation a valid issue. Lt. Kimmel's testimony regarding his recollection of these notes and their contents laid sufficient foundation for the court to admit his testimony of the existence of these destroyed exculpatory notes. Evid. Code § 402(a). While additional foundation would have broadened the probative value of this testimony, the prosecu-

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63 Neither was authentication under Evidence Code §§ 1401(b) and 1521(c) a valid reason for excluding the testimony. "The authentication of a document is not necessary when the execution of it is not in issue, but only the fact of the existence of a document of such tenor." *People v. Adamson* (1953) 118 Cal.App.2d 714, 720; *and see, People v. Marsh* (1962) 58 Cal.2d 732, 740.

tion's failure to provide these exculpatory notes to the defense prevented the defense from presenting additional foundation. The prosecution should have been estopped from capitalizing on its breach of its *Brady* and *Trombetta* duties by complaining of any inadequacy of foundation occasioned by its own unconstitutional conduct.[64]

Numerous cases have allowed testimony regarding the existence and content of missing writings to prove a fact which the witness knew from his own knowledge or perceptions. In *People v. Sassounian* (1986) 182 Cal.App.3d 361, the Court of Appeal concluded that where jail records were erroneously destroyed, a deputy with independent recollection of those records was allowed to testify as to the contents of those destroyed records. *See also*, *People v. Morris* (1964) 226 Cal.App.2d 12, 16-17 (testimony about a writing was allowed when the purpose was not to prove the content of the missing writing]; *People v. Hay* (1925) 74 Cal.App. 464, 471 (testimony from a witness who had seen envelopes which bore the name of accused were admissible without producing the original envelopes). In refusing to allow Lt. Kimmel to testify as to the

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[64] The notes which were lost or destroyed possessed an exculpatory value which would have been apparent before they were destroyed and defendants were unable to obtain comparable evidence from any other source. As such, these notes would meet the constitutional materiality standard under *Trombetta* had a motion been made to sanction the prosecution for the destruction of this evidence. *California v. Trombetta* (1984) 467 U.S. 479, 488-489.

existence of the destroyed notes, the trial court denied Masters his right to have the jurors hear a meaningful part of his defense.

(c) Due process does not condone punishing the proponent of secondary evidence not responsible for the unavailability of the primary evidence

If proffered evidence is unavailable through no fault of the proponent of that evidence, it would be unfair to punish the proponent for the failure to offer that missing evidence. That is why both the former Best Evidence Rule, former Evidence Code section 1500, *et seq.*, and its replacement, the Secondary Evidence Rule, Evidence Code sections 1521-1523, allow oral testimony to prove a writing when the original writing is missing "without fraudulent intent on the part of the proponent of the evidence." Former Evid. Code §§ 1501, 1505; Evid. Code §1523, subd. (b). In fact, dismissal may be warranted if the missing evidence is critical to the defendant's guilt or innocence as a contrary ruling would result in the denial of a fair trial and due process. *California v. Trombetta*, (1984) 467 U.S. 479, 488-489 (if exculpatory evidence was destroyed by the police and comparable evidence is unavailable, dismissal is required); *United States v. Valenzuela-Bernal* (1981) 458 U.S. 858, 873 (if a material and favorable defense witness has been deported and is thus unavailable for trial, dismissal is required); *People v. McShann* (1958) 50 Cal.2d 802, 808 (if the government invokes the official information privilege or the

informer privilege, and the undisclosed information goes to the defendant's guilt or innocence, dismissal is required). In all such cases, as in this case, the key factor is that the proponent of the evidence is not responsible for, and thus should not be penalized as a result of the unavailability of the primary evidence, and the secondary evidence is admissible.

C. WHETHER VIEWED INDIVIDUALLY OR TOGETHER, THESE EVIDENTIARY RULINGS ABROGATED APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

A defendant is entitled to introduce relevant evidence tending to raise a reasonable doubt about his guilt of the charged offense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky* (1986) 476 U.S. 683, 690; citations omitted; *see also United States v. Roark* (11 Cir. 1985) 753 F.2d 991, 994-995 (reversible error to exclude expert mental state testimony which would have impeached veracity of confession). *See also* Argument V, *supra* at 130, *et seq.*

Even evidentiary rulings, classically committed to the court's discretion, may constitute an abuse of discretion. A trial court's exercise of discretion in evidentiary rulings "must bow to the due process right of a

defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense." *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599; *see also United States v. Lopez-Alvarez* (9 Cir. 1992) 970 F.2d 583, 587-588 (exclusion of evidence that furthers the defense theory may violate due process and deny the defendant his federal constitutional guarantee of a meaningful opportunity to present a complete defense if the evidence "is sufficiently reliable and crucial to the defense"). Appellant was prevented again and again by the trial court's rulings from mounting an affirmative defense – beyond just impeachment on cross-examination – that the case against him was not true.

In *People v. McDonald*, *supra*, 37 Cal.3d at 377, this Court held that the trial court committed reversible error by refusing to allow the defense to present expert testimony on psychological factors affecting the accuracy of eyewitness identification. The jury need not be totally ignorant of the subject matter for expert testimony of this nature to be admitted. The question is whether the expert opinion would assist the jury.

> It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.
>
> *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.

In *United States v. Vallejo* (9 Cir. 2001) 237 F.3d 1008, 1018-1022, the Ninth Circuit found the district court had abused its discretion in excluding expert testimony about defendant's language disorder. "The testimony was offered to explain the discrepancies between Vallejo's and the [Customs Special] Agents' recollection of the communications which occurred during the interrogation." *Id.* at 1019. The court stated that the reasons for any discrepancies were for the jury to decide without the benefit of the expert's testimony. As in our case, the judge seemed extremely skeptical, even bordering on outright hostility, about allowing testimony from an expert who had not personally examined the defendant and would not "permit [the expert] to start rambling off into the 'toolies' [*sic*] about things that he doesn't know specifically apply to this Defendant or not. So the answer is no." *Id.* at 1019, n.5. The Ninth Circuit found the exclusion of this expert testimony constituted an abuse of discretion and, because it related to a key issue, its exclusion was not harmless error. *Id.* at 1022. Similarly, in the instant case, it was an abuse of discretion for the trial court to exclude Professor Irwin's testimony. Had the testimony been admitted, it would have enabled the jury to understand that there were sociological reasons why prisoners write notes claiming credit for crimes committed by others – such as Sergeant Burchfield's murder – other than to admit their actual guilt. The testimony went to a

key issue in the case, the prosecution's attempt to link defendant to this crime, and therefore its erroneous exclusion was not harmless error.

In *People v. Roberts* (1992) 2 Cal.4th 271, 298-299, this Court found there was no due process violation in allowing expert testimony regarding the BGF's rules and practices.

> . . . the court permitted the introduction of evidence of BGF activity with which [defendant] had no connection. . . . The Court did not abuse its discretion in permitting the prosecution to explore the nature of prison-gang life in order to elucidate its theory of the case, at least insofar as such testimony was necessary to furnish the jury a context for understanding that theory.
>
> *Id.*

It would be a strange and cruel irony if the converse of the above holding were not also true – that exclusion of such expert testimony on behalf of a defendant were not found to be prejudicial error. Professor Irwin's excluded testimony regarding prison-gang life was clearly relevant and necessary to allow the defense "to elucidate its theory of the case, at least insofar as such testimony was necessary to furnish the jury a context for understanding that theory." *Id.* To hold otherwise was an abuse of discretion which denied the defendant "a meaningful opportunity

to present a complete defense." *Crane v. Kentucky* (1986) 476 U.S. 683, 690.[65]

Similarly, Lt. Kimmel's testimony as to the existence and contents of the note was clearly relevant to establishing appellant's defense. It would have supported reasonable questions about the BGF kites. At the same time, it would have supported a plausible claim of third party culpability in conformity with the direct evidence of Officer Lipton's initial statements that the stabbing occurred at cell four (which housed Ephraim, a Crip) while simultaneously providing the context for the jurors to interpret the significance of the odd number of shoes taken from Ephraim's cell along with a fourth shoe with a stabbing implement hidden in it which was found in an uncontrolled area below Ephraim's cell. (*Supra* at 31) It would have further supported questions about institutional negligence in connection with the investigation.

Appellant had a constitutional right to present this evidence in his defense. Instead of according appellant his "meaningful opportunity, at least as advantageous as that possessed by the prosecution to establish the essential elements of his case" as required by the state and federal

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[65] As noted above, the defendant's ability to present a complete defense was further compromised by the trial court's rulings which created the anomalous situation wherein two of the prosecution's witnesses, Rufus Willis and Bobby Evans, were permitted to testify as experts on prison gangs and the BGF, while a sociologist who has studied prison society under objective academic principles was excluded from testifying on prison behavior.

constitutions (*In re Martin*, *supra*, 44 Cal.3d at 29), the trial court erected an artificial barrier to the admissibility of his evidence, ruling that unless appellant could prove authorship of an exculpatory note that the investigators destroyed and to which the defense was thus deprived of all access, Lt. Kimmel would not be allowed to testify. (RT 15261-62; 15264-65) In this bizarre turnaround of the applicable law, appellant was punished for the government's failure to carry out its duty.

D. REVERSAL IS REQUIRED FOR PREJUDICIAL ERROR

These two evidentiary rulings by the trial court, therefore, denied Masters his right to present a complete defense. If these errors resulted in an unconstitutional deprivation of Masters' rights to present a defense and to equal protection of the laws, reversal would be required unless the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18, 24. If the error did not rise to the level of violating rights protected by the U.S. Constitution, reversal would be required if it finds a reasonable probability that the error affected the outcome adversely to defendant. *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.

1. The Trial Court's Rulings, Viewed under the *Chapman* Standard, Were Not Harmless Beyond a Reasonable Doubt

The constitutional due process and Sixth Amendment violations in the trial court's rulings excluding both Irwin's testimony and the testimony regarding the Crip note and that gang's motive for killing a prison guard amounted, as discussed above, to an unconstitutional deprivation of Masters' right to present a defense. Accordingly, it should be reviewed under the stringent standard of *Chapman v. California*, *supra*, 386 U.S. at 24.

Exclusion of these three parts of the puzzle were not harmless beyond a reasonable doubt. Admission of this evidence would have gone a long way to defusing the prosecution's case. The jury could have discounted the BGF notes either because "everyone does it," or because the Crips were in fact just as likely as the BGF to have effected the killing. Indeed, the latter argument would have had considerable impact on the jury in light of the other evidence regarding Willis' Crips affiliation and the fact that Crips member Ephraim was housed in cell four, the cell in front of which Officer Lipton initially testified that Sergeant Burchfield was killed.

Because appellant was prohibited from attacking the prosecution's evidence, and was denied an equal opportunity with the prosecution to

present this defense, this Court cannot find the constitutional violations harmless beyond a reasonable doubt.

2. Even Under the *Watson* Standard, the Court's Rulings Were Prejudicial

To the extent the trial court's rulings violated state law, they require reversal if it is reasonably probable that the error may have affected the outcome. *People v. Watson*, *supra*, 46 Cal.2d at 836. In making this determination, it is important to note that not only would an acquittal be a "more favorable result" to Masters, but a hung jury would also have been more favorable. Cf. *People v. Brown* (1988) 46 Cal.3d 432, 471 n.1 (conc. opn. of Broussard, J.) ("A hung jury is a more favorable verdict").

In *People v. Humphrey*, *supra*, 13 Cal.4th at 1089, this Court held that the failure to allow the jury to consider testimony regarding battered women's syndrome was prejudicial to defendant. Defendant had been found guilty of voluntary manslaughter rather than murder, but another reasonable verdict was possible if she had been allowed to present the battered women's syndrome evidence in support of her claim that she acted in self-defense. *Id.* A hung jury for Masters would certainly have been another reasonable verdict and a more likely one had he not been deprived of his right to present a defense. The excluded evidence had the potential to raise a reasonable doubt as to the identity of the actual perpetrator sufficient to result in a hung jury for Masters.

In this case, the evidence which was excluded goes to the heart of the prosecution's case. The evidence against the defendants was based heavily on notes by the defendants that purportedly claimed credit for Sergeant Burchfield's murder. The evidence that numerous other notes which claimed credit for this crime were found in various parts of San Quentin, and that at least one of these notes appeared to have been written by a member of a different prison gang with a strong motive for revenge, the erroneous exclusion of this critical evidence was prejudicial to Masters' right to present a defense. *Id.*; *People v. Watson*, *supra*, 46 Cal.2d at 836.

Under either standard of prejudice, reversal is required in this case. Taken in conjunction with the errors discussed above, the trial court's rulings prevented the jury from fully considering the defense theory of the case. The court's ruling not only precluded Masters from establishing that the Crips had a motive to kill Sergeant Burchfield, but they prevented him from showing that there was evidence that a Crips member was probably among those who had actually taken credit for the killing.

Moreover, the record of jury deliberations suggests this was a close case. The jury deliberated for eight days and not only asked for reinstruction but asked for testimony to be reread as well. (CT 5103-04, 5106, 5108) Each of these factors has been held to reflect a closely balanced case. *See, e.g.*, *People v. Markus* (1978) 82 Cal.App.3d 477,

480 (request for re-instruction shows close case); *People v. Anderson* (1978) 20 Cal.3d 647, 651 (several days of deliberation evidences close case); *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 (juror request for instructions and rereading of testimony shows close case). The trial court's numerous errors in excluding relevant defense evidence were not harmless in this case.

3. Cumulative Harmless Error

Even assuming *arguendo* that the exclusion of expert testimony about inmate behavior and testimony about notes of non-BGF inmates taking responsibility for Burchfield's killing does not require reversal under the appropriate prejudicial error test, reversal is required for cumulative error. *See* Argument XI, *post*, 292-294.

IX. ADMITTING IRRELEVANT AND INFLAMMATORY EVIDENCE ABOUT THE REVOLUTIONARY POLITICAL BELIEFS OF THE BGF VIOLATED APPELLANT'S RIGHTS TO FREE SPEECH AND DUE PROCESS

The court erred in admitting irrelevant but highly inflammatory and prejudicial evidence concerning the extremist, violent and revolutionary beliefs of the BGF, a political group of which Masters was an admitted member. The error is manifestly prejudicial. Some of the evidence glorified the senseless, tragic deaths of a superior court judge and prison guards in the 1970 Marin County Civic Center shoot-out and later attempted prison escape by George Jackson. Both of these events were highly publicized in Marin County.

A. INTRODUCTION

The debate concerning admission of the so-called "gang-related" evidence spanned years and included several court hearings and written briefs. Over the course of this debate, the prosecution's reason for admitting the evidence changed shape and form to overcome defense objections and stipulations to facts sought to be established by the evidence. Thus, at the outset, the prosecutor asserted the evidence was necessary simply to establish the existence of the BGF and the defendants' membership in it. (CT 2629, 2679) When the defendants offered to concede these facts, the prosecution shifted course and argued that

the "radical revolutionary philosophy of the BGF is directly connected to the murder of Sergeant Burchfield" and "[t]he principals [sic] [of the BGF] are essential to put in context the nature and reason for the murder." (CT 4763)

In truth, the prosecution *never even attempted* to connect Sergeant Burchfield's death to the political philosophy of the BGF. Rather, the evidence showed simply that the conspiracy was the work of a handful of prisoners in C-section who were motivated by a desire to begin a "war" between the BGF and its prison enemies, the Aryan Brotherhood and Mexican Mafia (RT 12735); and that the conspirators were members and leaders of the BGF in the C-section of San Quentin who acted without authorization from their higher-ups in the BGF and carried out the killing without informing the BGF central command of their intentions. (RT 13717) No evidence even remotely suggested that the revolutionary political dogma of the BGF was the "underpinning" of the conspiracy to murder Sergeant Burchfield, as the prosecutor assured before trial.

It is not difficult to fathom the prosecution's relentless efforts to put the political beliefs of the BGF before the jury. Although the hundreds of pages of documents articulating the radical, violent politics of the BGF had no tendency in reason to prove *who* killed Sergeant Burchfield, or why, they vividly portrayed the BGF as a militant group that advocated murder as a political tool, championed racism and hatred, and glorified

the senseless, tragic deaths of innocent persons in the courthouse and prison escape attempts of the early 1970's. The prosecution put this evidence before the jury simply because it believed the jury would find it morally reprehensible.

The admission of such evidence was clear error. The evidence was irrelevant, and to the extent that it was relevant, it was far more prejudicial than probative. Evid. Code §§ 210, 352. Overarching these errors, Masters' rights under the First and Fourteenth Amendments were violated by admission of evidence of political beliefs that had no relevance to the issues of the case. *Dawson v. Delaware* (1992) 503 U.S. 159, 166-167. When a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee* (1991) 501 U.S. 808, 825. The admission of Masters' extremist political beliefs cuts to the heart of the Due Process Clause by diverting the jury's attention from guilt or innocence.

The error is reversible per se. *Rose v. Clark* (1986) 478 U.S. 570, 587; *Dawson v. Delaware*, *supra*, 503 U.S. at 169 (conc. opn. of Blackmun, J.). Alternatively, and under any standard of prejudice applied, the error is prejudicial in this case.

B. THE PROFFERED RELEVANCE OF THE FIRST AMENDMENT EVIDENCE, AND MASTERS' OFFER TO STIPULATE TO THE FACTS SOUGHT TO BE PROVED

In January 1989, the prosecution filed notice of the "gang-related" evidence that it intended to offer. (CT 2629, 2679) According to this notice, the evidence was to be "used against the defendants for the purpose of showing common gang-related activity that will assist in establishing the existence of the BGF and the defendants' membership in it." (CT 2629, 2679)

A prosecution memorandum of points and authorities filed a month later stated the evidence was relevant to the following issues:

> (1) the existence of the Black Guerilla Family (BGF) as a prison gang at San Quentin State Prison;
> (2) identify the members of that organization;
> (3) document the societal association of Andre Johnson, Jarvis Masters, Lawrence Woodard, as well as non-indicted co-conspirators such as Michael Rhinehart, Willie Redmond, Donald Carruthers, Brian Vaughn, Mark Ingram, Nelson Gomez, Walter Daily, Harold Richardson and Rufus Willis;
> (4) the structure and regulations of the BGF which exacts control over its membership even as to such details as to when to eat, what to eat, when to exercise, type of exercises, what to read, sexual discipline, a theory of interpretation of history and events, how to defend oneself, how to attack another, how to construct and use weapons, and the use of special methods and/or mechanisms for communication. (CT 2806-07)

The prosecution reiterated these theories in reply to the defendants' objections (CT 3000), and added that the evidence was necessary to corroborate the testimony of Rufus Willis, an accomplice as a matter of law. (RT 3119) Finally, the prosecution declared that the evidence "provides circumstantial evidence of elements of the crimes charged that must be proven by the People: premeditation, malice aforethought, motive and intent." (CT 3119)

On March 3, 1989, stipulations regarding the BGF were proposed by all three defendants. (CT 3120, 3174-76) Masters offered to stipulate that he was known by the BGF name "Askari" and that he was a member of the BGF at San Quentin. (CT 3120) Like the words "Brother," "Comrade," "Soldier," or "Justice," "Askari" describes a member of a class of individuals. Thus, the title "Askari" was used by other BGF members in C-section as well as a large portion of the San Quentin black prison population in 1985. (RT 13916, 14802, 14906, 14921) In addition, Masters was specifically known as "Askari Left Hand" and "Thomas." (RT 12715-16, 14910; CT 1916) Woodard offered to stipulate to the existence of the BGF in San Quentin in 1985, his membership in the group, that he was known by the Swahili name BGF "Askari",[66] that members of the BGF are sometimes referred to by Swahili names, and that black

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[66] On the same day, the court deferred ruling on the evidence until the documents were offered at trial. (CT 3176)

prisoners commonly study Swahili in prison. (CT 3174-75) Johnson offered to stipulate that the BGF existed, that defendants and the unindicted co-conspirators were members of the BGF, that defendants and the co-conspirators knew each other, and that Johnson was known by the name "Dray." (CT 3120)

To avoid these stipulations, the state concocted a new theory of relevance. In October 1989, the prosecution filed two trial briefs regarding the "gang-related" evidence. (CT 4749, 4762) In one of the briefs, the prosecution asserted, for the first time since Sergeant Burchfield's death, that "the radical revolutionary philosophy of the BGF was directly connected to the murder of Sergeant Burchfield." (CT 4763) The prosecutor asserted that under the BGF philosophy, killing a correctional officer was "an act to further the revolutionary cause." (CT 4763) According to the prosecutor, "[t]he voluminous nature of the material is circumstantial evidence of the intensity of the beliefs held by the members of the BGF and the all-encompassing nature of their commitment to the principles of Black Revolution. The principals [sic] of the revolution are essential to put in context the nature and reason for the murder." (CT 4763)

The court made various rulings on the admissibility of the evidence. At a hearing on September 13, 1989, the court stated that evidence would be admitted to "show the customs and practices of the BGF *if* those customs and practices relate to the facts and the evidence in

this case." (RT 12164) (emphasis added) Later in the same hearing, the court admitted the documents to identify the unindicted co-conspirators and "to show what the structures and regulations of the BGF were and what control . . . and discipline it had over its members." (RT 12165-66) Further, the court admitted evidence to corroborate the testimony of the co-conspirators. (RT 12169)

As a result of these rulings, a slew of inflammatory, irrelevant documents came before the jury. For example, Exhibit 318-B(6)(a) chronicles a history of blacks rebelling against whites, and includes this BGF description of the Marin Civic Center shoot-out and later San Quentin prison escape attempt by George Jackson:

> August 7, 1970 slave revolt in Marin County when Jonathan Jackson, James McClain, and William Christmas took hostages in exchange for the Soledad brothers giving their life to the struggle. To August 21, 1971, flight of the dragon in the San Quentin Adjustment Center when the most political mind of the organization was murder. [sic] Comrade George Jackson left us, but three pigs and two (2) AB's did also . . . . Black August represents a determined effort to perserve [sic] in struggle until total victory is the people's . . .[67]

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[67] Willis testified that the BGF was founded on the ideology and teachings of George Jackson. (RT 12659)

Over and over again, these exhibits confronted the jury with the violent, revolutionary political beliefs of the BGF. The following excerpts are representative of the inflammatory content of the documents:[68]

> Exhibit 390-E(1): sets forth the goals and political theory of the BGF, and closes with the declaration: "We are the beneficiaries of George's legacy; keepers of the Dragon's torch."
>
> Exhibit 385: "you either ride the Yankees back or permit him to ride yours" . . . "one must either be the master or the slave, an executioner or the victim."
>
> Exhibit 390-C(1): "revolutionaries are people with guns and ideology. . . . White institutions created it, White institutions maintain it, White society condones and endorses it, Hence the black vanguard must destroy and direct the struggle to destroy the institution of capitalism."
>
> 383-A(3)(c): "our basic aim is to liberate all members from prison camps circumstances will determine the means."
>
> 318-B(2): "The Gaidi is that combatant who armed with the consciousness of the black underclass in Amerikkka wages struggle in the service of new Afrikan people, politically, military, socio-culturally and economically under the banner of our party . . "

As more fully explained below, none of these documents were relevant to any disputed issue.

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[68] These are examples. All the gang-related documents were objected to at trial. On appeal, Masters argues that in particular, the following exhibits were erroneously admitted: 318-A(1), 318-A(4), 318-B(1), 318-B(2), 318-B(6)(a), 318-B(6)(a)(1), 318-B(7), 318-B(9), 336, 336-A, 353, 376-A, 383-A(8), 383-A(1), 383-A(2), 383-A(3)(a), 383-A(3)(b), 383-A(3)(c), 383-A(6), 390-B(1), 390-C(1), 390-E(1), 417-B, 418-A, 419-B.

C. THE EVIDENCE WAS IRRELEVANT TO ANY DISPUTED FACT

Evidence Code section 210 defines relevant evidence as evidence which has "any tendency in reason to prove or disprove any *disputed* fact that is of consequence to the . . . action." (Emphasis added.) Thus, evidence of gang membership is admissible to prove motive, (*People v. Burns* (1987) 196 Cal.App.3d 1440, 1455-56), threats to prosecution witnesses, (*People v. Harris* (1985) 175 Cal.App.3d 944, 957) and identity, (*People v. Beyea* (1974) 38 Cal.App.3d 176, 194) where these issues are in dispute. However, it is error to admit evidence of gang membership when such evidence has little or no relevance to any disputed issue at trial. *See, e.g.*, *People v. Pinholster* (1992) 1 Cal.4th 865, 942; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 76-79.

When a defendant offers to stipulate to a fact, however, the fact is no longer "disputed" within the meaning of section 210, and evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code section 350. *People v. Bonin* (1989) 47 Cal.3d 808, 848-849. In *Bonin*, defendant was charged with murder. The prosecution sought to call the parents of the victims to establish identity. Defendant offered to stipulate to the identity of the victims. The prosecution refused the stipulation and presented the testimony. This Court first noted that the

defendant's stipulation rendered the issue on which the evidence was offered "undisputed" within the meaning of Evidence Code section 210. 47 Cal.3d at 848-849. Under such circumstances, the prosecutor was required to accept the proffered stipulation:

> "[I]f a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury." . . . Thus, the court should have compelled the prosecution to accept the defense's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation.
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> *Id.* at 849 (citations omitted).

Bonin controls this case. Masters' offer to stipulate that he was known by the BGF name "Askari" and that he was a member of the BGF (CT 3120), in conjunction with Woodard's offer to stipulate to the existence of the BGF in San Quentin in 1985 and to his membership in the group, that he was known by the BGF name "Askari", that members of the BGF are sometimes referred to by Swahili names, and that black prisoners commonly study Swahili in prison, satisfied all the legitimate bases for admission of the gang-related documents. (CT 3174-76) Pursuant to *Bonin*, the evidence should not have been admitted.

In arguing for a contrary result, the prosecution relied primarily on *People v. Manson* (1976) 61 Cal.App.3d 102 (*cert. denied*, 430 U.S. 986); *People v. Remiro* (1979) 89 Cal.App.3d 809 (*cert. denied*, 444 U.S. 876);

People v. Frausto (1982) 135 Cal.App.3d 129 and *People v. Dominguez* (1981) 121 Cal.App.3d 481. (CT 2806) In fact, these cases weaken the prosecution's argument because in each the challenged evidence *directly related* to the defendant's motive to commit the crime. That is not the case here.

In *Manson*, the defendants and other members of the "Manson Family" believed that a race war between blacks and whites would lead to revolution, after which Manson and his followers would emerge from their hiding place in the California desert and assume control over the country. Manson's name for the race war and resulting chaos was "Helter-Skelter." The evidence showed that the Tate-LaBianca murders were the first step in Manson's grand scheme to foment civil war between the black and white races. *People v. Manson*, *supra*, 61 Cal.App.3d at 130-131. The evidence showed the revolutionary philosophy was developed by one of the defendants and was followed by his "Family" in committing the charged murders. Because there was a direct connection between the "Family's" lunatic political views and the charged offenses, the evidence was properly admitted to prove motive.

Similarly, in *Remiro*, defendant was charged with the murder of the Oakland Public School Superintendent Marcus Foster and the attempted murder of Foster's assistant. At trial, defendant objected on grounds of relevance and undue prejudice to the admission of documents showing

that the Symbionese Liberation Army ("SLA"), of which defendant was a member, planned to kill other public officials and influential private citizens. *Id.* at 841. Relying on *Manson*, the court overruled the objections, holding that "defendants were engaged in a conspiracy of dimensions far broader than the murders for which they were charged." More specifically, the court found that:

> The slaying of Superintendent Foster was only a step in a planned series of terrorist activities designed to accomplish the SLA's avowed goal of fomenting a violent upheaval within American society in order to effect revolutionary change.
>
> *People v. Remiro*, *supra*, 889 Cal.App.3d at 842.

Thus, in both *Manson* and *Remiro* the charged offense was merely a first step toward accomplishing a greater objective which could only be understood in the context of the doctrines espoused by the groups, since the larger objective of the murder conspiracies was societal upheaval and revolution. As stated in *Remiro*, "[t]he challenged evidence was relevant and admissible to show the nature and scope of the conspiracy which spawned the plans to murder Foster and Blackburn." *People v. Remiro*, supra, 89 Cal.App.3d at 843.

Nor does the People's reliance on *People v. Dominguez*, *supra*, 121 Cal.App.3d 481, aid its position. There, defendants, members of the Nuestra Familia, were convicted of the murder of a rival gang member.

Evidence was admitted without objection showing the Nuestra Familia to be a "rigid, militaristic" organization. Defendants were "soldiers" in the gang; they received orders from a superior to travel to Bakersfield, commit a robbery, kill a drop-out from the gang, and kill any gang enemies they might encounter on the way. The challenged evidence consisted of testimony from two former members of the Nuestra Familia. One said she carried messages to "soldiers" from higher-ups ordering them to get involved in "hits, prostitution, drugs, anything that would bring money to the organization." *Id.* at 497-498. Another testified that the street activities of the gang included "robbery, sales of drugs, prostitution, extortion, contracts, meaning someone pays you to kill someone." *Id.* at 498.

On appeal, the court ruled the evidence admissible, holding that motive could not be proved "without showing that the Nuestra Familia engaged in criminal and violent acts and that members were obligated to commit such acts under penalty of their own lives." *Id.* at 498. The evidence supported the prosecution's theory of the case by showing that the Nuestra Familia was a criminal organization, and that defendant's agreement to travel to Bakersfield and commit several violent crimes was performed in the context of the normal activities of the Nuestra Familia. Thus, the challenged evidence provided a reason, or motive, for the crimes. *Id.*

Like *Manson* and *Remiro*, *Dominguez* broke no new ground. Each of these cases falls under the general rule that gang membership evidence is admissible, in the prosecution of a gang-related crime, to prove a disputed fact such as motive. *People v. Williams* (1997)16 Cal.4th 153, 193 (prosecution's theory of case was that victim was murdered for looking like a Crip in an area claimed by both Crips and Bloods); *People v. Frausto*, *supra*, 135 Cal.App.3d at 141.[69] In each case, evidence of what the organization believed or did in the past was necessary to explain the motive for the charged offenses.

In *People v. Ortiz* (1979) 95 Cal.App.3d 926, the Court of Appeal distinguished *Manson* and found the trial court had erred in admitting evidence regarding the cult to which defendants belonged. The prosecution had argued that the admission of evidence regarding the cult was relevant because it would uncover a common design among members of the cult which included killing people. *Id.* at 933. However, no such sinister cult purpose was shown. Similarly, the court rejected the admission of evidence regarding a defendant's practice of animal sacrifices

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[69] In *Frausto*, the court stated that "it has repeatedly been held that it is proper to introduce evidence which is even unpleasant or negative pertaining to an organization in issue which is relevant on the issue of motive or the subject matter at trial." *People v. Frausto*, *supra*, 135 Cal.App.3d at 140. The subject matter of Masters' trial was the conspiracy to kill Sergeant Burchfield, who was believed to be bringing in bullets that might be used against BGF members. The motive was self-defense, and had nothing to do with the BGF's revolutionary political philosophy.

which, even if it was relevant to impeach the witness, was unduly prejudicial under Evidence Code §352. *Id.* at 933-934.

The State failed to make any claim here of the connection between the prison gang and the charged offense, as it did not even attempt to connect Sergeant Burchfield's death to the political philosophy of the BGF at trial. The State's star witness, Rufus Willis, testified that the original plan was to strike at certain members of the Mexican Mafia and Aryan Brotherhood, prison gangs that were enemies of the BGF. (RT 12734) According to Willis, inmate Redmond "stated he wanted to start a war by striking, start it off by striking police." (RT 12735) At the next meeting, Redmond focused on Sergeant Burchfield because it was thought that Burchfield had been furnishing weapons to the Aryan Brotherhood. (RT 12739) The State's other key witness, Bobby Evans, a self-described leader of the BGF, said the central committee of the BGF did not know of the plan to attack Burchfield and had not ordered it. (RT 13717)

Contrary to the prosecutor's assurances, "the radical revolutionary philosophy of the BGF" was *not* "directly connected to the murder of Sergeant Burchfield." (CT 4763) Rather, the plan to murder Sergeant Burchfield was born of a desire to strike at fellow members of the prison world and their unlawful suppliers and not at the "white, capitalist" society outside San Quentin's walls. The conspiracy was grounded not in "revolutionary" politics but in a battle for prison turf. "Absent some

connection between the prison gang and proof of the charged offenses, of course, a prosecutor's reference to prison gangs is irrelevant and prejudicial." *People v. Pinholster*, *supra*, 1 Cal.4th at 942.

Unlike *Manson* and *Remiro*, the political beliefs of the BGF did not inspire the conspiracy to kill Sergeant Burchfield. Unlike *Manson* and *Remiro*, the charged offense was not the first step of a broader conspiracy to provoke revolution in America. Absent a nexus between political thought and criminal deed, evidence of the BGF philosophy was simply irrelevant. Given the proffered stipulations, the evidence was irrelevant and should not have been admitted.

D. EVEN IF THE EVIDENCE RETAINED SOME MARGINAL RELEVANCE, ITS PROBATIVE VALUE WAS FAR OUTWEIGHED BY THE PREJUDICE CAUSED BY ITS ADMISSION

The competing demands of justice require the trial courts to proceed with extreme caution when dealing with gang evidence, especially when the evidence contains political material related to gangs. "[E]ven where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it." *People v. Williams* (1997) 16 Cal.4th 153, 193.

Evidence Code section 352 requires trial courts to exclude evidence "if its probative value is substantially outweighed by the

probability that its admission will . . . create substantial danger of undue prejudice." Although incapable of precise definition, probative value refers to three related concepts: relevancy (the extent to which the evidence tends to prove an issue), materiality (the importance of the issue to the case) and necessity (the need to use this evidence to prove the issue). *People v. Schader* (1969) 71 Cal.2d 761, 774-775; *People v. Stanley* (1967) 67 Cal.2d 812, 818-819.

When a defendant offers to stipulate to a certain fact, the probative value of evidence which proves this fact – and is no longer necessary to do so – is minimal and may be outweighed by its potential for unfair prejudice. *United States v. Spletzer* (5 Cir. 1976) 535 F.2d 950, 955-956 (interpreting probative value component of Federal Rule of Evidence 403, the federal analogue to California Evidence Code §352). "Undue prejudice" refers to evidence which "tends to evoke an emotional bias against [one party] and which has very little effect on the issues." *People v. Wright* (1985) 39 Cal.3d 576, 585. *Accord People v. Yu* (1983) 143 Cal.App.3d 358, 377 (*cert. denied*, 464 U.S. 1072).

The balancing of the risk of prejudice from the proffered evidence, against its probative value on the material issues, becomes even more complex in light of the stipulations.

> `The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the

> state's case of its persuasiveness and forcefulness." [citing *People v. Scheid* (1997) 16 Cal.4th 1] (*Id.*, at 17, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007...)
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> We emphasize that this is a "general rule." The exception – which we count on the trial courts to recognize and enforce – is the instance in which the probative value of the evidence is substantially outweighed by its prejudicial effect. (Evid. Code §352.) These are among the most difficult and important decisions that a trial court makes. Even approached – as they must be – with great care, they tax every judge's reservoirs of common sense, fairness and circumspection. . . .
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> *People v. Thorton* (2000) 85 Cal.App.4th 44, 49.

The undue prejudice resulting from the admission of evidence regarding the BGF's revolutionary philosophy and history[70] clearly outweighed any probative value of this evidence. As such, the court should have compelled the prosecution to accept the stipulations offered by the defendants to establish their BGF membership and kinship names to avoid the extremely prejudicial effect of the evidence which was offered instead.

Moreover, even if the gang-related evidence retained some slight probative value after Masters' proposed stipulation, it should have been excluded under section 352.

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[70] The dramatic events which took place in Marin County in the early 1970's were memorable enough that many prospective jurors personally recalled them or knew some of the victims, (RT 1500; 4445-4452; 5635) although these events date back to when Masters was less than ten years old.

First, the evidence shed no light on any disputed factual issues. It was offered ostensibly as evidence of motive and corroboration for Willis' testimony. As shown above, the evidence had nothing to do with motive. Further, the corroborative value was slight and cumulative. Any member of the BGF would be expected to be familiar with the political theory of the group; documents confirming Willis' understanding of the general nature of the organization do not establish the trustworthiness of his more incriminating testimony regarding Masters' guilt.

Second, the evidence was particularly prejudicial in Marin County where jurors were likely to be familiar with the Civic Center shoot-out and 1971 attempted prison escape. During voir dire, several potential jurors said they were familiar with the victims or events of the 1970 courthouse shooting. (RT 1500; 4445-4452; 5635) Masters was on trial for an in-prison murder of a prison guard. In such a case, it seems obvious that evidence showing the founder of the BGF and other members had murdered correctional officers and a Superior Court Judge was likely to unduly and prejudicially influence the jury.

The trial judge herself appreciated the tremendous prejudicial impact such evidence would have on Marin County jurors:

> I can't imagine that, the district Attorney being allowed to introduce any evidence . . . that connects or infers that these defendants belong to the same gang that George Jackson

> did, and therefore the jury must conclude they're probably guilty. It's so far afield that it's ludicrous. . . . I'm not going to allow that connection to be made in this trial in no way . . .. [I]t seems to me to allow that connection to be made is so prejudicial in this county that it might outweigh probative value since there's a substantial amount of gang material that doesn't relate to Jonathan and George Jackson or Angela Davis. (RT 1497-1500)

Inexplicably, the court later admitted the *exact* same evidence it earlier acknowledged to be enormously prejudicial.

"When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact." *People v. Cox* (1991) 53 Cal.3d 618, 660. The inflammatory impact of the BGF's revolutionary philosophy and history looms even larger than the simple fact that the defendant is a member of a racially-based prison organization. Given the lack of relevance to any material issue, and even assuming *arguendo*, that all members of the BGF believe fully in the BGF's philosophy, this evidence remains an extraneous factor which might lead the jurors to confuse what the defendant did, with who he is.

The presumption of innocence cannot tolerate that confusion. "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Myers* (5 Cir. 1977) 550 F.2d 1036, 1044 (*cert. denied* 439 U.S. 847). Just because Masters was a member of the BGF does not mean he conspired to, or

aided and abetted in, the murder of a white correctional officer. Indeed, Masters' principal defense (which was itself not allowed) was based upon misidentification. Due to the improper admission of prejudicial evidence regarding the BGF, however, the jurors had a harder time respecting Masters' presumption of innocence and separating who he is from what he actually did. If the admission of this inflammatory evidence improperly influenced the jury and resulted in lightening the prosecution's burden of proof, this raises the possibility that Masters' right to due process was impaired. *People v. Garceau* (1993) 6 Cal.4th 140, 186. The evidence regarding the BGF revolutionary philosophy and history was clearly irrelevant, enormously prejudicial, and its introduction as evidence in this case should be condemned. *People v. Cox*, *supra*, 53 Cal.3d at 660.

E. ADMISSION OF THE IRRELEVANT EVIDENCE VIOLATED MASTERS' FIRST AMENDMENT AND DUE PROCESS RIGHTS

The erroneous admission of Masters' abstract political views also implicates the First Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments. First, the admission of evidence of a criminal defendant's membership in a political group violates the First Amendment when such membership is irrelevant to any disputed fact. In *Dawson v. Delaware*, *supra*, the Supreme Court held that the state violated a defendant's First Amendment rights when it introduced evidence of his membership in the Aryan Brotherhood, a white supremacist

organization, at the sentencing phase of a capital case, when that evidence was wholly unrelated to the crime of which defendant was convicted, or to any factor that the jury could consider in determining the penalty. 503 U.S. at 166-167.

> [W]e conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs. Cf. *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").
>
> *Dawson v. Delaware*, *supra*, 503 U.S. at 166-167.

So, too, here did the admission of Masters' political beliefs, untethered to the facts of the case, violate the First Amendment right to freedom of expression. The admission of this type of evidence presents the very real risk of a conviction based upon what a man believes, and not what he did.

Similarly, admission of this evidence also violates due process. When a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, *supra*, 501 U.S. at 825. As explained above, the political and historical views of the BGF were especially prejudicial in a jury trial in

Marin County, which had been the site of the infamous shoot-outs that spawned the organization. The impact of this evidence upon a Marin jury is akin to informing a Jewish juror that a defendant accused of killing a Jew bears a swastika tattoo. While not every error in admitting evidence violates due process, admission of the BGF's extremism was so unduly prejudicial that it rendered the trial fundamentally unfair and denied Masters the constitutionally required protection of the presumption of innocence. *United States v. Myers*, *supra*, 550 F.2d at 1044.

F. THE ERROR REQUIRES REVERSAL UNDER ANY APPLICABLE STANDARD OF PREJUDICE

In *Rose v. Clark*, *supra*, 478 U.S. 570, the Supreme Court reiterated its long-standing rule that "some constitutional errors require reversal without regard to the evidence in the particular case." *Id.* at 577. The rule of per se reversal "recognizes that some errors necessarily render a trial fundamentally unfair." *Id.* Further, "violations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial court. . . . [O]ur Constitution, and our criminal justice system, protect other values besides the reliability of

the guilt or innocence determination." *Rose v. Clark*, *supra*, 478 U.S. at 587-588 (Stevens, J. conc.).[71]

In Justice Blackmun's concurrence in *Dawson*, he suggested that the violation of the First Amendment was reversible per se: "[b]ecause of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today." 503 U.S. 159, 169.

Justice Blackmun's reasoning applies here. The admission of Masters' political beliefs was an egregious violation of his freedom of expression guaranteed by the First Amendment. The constitutional right violated here is the precise type of right which "[is] not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial court."

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[71] The Supreme Court has frequently applied this approach when dealing with errors of this magnitude, holding that certain errors require reversal without a showing of prejudice. *See, e.g., Vasquez v. Hillery* (1986) 474 U.S. 254 (unlawful exclusion of blacks from the grand jury); *Waller v. Georgia* (1984) 467 U.S. 39 (denial of the right to a public trial); *McKaskle v. Wiggins* (1984) 465 U.S. 168 (denial of the right to self-representation at trial); *Estes v. Texas* (1965) 381 U.S. 532 [televising of trial]; *Turner v. Louisiana* (1965) 379 U.S. 466 (use of the same deputies as jury custodians and witnesses); *Gideon v. Wainwright* (1963) 372 U.S. 335 (total deprivation of the right to counsel); *Tumney v. Ohio* (1927) 273 U.S. 510 (trial of a case before a judge with a financial stake in the outcome).

Rose v. Clark, *supra*, 487 U.S. at 587-588. The liberty principles protected by the First Amendment do not ride coach while a state's interest in affirming convictions travels first class. A per se reversal rule is required to afford the First Amendment its proper role as a fundamental American value.

In any event, the error in this case requires reversal under any standard. It is reasonably probable the jury would have returned a more favorable result had the evidence been excluded. The case was a close one, as evidenced by the length of deliberations (eight days). *See, e.g.*, *People v. Carrera* (1989) 49 Cal.3d 291, 345 (*cert. denied* 495 U.S. 911) (slightly more than a day and a half indicates close case); *People v. Anderson* (1978) 20 Cal.3d 647, 651 (several days of deliberation evidences close case). The case hinged upon the credibility of the two key prosecution witnesses, Willis and Evans, both of whom had compelling reasons to lie. Moreover, Officer Lipton's earlier testimony that Sergeant Burchfield was killed in front of cell four corroborated the defense theory that the Crips were responsible for the killing.

Against this background of reasonable doubt, it is highly probable that the jurors, perhaps without admitting it to themselves, presumed Masters to be guilty because he embraced such violent, extremist political views. In essence, the improperly admitted evidence presented Masters to the jury as a hate monger, a racist who hted white people,a

revolutionary that would stop at nothing to achieve the goals of the BGF. Once the jury believed this, it was too short a step to acceptance of Willis' and Evans' self-serving testimony. Reversal is required.

X. THE JURY'S 18-DAY SEPARATION DURING DELIBERATIONS WAS PREJUDICIAL CONSTITUTIONAL ERROR

During the middle of its guilt-phase deliberations, for an 18-day period between December 15, 1989, and January 2, 1990, the jury was released for the Christmas and New Year's holidays. This 18-day separation was an abuse of discretion and a violation of appellant's rights to due process.

A. THE PLANNED HOLIDAY RECESS WAS INTENDED TO TAKE PLACE DURING THE PRESENTATION OF EVIDENCE

On August 17, 1989, after jury selection and during a motions hearing prior to the start of the trial, the court indicated to counsel that it intended to release the jury for the week before and the week of Christmas – from December 16th to January 2, 1990. The court asked for and received no objection from respective counsel. (RT 10623) As subsequent comments by the court and prosecutor make clear, however, by reference to witnesses possibly having to travel on New Year's Day, the underlying assumption was that the trial would still be in the evidentiary stage. (RT 10623-10624)

On the day they were sworn, August 21, 1989, the jurors were told of the holiday plans (RT 10634 [jury], 10666 [alternates]). The first witness was sworn on August 25, 1989. (RT 10945) On November 21,

1989, there was a break in the defendants' case until the Monday following Thanksgiving, and the court and counsel again discussed the schedule. (RT 15182, *et seq.*) The court noted that, depending on the length of the rebuttal and surrebuttal cases, arguments could possibly start on December 1, 1989, and the jury might get the case as early as December 4th or 5th. If so, the court said,

> The jury will have a substantial amount of time then . . . before their announced Christmas holiday. I'm not sure that I might not have to revise that if they are still in deliberation on the 15th. I may keep them longer. (RT 15190)

Crucially, then, the court had indicated to defense counsel that if the jury were in deliberations, the holiday would be revised. On the next court day, the Monday following the Thanksgiving holiday, the court's view had somewhat changed. The court explained to the jury that the evidence would end the following week; the court and attorneys would go over the instructions; the jury would hear arguments commencing no later than Monday, December 11, 1989; and the instructions would be given by the last day before the planned holiday, December 15. (RT 15282-15284) However, there was nothing to alert the defendants or their counsel that the jury would separate for the holiday *during* deliberations.

Checking on the possibility of deliberations during the week of the 18th of December, the judge asked how many of the jurors had

unchangeable plans for that week. Six nodded in the affirmative. (RT 15284) That being the case, the court said,

> [A]fter the evidence is over this week, we'll have the arguments the following week, and then you will be instructed after the 1st of the year. And you will then be considering your verdicts when we come back after the holiday. . . . So you know what to expect, there will be evidence, we'll be finished with the evidence probably by Friday, maybe next Monday, and then you'll have a few days off. We'll have arguments, and we'll have the Christmas holiday, and then we'll come back for the instructions on the law and your considering your verdicts." (RT 15284-85)

A short time later on the same day, Masters' defense counsel expressed his concern about giving his argument before the holiday and having the jury instructed two weeks later. He requested both argument and instructions after the holiday. The court's response was limited to the point that both argument and instructions might occur before the holiday. (RT 15306)

As of Monday, November 27, then, there was no contemplation, no indication from the court that there might be a two-week holiday vacation in the middle of deliberations.

By November 30, however, the schedule had changed again: arguments would commence for the Woodard and Masters jury on Tuesday, December 5, and by either Wednesday or Thursday of that week, the jury would retire to begin deliberations. (RT 15579-15580)

Moreover, unlike during the course of trial, there would no "no days off." (RT 15591)

The following day, after the defense rested, the court announced that the jury would hear oral arguments and instructions commencing the following Tuesday, and then would begin deliberations late Wednesday or early Thursday, which would have been December 5th, 6th, and 7th. (RT 15765) For the first time, however, since it became clear that deliberations would begin before Christmas, the court affirmed that the two-week holiday recess would take place as scheduled, despite the fact that it would interrupt deliberations: "[W]e will be – all be here until the 15th and we will recess for the Christmas holidays as originally scheduled if you have not reached a verdict." (RT 15765)

The jury began its deliberations on Thursday, December 7 (RT 16356; CT 5098). There were no deliberations on Friday, December 8; (CT 5099) The December 11 minutes recite that the trial was "resumed from December 7" (CT 5100) and that an illness to one of the jurors prevented the actual resumption of deliberations until Wednesday, December 13. (CT 5100-02) Deliberations continued on December 14 and 15, and at the end of the Friday session, the jury was released for 18 days, until January 2, 1990. (CT 5104-05; RT 16793)

The jury returned on January 2, 1990 (CT 5106), and four court days later, on January 8, 1990, the jury returned its verdicts. (CT 5124)

B. THE JURY SEPARATION WAS A PREJUDICIAL DENIAL OF DUE PROCESS WHICH WAS NOT WAIVED BY FAILURE TO RAISE THE ISSUE BELOW

In 1969, Penal Code section 1121 was amended to allow a trial court, in its discretion, to let the jury separate after deliberations have commenced.[72]

A violation of the pre-1969 version of section 1121, which did not allow separation during deliberations, resulted in a presumption of prejudice which could only be rebutted by evidence that during the separation, the jurors did not discuss the case and were not improperly influenced. *E.g.*, *In re Winchester* (1960) 53 Cal.2d 528, 534.

The cases since 1969 have ranged all the way from approval for jurors to return home overnight and on weekends (e.g., *People v. Murphy* (1973) 35 Cal.App.3d 905, 933), to disapproval – indeed, a finding that due process was denied by – an 11-day separation after submission of the case to the jury. *People v. Santamaria* (1991) 229 Cal.App.3d 269.

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[72] Prior to amendment, section 1121 provided for separation only before submission of the case to the jury. The present version provides for separation without reference to submission:

> "The jurors . . . may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them . . . ." *Stats.* 1969, ch. 520, § 1m, p. 1131.

In the subsections which follow, appellant will argue (1) that the 18-day jury separation was an abuse of discretion; (2) that it resulted in a violation of appellant's right to due process; (2) that the issue was not waived by failure to object below; and (3) that the error was one that requires either a presumption of prejudice or reversal per se.

1. The 18-Day Separation of the Jury During Deliberations Violated Appellant's Right to Due Process

Although section 1121 vests the trial court with discretion to allow separation of the jury after the beginning of deliberations, this discretion "is not without limits." *People v. Santamaria, supra*, 229 Cal.App.3d at 276.

Santamaria involved a murder trial in which deliberations were begun on the 14th day and recessed after the 15th day for 11 days because of the trial judge's absence. On the day the jury returned, they asked for a copy of the instructions, and by mid-afternoon had returned a verdict of guilty. The eleven days of the separation included two weekends, two successive Monday holidays, and a four-day week during which the trial court was absent without explanation in the record.

The Court of Appeal found both an abuse of discretion and a violation of due process, and reversed. It first analyzed the separation in terms of continuances for good cause, and noted that a court's schedule is an insufficient excuse for delay. 229 Cal.App.3d at 277, citing *People*

v. Katzman (1968) 258 Cal.App.2d 777, 789 (*disapproved on other grounds, Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 777-780, and n. 11). Although administrative duties, a congested calendar, or any other *exceptional* circumstance might explain such a continuance, the *Santamaria* court was unable to find any good cause. In addition,

> both the timing and duration of the continuance [were] particularly troublesome. A long adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and court's instructions may become dulled or confused. . . . Obviously, the longer the separation, the greater the risk. A long adjournment of deliberations also disrupts the very process and pattern of the jury's orderly examination of the evidence. The People cite no case in which an interruption of jury deliberations of such length has been countenanced in a criminal case, and our own independent research has not uncovered any similar case. (Citation)
>
> 129 Cal.App.3d at 277-278.

A simple comparison of *Masters* with *Santamaria* suggests even more strongly an abuse of discretion: (1) The trial here was much longer, involving three months rather than Santamaria's 14 days; (2) the interruption was even longer – 18 days as against 11 days; (3) the risk of discussion with non-jury members was even greater, because the break included common family holidays and parties, at which a juror would be

naturally pressed to discuss the case, or to hear another's opinion about it; (4) the People still cannot cite a case approving such a break as this.[73]

The *Santamaria* court also rested on the availability of an alternative in that case – the substitution of another judge pursuant to Penal Code section 1053 129 Cal.App.3d at 278.[74] In the instant case, there may well have been an alternative, but we will never know. The court only asked the jurors how many of them had plans for the week of December 18th, without determining either (1) at what point in the week their plans would interfere with further deliberations, or (2) whether there were times during the following week, between the Christmas and New Years' holidays, open for deliberation.

The *Santamaria* court concluded as follows:

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[73] The Court of Appeal which decided appellant's co-defendants' appeal did not deal with the issue head on; rather, it rested on the failure of defendants to object to the 18-day break at trial. *People v. Johnson* (1993) 19 Cal.App.4th 778, 791-794.

[74] Section 1053 provides in pertinent part:

> If after the commencement of the trial of such a criminal action or proceeding in any court the judge . . . presiding at such trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial . . . . The judge . . . authorized by the provisions of this section to proceed with and complete the trial shall have the same power, authority, and jurisdiction as if the trial had been commenced before such judge or justice.

> To summarize, appellant was faced with a serious charge, a special circumstances first degree murder. The risk of prejudice inherent in suspending deliberations for 11 days was considerable, from the prolonged exposure of the jurors to outside influences, from the strong probability that their recollections of the evidence and the instructions would fade or become confused, and from the subversion of the pattern of orderly deliberation.
>
> 229 Cal.App.3d at 278-279.

This case was just as serious, and the risks listed by the *Santamaria* court were both present here and heightened by the even greater period of jury separation. If those risks led to "inherent" prejudice after 11 days, they were even more inherently prejudicial after 18 days.[75]

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[75] A contrary result was reached in *Hamilton v. Vasquez* (9 Cir. 1994) 17 F.3d 1149, which also involved a challenge to an 18-day holiday adjournment during deliberations. As in *Santamaria* and the instant case, there was no defense objection; and as in this case – but not *Santamaria* – the break was pre-planned and pre-announced, and the purpose was to accommodate jurors' holiday plans. The Court of Appeals distinguished *Santamaria* on the grounds that in *Santamaria* the court had not stated sufficient grounds for the break and there was no indication of any exceptional circumstances warranting it. If, however, as is argued below, the *Santamaria* court and appellant are correct that the 18-day break is so far beyond the bounds of normal trial procedure as to constitute a fundamental flaw in the conduct of the trial, then the *reasons* for the break are not determinative of the violation of due process.

Moreover, *Hamilton* is distinguishable because the trial court in that case made specific inquiry of the jury regarding their ability to deliberate during the week following Christmas (17 F.3d at 1159), but one of the jurors was to be away. In the instant case, the court only asked if jurors had plans for the first week; no mention was made of the second week, and no effort was made to determine whether the jurors' plans covered the entire week.

Even if the reasons for the break in this case were sufficient to avoid its characterization as an abuse of discretion, it was such a fundamental departure from normal trial procedure as to constitute a violation of due process. The *Santamaria* court found a due process violation.

> Due process implies an adherence by the trial court to the established mode of trial. Extreme variations from that practice . . . subvert that integrity of the legal process. . . . The 11-day continuance . . . far exceeds the limits of experience, reason, and most importantly, due process.
>
> 229 Cal.App.3d at 283.

That the error was one affecting appellant's fundamental due process rights is discussed further in the sections which follow.

2. The Violation Was a Structural Defect Requiring Reversal Per Se, or at Minimum, a Presumption of Prejudice

The error, the due process violation, is reversible per se because it constituted structural error. The distinction between trial error and structural error was created in *Arizona v. Fulminante* (1991) 499 U.S. 279, 310. Trial error is defined as "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-308. Structural errors are "structural

defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 309.

What sort of error is an 18-day break in deliberations? It could not qualify as trial error, because (1) it did not occur during the presentation of the case to the jury, and (2) it cannot be quantitatively assessed in relation to any other evidence. On the other hand, it is surely related to the "constitution of the trial mechanism," and it most certainly defies analysis by harmless-error standards. Under the *Fulminante* definitions, if it be error, it can only be structural error, requiring reversal per se.

A common reason given for requiring reversal per se is that the error is not one in which the prejudice can be either shown or disproved. For example, in *People v. Werwee* (1952) 112 Cal.App.2d 494, decided before the amendment to section 1121 allowing the jurors to separate during deliberations, the trial court, with apparent consent of counsel, allowed jurors to go home overnight during deliberations. On a motion for new trial, 11 of the 12 jurors stated (and it was stipulated as to the 12th) that, although they spoke with many people during the separation, they did not speak with anyone about the case. The Attorney General argued that the presumption of prejudice had thus been rebutted. The Court of Appeal disagreed, pointing out that a judicial determination of prejudice requires the opportunity for both sides to present evidence, but a defendant is not in a position to do so:

> [W]hen only the jurors know what their conduct has been, . . . their unsupported affidavits are the weakest sort of evidence. When there has been a prolonged separation [here, overnight], during which jurors moved about at will, affidavits or testimony of the jurors that they had not discussed the case or been guilty of other misconduct would be mere formality, and not capable of refutation by the accused."
>
> 112 Cal.App.2d at 497.

Other courts have made the same point. The Delaware Supreme Court said, in reversing a murder conviction after the "prolonged" separation of the jury over a weekend, that even when the judge inquires of the jurors regarding possible prejudicial activities, "silence or oral statements of jurors that they have not discussed the case or have not been guilty of other misconduct may be 'a mere formality, and not capable of refutation by the accused.'" *Hughes v. State* (Del. 1981) 437 A.2d 559, 577, quoting *Kimoktoak v. State* (Alaska 1978) 578 P.2d 594, 596 (3-day separation in joy-riding case). In *Kimoktoak*, the question was whether to adopt a presumption of prejudice, rebuttable by the People, or a per se rule of reversal. The Alaska Supreme Court took the latter view, because of the "inherent difficulty in obtaining reliable information on whether there has been misconduct." 578 P.2d at 596.

In re Carpenter (1995) 9 Cal.4th 634, provides a useful contrast. There, a juror had received outside information about the case, discussed this with a non-juror, and then lied about it when confronted after trial.

This Court held, *inter alia*, that when misconduct involves the receipt of information from extraneous sources, the effect of that is judged by a review of the entire record, and may be found to be prejudicial, either because of the nature of the material or indications of actual bias. *Id.* at 653 In this case, however, there is no single piece of inappropriately introduced evidence, or evidence of bias. Rather, appellant is claiming that the very fact of an 18-day separation, which could have affected the jurors in myriad ways, each of them differently, and in many ways un-knowable or undiscoverable, renders impossible any realistic chance of analyzing the harm, for there is nothing – no thing, no item or quantum of evidence or information – with which to compare it.

Again, the *Santamaria* opinion is persuasive on the point: "it would be virtually impossible . . . for appellant or anyone else to prove" that the 11-day delay affected "the jurors' ability to remember complicated facts, as well as . . . their recall and understanding of instructions." 229 Cal.App.3d at 282. Indeed, this is an impossibility exacerbated by Evidence Code section 1150, which renders inadmissible any evidence of the affect of a jury separation on the juror's deliberations.[76]

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[76] Evidence Code section 1150, subdivision (a), provides in relevant part:

> Upon an inquiry as to the validity of a verdict, . . . evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room. . . . No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror. . . .

The *Santamaria* court's implicit recognition of the practical difficulties – indeed, near impossibility – of the defendant's finding or being able to present evidence of prejudice during a lengthy jury separation led that court to avoid what it found to be a legislative intent to eliminate the former presumption to prejudice. To require appellant in this case to present evidence of misconduct or prejudice is to ask the impossible, and to make meaningless any reference to limitations on a court's discretion to allow a jury to separate during deliberations, for no matter how long.

Even if this Court is unwilling to consider the error reversible per se, a presumption of prejudice should apply. *Santamaria* concluded that the presumption of prejudice which formerly applied to jury separations during deliberations was eliminated, *sub silentio*, by the Legislature's granting to the trial judge discretion to separate the jury after submission. If this Court finds an abuse of discretion but no due process violation, the sheer length of the separation should shift the burden to the State to show an absence of prejudice. If this court finds a due process violation but chooses to analyze it under the federal *Chapman* standard, the result is the same: the People can in this case no more show an absence of prejudice than the appellant can show its presence.

3. The Fundamental Nature of the Error Requires Disregard of the Rule of Waiver for Failure to Raise the Issue Below

The fundamental nature of the due process violation also mitigates the failure of counsel to object below, if for no other reason than the sheer magnitude of the structural error. The 18-day separation in this case, however, was a "structural defect" of such magnitude that it rendered the jury trial unable to "reliably service its function as a vehicle for determination of guilt or innocence[.]" *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 (internal quotation marks omitted).

California appellate courts have reached two opposite results on the question of whether a failure to object to a jury separation during deliberations will waive the issue on appeal. In *People v. Harris* (1977) 73 Cal.App.3d 76, there was a five-day separation after one day of deliberations on an attempted robbery charge. The five days included two court holidays and a weekend, and only one day on which the court would normally have been sitting. The court held that failure to object resulted in a waiver of the issue. *Id.* at 83. Santamaria, in contrast, found no waiver, because "the court's abuse of discretion . . . was of such magnitude that whether or not appellant objected is irrelevant." 229 Cal.App.3d at 279, n.7.

One way to harmonize *Harris* and *Santamaria* is to view them as representing a continuum, on some point of which, in between the five

days' separation of *Harris* and the eleven days' in *Santamaria* an objection below becomes unnecessary. On that basis, the instant case, falling on the continuum well beyond *Santamaria*, falls well beyond the point at which waiver is invoked.

Another way to view them is as the Court of Appeal did in Masters' co-defendants' case – to consider the *Santamaria* court's rejection of waiver merely dictum based on the People's failure to raise the issue prior to submission. *People v. Johnson* (1993) 19 Cal.App.4th 778, 793-794.

Appellant submits, however, that the proper way to distinguish *Harris* from *Santamaria* is simply this: that the 11-day separation in *Santamaria*, and certainly the 18-day break in this case, is such a fundamental break with the normal process of a trial and is such a distortion of the framework of criminal procedure, that "mere acquiescence by counsel" will not operate as a waiver of the issue on appeal. *People v. Aguilar* (1984) 35 Cal.3d 785, 794 (defendant's right to interpreter may not be waived by counsel); see also *Raines v. State* (Fla. 1953) 65 So.2d 558, 559-560 (15-hour separation without admonition – no waiver); *Magwood v. State* (1980) 46 Md.App. 668, 675, 420 A.2d 1253 (requiring personal waiver by defendant of right to require jury to stay together); *People v. Coons* (1990) 75 N.Y.2d 796, 797, 551 N.E.2d 587 (allowing jury to go home overnight after submission, a violation of statute, so affected the mode of proceedings that no objection was

necessary to preserve the issue); *State v. Hill* (La.App. 1990) 562 So.2d 12, 14 (releasing jury overnight was "error patent," not requiring either objection below or raising of issue on appeal).

In the context of an appeal, one can only speculate as to the reasons that counsel did not object. Perhaps the court's waffling back and forth on the question lulled them into a belief that the jury would not separate for the entire 18 days. Perhaps they were simply exhausted and wanted, themselves, the two-weeks-plus the rest. Perhaps they were concerned that forcing the jury to give up its hoped-for holiday would result in angry jurors. It doesn't matter. In the context of a *habeas* petition, their reasons may be explored; in this appeal, all that matters is that this was a gross distortion of the trial process with potentially enormous, though unknowable, effects, and application of the waiver rule would elevate the trial court's serious violation of due process into an appellate abomination.

XI. CUMULATIVE ERROR REQUIRES REVERSAL OF THE VERDICT OF GUILT

Even assuming *arguendo* that none of the specific errors committed at trial, when considered alone, requires reversal, this is only the beginning of the inquiry. Reversal is still required if the cumulative prejudice flowing from the errors below denied Masters a fair trial. *Taylor v. Kentucky* (1978) 436 U.S. 478, 488 n.15.; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *McDowell v. Calderon* (9 Cir. 1997) 107 F.3d 1351, 1368.

Reversal is warranted in this case because, there were numerous errors which, taken together, resulted in appellant having been convicted as a result of a fundamentally unfair trial. These errors effectively combined to deny Masters the right to defend himself against a capital offense. The specific errors claimed by this appeal include the following:

- Appellant was denied a fair opportunity to impeach his accusers and was denied the opportunity to present his principal defense – actual innocence;
- Appellant was denied a line-up and crucial cross-examination of Willis;
- Compelling evidence of mis-identification and innocence was excluded;
- The State refused to disclose evidence of Evans' bias, and the court prevented Masters from disclosing that bias;

- The court denied judicial use immunity for defense witnesses and restricted examination of the prosecution's motives;
- Appellant's free speech and due process rights were violated by the admission of irrelevant and inflammatory evidence about the BGF's political beliefs;
- The court failed to sever Masters' trial from Woodard's;
- The jury was allowed to separate for an 18-day break during deliberations; and
- Other evidentiary rulings prevented Masters from putting on his defense: the exclusion of expert testimony regarding inmate behavior, the exclusion of evidence that the Crips claimed credit for committing the murder, and the Crips' motive for the crime.

This Court's statement in *People v. Hill, supra*, therefore applies equally to appellant's case:

> Defendant's trial, as seen, was far from perfect. In the circumstances of this case, the sheer number of instances of . . . misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone.
>
> *People v. Hill*, *supra*, 17 Cal.4th at 845.

As in *Hill*, reversal is required in Masters' case due to the sheer number of serious errors which occurred in the guilt phase of appellant's trial raising the strong possibility of a prejudicial effect. This is especially true since the errors combined to deny appellant both his right to put on his principal defense and his right to impeach his principal accusers.

PART THREE: PENALTY PHASE ARGUMENTS

PENALTY PHASE STATEMENT OF FACTS

A. PROCEDURAL BACKGROUND

On January 19, 1990, the court granted a motion by Johnson for his penalty trial to follow those of Woodard and Masters. (RT 17112) The Woodard penalty trial was set to go first, in late February, 1990, apparently because one of his attorneys was pregnant and there was already going to be a "race with the stork." (RT 17116) The expectation was for it to last four weeks. (RT 17116)

On March 28, 1990, the court heard the People's motion to once again exclude the evidence that Bobby Evans was released from jail shortly after the conclusion of the guilt-phase trial. (RT 18842-45)

Masters moved to excuse or to have the opportunity to voir dire the jury, which had just completed the Woodard penalty phase, having been unable to agree on a penalty verdict. The court denied both the motion to excuse the jury (RT 18854) and the motion to voir dire the jury. (RT 18856)

1. The Hamil Motion

The court also denied Masters' motion to dismiss the charge that Masters was involved in the murder of Bob Hamil in 1980, as he was not charged in that murder and was not even notified he was a uspect in that

murder until the section 190.3 notice in this case. (That notice was filed on August 30, 1988, CT 1089, eight years after Mr. Hamil's death) Accordingly, Masters suffered the prejudice of having no notice that he was a suspect in that case until eight years had gone by, and therefore had no practical ability to defend against the charge, locate witnesses, or present an alibi. (RT 18866) The court denied the motion, stating that if the prosecution were able to make its case via Masters' statements to the Long Beach police, that might jog his memory as to where he was.[77] (RT 18868-69)

2. The Renewed Motion Re: Bobby Evans

The People moved to exclude evidence of what happened to Bobby Evans after he testified in this guilt phase of the trial. (CT 5699) The defense opposed, seeking again to introduce evidence that, in fact, Evans was granted continuances until the end of the Marin trial and was thereafter immediately released on the pending charge, and had his parole violation term reduced to effect his immediate release. (CT 1538) The purpose was to impeach Evans' testimony that he was not granted any favors for his testimony, raising doubts about his credibility and thus contributing to the jurors' lingering doubt. (CT 5936, 5939) The defense also sought to impeach Evans with statements he had made since his

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[77] The court's reasons for denying the motion to exclude seem particularly cynical, and to presume Masters' guilt.

testimony about his involvement in contract shootings, contrary to his trial testimony that he had not shot anyone. (CT 5942) At the hearing on the motion, the defense argued that while only what occurred before his testimony was directly relevant, what *happened* after cast doubt on what Evans told the jury, and that there was a difference between his expectation that he would not go to prison and what Hahn actually promised him. (RT 18843-45) The court ruled that the defense could not introduce evidence of Evans' disposition after his testimony, but could present the testimony of Hahn regarding what he might have promised Evans. (RT 18956-57)

3. Motion to Excuse or Voir Dire the Jury

Following the Woodard verdict, Masters filed a motion for a new jury, or in the alternative to reopen jury voir dire. (CT 5889) Following a hearing (commencing at RT 18846), the court refused both to empanel a new jury (RT 18854), and to reopen voir dire. (RT 18855-56) More extensive discussion of the points raised by the defense appears *ante*, within the argument claiming error.

B. EVIDENCE IN AGGRAVATION

The trial court allowed introduction, pursuant to Penal Code section 190.3, of a number of charged and uncharged prior offenses. These included (1) uncharged juvenile conduct; (2) a series of 1980

armed robberies for which Masters was convicted; (3) jailhouse and prison misconduct; and (4) two uncharged murders.

1. Juvenile Conduct

George Brennan testified that when he and a friend were riding bicycles in Harbor Regional Park on October 24, 1974, two boys stopped them, asked them for money, checked their pockets, took a quarter and a penny or two from Brennan, and then, when he pleaded for it to be returned, returned it to him. (RT 191172-73) One of the boys talked the other one out of taking Brennan's new diver's watch. (RT 19174) In the end, what was taken was returned. (RT 19175-76) Masters was one of the boys. (RT 19177-78, 19187)

On July 3, 1975, Masters allegedly got into a fight with his friend, Cornelius "Joey" Campbell, and then went to Campbell's house and shot at the house with a gun. Campbell denied on the stand that this occurred, and denied that he told the police that Masters had a gun. (RT 19957, 19960) Police Officer Robert High testified that Campbell reported that Masters came to his house with a .22 handgun in his waistband and fired it into the house. (RT 19977-78) The police report, however, only states that Masters pointed the gun at Campbell and yelled at him, "I'm going to kill you." (RT 19979-80) Moreover, the officer admitted that the narrative portion of the report had not been filled in when Campbell signed it, and that much had been said which did not get into the report. (RT 19982,

19989) Sergeant Ivan Header, then the juvenile investigator for the Harbor Division, testified that Jarvis admitted using a zip-gun that used .22 caliber shots. (RT 20004-05) Jarvis, however, testified that he used a cap gun that used special, extra-loud caps. (RT 21634)

In 1976, there were two incidents at Cooper Junior High School. In October, Jarvis got hauled into the Dean's office, and in response to being restrained, dashed into the next office, picked up a three-hole punch, and threatened to hit the Assistant Principal with it. The police were called and arrested Masters. (RT 19204-05) The police report stated that Masters had told the Assistant Principal that if he came into the room, Jarvis would hit him with the punch; when the police arrived, Jarvis said they could come in. (RT 19216)

About a month before that, Masters came off the school bus being hassled by a larger student and Masters was screaming at the other boy that he was going to kill him. He jumped the fence, looked in the shrubbery and came up with a hacksaw, jumped back and went after the larger student, screaming "I'm going to kill you." (RT 19206, 19268)

Also in October 1976, a fellow with the first name Jarvis and a friend stopped Daniel Cobos, who was riding a bike, and ordered him to give them his watch. (RT 19223-24, 19230) Masters' statement at the time was that they asked to see that watch; that after Masters looked at it,

he gave it to his friend; and that the friend then took off running and Masters followed him. (RT 19249-50)

After Masters was placed in the custody of the California Youth Authority, there were some incidents which occurred at Youth Authority facilities. The court, after a section 402 hearing at which the victim denied Masters' involvement, excluded one of these–and alleged sexual assault. (RT 19809) Curiously, evidence was later admitted regarding it, but the alleged victim, Kenneth Allen, denied any recollection of being hit or beaten (RT 20057), and an alleged witness, Michael Ray Anderson, denied seeing Masters taking part in sexual activities (RT 20160-20161).

2. 1980 Robberies

In 1980, there were a number of robberies for which appellant was convicted:

– A November 18, 1980 robbery at a K-Mart, in which one of the robbers, an Hispanic, fired a shotgun twice (though not at anyone). (RT 19298-19300, 19344-55);

– An October 31, 1980 Taco Bell robbery (RT 19496-19511);

– Robberies of a Taco Bell at gunpoint on November 6 (Masters acting alone) and November 11, 1980 (with another) (RT 19301-06, 19370-79);

– The robbery on November 9, 1979 of a USA gas station (RT 19339-43);

– The robbery of Sambo's Restaurant on October 14, 1980 (RT 19356-69);

– The shooting at police officers responding to a robbery-in-progress report from a USA gas station (RT 19380-82, 19399-19404).[78]

3. County Jail Incidents

Two uncharged incidents in the Los Angeles County Jail, after Masters' arrest on the 1980 robberies, were alleged. Deputy Mark L. Mechanic testified that on July 2, 1981, he confiscated a weapon from Masters' cell at the county jail that he had seen Masters throw under his bunk. (RT 19759-62) In his search, Mechanic also found a second weapon under the bunk. (RT 19764)

On July 30, 1981, there was a disturbance at the jail. Following the initial disturbance, Masters was trying to rile the prisoners up, and when deputies approached, he hit Deputy Morris in the chest and shoved him backwards. (RT 19775-79)

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78 In his testimony, Masters explained that he was there with a bunch of gang members and their girlfriends, and when they heard that cops were in at the USA station, they went over there and shot into the air. (RT 21713-14) In response to evidence from a victim of one of the Taco Bell robberies that she was hit on the head (though she knew not by whom), Masters denied that he ever struck anyone, and denied doing the Taco Bell robbery at which witness Barbara Moorhouse was nicked on the back of the head. (RT 21713)

4. Prison Incidents

The prosecution introduced several incidents occurring after appellant became an inmate at San Quentin. On July 27, 1984, Officer Beiderman found a stabbing device in appellant's cell. (RT 19925) On September 5, 1984, while Officer Bruce Stacey was accompanying inmate Roa back to his cell, an inmate-manufactured spear flew out of Masters' cell, missing Roa by about a foot. (RT 19936, 19938-39)

Officer John O'Mullen, one of the transportation officers during the preliminary hearing in the instant case, described an incident in which Masters reacted to a commotion involving co-defendant Woodard by attempting to get free during the removal of restraints, apparently to help Woodard. (RT 20009-19) The defense, however, rebutted this with evidence from Correctional Officer Earnest Pulliam that when he came upon the incident, Masters was in a separate holding cage, not doing anything. (RT 21414-21415) Masters explained the incident in his testimony: as he leaned toward the window of the holding cell to view the altercation between Woodard and Officer Holley, Officer O'Mullen, who had just taken off his restraints, put his arm around Masters' waist. Masters, who did not know what was going on in the hallway but was concerned for Woodard, tried to get out of O'Mullen's grasp, and O'Mullen slammed him to the ground. Officers O'Mullen and Thomas tried to

restrain him; he sought to get up, and was swinging his elbows. He was not trying to hit O'Mullen. (RT 21768-70)

5. The Two Uncharged Murders

There were two uncharged murders alleged under section 190.3. The first was a robbery-murder of the owner of a liquor store, Bob Hamil, on October 22, 1980 in Wilmington. The second was the San Quentin murder of inmate David Jackson. The evidence of these murders is set forth below.

(a) The Hamil Murder

Witness Shugo San Luis, Jr., was talking outside a bowling alley at about 11 p.m. on October 22, 1980. He heard a sound like the backfire of a car, looked up, and saw someone running from the liquor store across the intersection and getting into the passenger side of a yellow 1968 Camaro. (RT 19512-15)

On the same night, also at about 11 p.m., Michael Balangit was driving by the Hamil Liquor Store and noticed a late sixties yellow Camaro in front of the liquor store, from which two men were going into the store. Both were black, one was wearing sun glasses and a beany, was about five-eight, and the other was taller. (RT 19517-20, 19524) Balangit continued on down the road, but felt that something might be amiss, so he turned back, and as he approached the liquor store, saw the car leaving the store. Balangit pulled up in front of the store, peeked in, saw blood on

the counter but no one there, and went down the block to call the police. (RT 19520-21) Police Detective William Whittaker responded to the scene and found that Hamil, the liquor store owner, had been shot to death at close range. (RT 19529-31)

Officer Robert Van der Meer testified that Masters, after his arrest on the robbery charges, stated that he would not admit to the murder; that they, the police, would have to prove that one. (RT 19665) In addition, Officer Paul Chastain, who was present at the interrogation, indicated that appellant knew many of the details of the incident, and lapsed into use of the pronouns "us" and "we" in discussing the Hamil liquor store robbery, and then smiled and reverted to use of the term "they." (RT 19718-26)

The defense called Detective Roland Drouin, who was one of the detectives investigating the Hamil murder. He was contacted by the Long Beach Police.toward the end of November, 1980, about their having Masters in custody and about his having made statements about the Hamil murder. (RT 20583-85) Later, he was provided with a copy of a report documenting Masters' statements. (RT 20585) Nevertheless, he took no steps to charge Masters.[79] (RT 20586)

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[79] The trial court sustained an objection to a question relating to an entry Drouin had made in his log, to the effect that he thought Masters' information was bogus. The prosecution initially objected on hearsay grounds, and lack of foundation. When the defense sought to lay a foundation regarding his opinion, the court sustained an objection that it called for an opinion, despite the fact that his (continued...)

As noted above, prior to the penalty phase trial, the trial court denied a defense motion to exclude evidence of this offense on the grounds that he never had notice, until the section 190.3 notice prior to this trial, that he was a potential suspect for that crime, leaving him unable to remember where he was, and unable to locate any alibi witnesses. (RT 18865-69)

(b) The Jackson Murder

The second uncharged murder introduced in the penalty phase was that of a fellow San Quentin inmate, David Jackson. According to Clayton Holley, who was assigned to the yard gun post on the day of the murder, Masters was in a group of about six inmates when Jackson was stabbed in the neck, leading to his death. (RT 20180-94) Former officer Arzate testified that when he arrived at the scene in response to the alarm, the weapon was still sticking out of Jackson's neck. (RT 20258)

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[79](...continued)
partner, who testified for the prosecution, was qualified as an expert. (RT 20586)

The court also sustained an objection to the question of whether Drouin took Masters' statement into account in the decision not to charge him, to which the prosecution objected that whether he was charged or not was irrelevant. (RT 20587) It is hard to imagine that a police detective's opinion regarding whether to charge a suspect with a crime is irrelevant to whether the prosecution can prove that he committed the crime, especially when the principal evidence linking Masters with the crime was his statement, to which the detective evidently gave little credence.

The murder was tied to Masters by the testimony of inmate Johnnie Hoze. Hoze was a member of the BGF, and the gang security chief in the AC unit from 1981 to 1985. (RT 20354) Hoze testified that when Masters was assigned to the AC, he told Hoze that he was assigned to the AC for killing Jackson and described leaving the weapon in Jackson's neck. (RT 20362) During the ensuing year, Masters allegedly bragged many times to Hoze about the Jackson killing, without mentioning the victim's name (RT 20366-67) and told Hoze both individually and in the presence of other BGF members in a "hit cadre" that the adrenaline rush "was better then having sex." (RT 20367, 20371)

The defense introduced the testimony of the correctional officer, Richard O'Connor, who assisted in the removal and search of the inmates and search following the stabbing. (RT 20624) O'Connor placed Masters in restraints, took him to a holding cell, and gave him an unclothed body search, which revealed no contraband, blood, cuts or abrasions. (RT 20529)

Inmate Lester Lewis testified that he was on the yard talking with Masters when the stabbing occurred. (RT 20636) He had been with Masters eight or nine minutes before the stabbing, and at no time did Masters approach the area where it happened. (RT 20640) This was confirmed by inmate Ronnie Dubarry, a good friend of Jackson's, who saw Masters speaking with another inmate for five or ten minutes near the speed bag, up to the time of the stabbing. (RT 20690) Inmate Howard

Williams was lifting weights, and Masters was immediately to his left and nowhere near Jackson, and speaking with someone, at the time of the stabbing. (RT 20721, 20728-20729)

C. EVIDENCE IN MITIGATION

1. Evidence Regarding Bobby Evans' Bias

The court having restricted the defense to what occurred *before* Evans' testified on October 31, 1989, the defense called William Denny, the Alameda County Deputy District Attorney who was assigned to the Evans case pending in that county in time for the report and sentencing originally scheduled for July 27. The matter was continued until September 12. On that day, he heard from Deputy District Attorney Giuntini, who asked him to request that the sentencing be put off for five weeks because of a pending case in Marin in which Evans was testifying in. (RT 20590, 20595) Just before the next court date, October 24, Giuntini again told him the Marin case was still pending and he should seek another continuance. (RT 20600-01) Also in October, Denny had telephone contact with agent Hahn, who asked him whether he would have served enough of a 16-month sentence to be released on his next

court date, which was November 9. Denny told Hahn it would not be enough time.[80] (RT 20598-20600)

Agent Hahn denied that any deals were made in exchange for Evans' testimony, only that he told Evans that his safety and security would be taken care of. (RT 20611-12) At their first meeting, Hahn told Evans he couldn't keep him out of prison but would take care of his safety and security. (RT 21194-95) Hahn reiterated the promise of safety at an August 3, 1989 meeting with Evans; he might also have mentioned moving him to a prison in another state. (RT 21196) Hahn stuck by his claim that there was nothing he ever promised Evans to effect the outcome of the Alameda County charges. (RT 21199) Hahn did, however, answer in the affirmative when asked if he told Evans he would make efforts to postpone sentencing so Evans would not have to go back to prison, prior to September 20, 1989. (RT 21201) In fact, when Evans asked about keeping him from going back to prison on the Alameda County charge, his answer was: "'I will take care of it.'" (RT 21201, 21204-05) Hahn did, in fact, take steps to get the Alameda County District Attorney to postpone sentencing. (RT 21205)

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[80] On cross-examination, the prosecutor elicited testimony from Denny that he was present at every report and sentencing date through Evans' sentencing on December 13, and there were no deals given to Evans. (RT 20604) In light of this testimony, the defense asked to go into any deals after October 31, because the prosecution had opened to door to what happened though sentencing. The motion was denied. (RT 20605) This was error.

When Hahn denied that he also told Evans he would try to resolve the parole revocation to keep him out of prison, the defense read the transcript of a hearing, out of the jury's presence during the guilt phase, at which time Hahn admitted telling Evans he would try to keep him out of prison on the parole revocation, and that he would try to get Evans and his family into a witness protection program. (RT 21210-12) He also admitted that while he had documented the fact that he could not promise Evans anything in return for his testimony, he failed to document his efforts to have the sentencing postponed, his phone calls to the District Attorney to that end, Evans' efforts to contact him when sentencing dates were coming up, or that he had discussed with Marin D.A. Investigator Gasser getting Evans into witness protection. (RT 21217-18)

2. Johnny Hoze's Bias

Johnny Hoze was the inmate witness who testified about Masters' admissions regarding the Jackson murder. Melody Ermachild, a defense investigator, testified regarding Johnny Hoze's animosity toward the BGF and Masters. When she interviewed him, he related an incident in which he was the subject of a hit by an individual named Davis, and alleged later threats against his family by both Masters and Woodard. (RT 20817, 21021, 21024) On cross, Ermachild said that she remembered the Hoze interview because the first time she introduced herself to him,

he said he wanted Masters dead, and if he were allowed to, he would kill Masters himself instead of having the State kill him. (RT 21027)

3. Evidence Regarding Masters' Childhood

Members of Masters' family, people who knew him, and Masters himself testified regarding his horrendous early childhood and his later upbringing, mostly by the state, leading up to the crimes which landed him in San Quentin.

(a) Early childhood

Masters' mother Cynthia, who was known as Shorty, had two children by two previous fathers, and three with Masters' father, Billy Masters – Jarvis himself and two sisters, the youngest of whom is a surviving twin. (RT 20824) Most of them have been or are in prison. (RT 20828) Shorty was an alcoholic, a drug addict, and a prostitute, and both Masters' father and his stepfather Otis Harris were extremely violent toward her.

Billy Masters beat Shorty often, and when he was gone, she would go to work on the street, leaving the children. (RT 20828-29) One night, the police called her sister Lillian to tell her they had just dispatched an ambulance to the Masters apartment. When she got there, blood was all over the walls. Billy had hit Shorty with a barstool and part of her nose had been ripped off. (RT 20830-31)

Jarvis' older sister Sharleen explained that after the twins were born when Jarvis was 3, their mother "gave" them to Jarvis and Sharleen – the boy, Carl, to Jarvis, the girl, Carlette, to Sharleen – to take care of. (RT 21491-92) They were alone in the house most of the time, and after dark, they would be scared and just stay in their bed. (RT 21492-93) Neighbors might feed them, or they would eat sandwiches, such as bread and sugar, or bread and mayonnaise, or mix flour, water, salt and pepper. (RT 21493) There were times when they were left for a couple of days at a time, and they would just get up and play, and then go to bed at night; if it was a school day, they would just skip school. (RT 21493-95)

Masters' uncle, Kalvin Campbell, described Billy Masters' relationship with the children, such as it was. He would go into a rage, without warning, tear up furniture, and jump on his wife. (RT 20875) After Billy left, Kalvin would visit the children. Shorty was rarely there, and the children were nervous, in a shell, though happy to see him. (RT 20878-79)

In a final incident, Billy had set fire to the house and the whole door was black, and the window was broken out by the door. Billy came back in and demanded to see his wife; Lillian and the kids said no, she was leaving, and Billy threw a lamp against a wall and clicked out a straight razor and said he was going to kill them. Lillian's brother Calvin hit him

three times with a lead pipe and he went over the front of the balcony and ran, and hasn't been seen since. (RT 20835-36)

After Billy left, Shorty "went on the street totally," on drugs and hooking. (RT 20837) Then she got involved with Otis Harris, and she was supporting both their habits. (RT 20838) She was never there at night, and slept during the day. (RT 20839) The house was dark, and smelled stagnant, and the kids had sad faces. (RT 20839-40) There was a smell of urine because Shorty didn't wash the sheets after the kids wet their beds. (RT 20840)

When Shorty and Otis were both at home, they would put the kids in the back bedroom; once Jarvis saw them putting dope in balloons, weighing it on a scale, shooting up, and counting money. (RT 21563-64) To the extent that his mother stayed drunk or loaded, it was a benefit to the kids:

> Those were my best memories of my mother when she was loaded. I mean, when she wasn't loaded, there would be a lot of chaos in the house. There would be frustrations, anger, fights, arguments. When she was drunk or when she was loaded she was nodding, she was sleeping. We were able to come out. Sharleen used to always comb her hair. I don't know how to describe it. Sort of like when you tranquilize an animal or something And once it's – once the dope is in him, in the animal, it relaxes, falls down, and you can get close to it. And that's what Sharleen used to do a lot.

> Every time my mother got mad, Sharleen used to say, "Mamma, do you want the medicine? Do you need the medicine?" Sharleen was to go get the medicine, and . . . [my mother] would shoot it. (RT 21565)

In contrast, when his mother was sober,

> She was just real angry. She was nervous, tense. She was moving real fast. She didn't want to be bothered with nobody. She was just a whole complete different person. She was – She would be someone that you didn't want – you knew you didn't have no business around. It was just "stay away from her." (RT 21570)

Life with Otis was no picnic, either: Otis would hold Jarvis between his legs and slap him, and tell Jarvis to hit him. "Don't be a girl." Once, Otis just kept slapping him in the face, Jarvis related, and "I just remember spinning out. And I closed my eyes, and started scratching him in the face. And he let me loose." (RT 21574)

Another time, the children were present when their mother, while they were hiding under the bed, was severely beaten, and so bloodied that young Jarvis did not know what to do when she passed out and kept bleeding. (RT 21567-70)

Many times, the police would come when the children were alone in the house, and then soon after their uncle would come and take them to their grandmother's house. One day, their mother checked Carlette, one of the twins, who was crying, and then checked her twin, Carl, and found him dead. (RT 21498-99).

After that, the authorities came and took the children, and Jarvis began a series of foster and institutional placements.

Summing up his early life, Masters' aunt Lillian, said simply that he never had a chance. He lived in a hellhole. He had nobody to tell him what to do, and what not to do.[81] (RT 20844)

(b) The foster and institutional placements

Jarvis then lived in a succession of foster homes and juvenile facilities. He had a very good relationship with his first foster parents, the Procks; a not-so-good relationship with the second, Lillian Chargois, and lived briefly with a third before being sent to MacLeren Hall, then Boys Town of the Desert, MacLaren Hall again, and then the California Military Academy. (RT 21588-21615)

Although separated from his sisters, Jarvis was well taken care of by his first foster parents, the Procks. He got along well with Mr. Prock, and began calling him Daddy or Poppa (RT 21145). Mrs. Prock became ill, however, and Jarvis was transferred to the home of Florence Chargois, with whom he did not get along. He began running away when Mrs. Chargois would not let him attend Mrs. Prock's funeral, and each time he ran away, he was to be found at the Prock's. (RT 21145-46; 21607). Mrs.

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[81] Similar testimony, describing the wretched conditions under which Jarvis and his siblings were raised, was supplied by his half-brother Thomas Smith (RT 21452 *et seq.*), his sister Carlette (RT 21432 *et seq.*), and his older sister Sharleen Masters. (RT 21485 *et seq.*)

Chargois recommended that he be placed in a home closer to the Procks', but he was instead moved to MacLaren Hall, a juvenile facility. (RT 21147, 21607).

When Jarvis was transferred to MacLaren Hall, he loved it: "When you're fenced in, you don't have to run." (RT 21607) He stayed there for as long as he possibly could (by refusing, for example, new foster placements), and then was transferred to Boy's Town of the Desert, where he stayed for about a year. After running away several times, he was returned briefly to MacLaren Hall, and then sent to the California Military Academy, where "fighting was it." (RT 21608-15)

(c) Harbor City and the teen years

Eventually, he was returned to his family, to live with his Aunt Nadine in Harbor City for about three years. (RT 20911, 21618-19) Harbor City in the 1960's and 1970's was a low income, depressed community with a high crime rate, a high incidence of single-parent families, a high crime and violence rate, and a prevalence of gangs. (RT 21119-20)

The two juvenile incidents introduced by the prosecution occurred during this period. Masters' cousin Ricky Campbell testified that he and Jarvis stopped Georgie Brennan and took something from him. (RT 20911) Regarding the Joey Campbell incident, when Jarvis ran in with a

bump on his head from Campbell, he grabbed a cap gun, not a real gun, and ran down to Joey Campbell's house. (RT 20912)

John Northmore, the Director of the Harbor City Teen Post, testified that from age 12 to about age 14 or 15, Jarvis was coming to the teen post nearly every day, taking part in the activities there. (RT 21126) He got along with the others in the teen post activities. He did have a temper and sometimes arrived in a depressed mood, and though he had a problem with authority figures, he was respectful toward Northmore. (RT 21127)

As a result of the incident with Joey Campbell (see *ante),* he was sent to Page, a fire camp, and then, a few months later, Kilpatrick, which had a "rubber room" where he would be put, stripped to his shorts, for a few days at a time. There were fights there (as well as at Page), as well as paint and glue-sniffing. (RT 21637-21640)

When he returned to Nadine's, he got heavily into the local gang, the Harbor City Chicos. Drugs and violence, and now, guns, were a part of the neighborhood. (RT 21640, 21642) His social worker had him committed for a time to a hospital in Compton, where they forcefully medicated him with drugs such as Stelazine, Mellaril, and the like. (RT 21642-43) With the exception of the time in the hospital, he attended the Cooper school from the sixth grade to the eleventh. (RT 21664-65) John Northmore, the Director of the Harbor City Teen Post, described the sorry

conditions at the Cooper School, which was an educational dumping ground for kids the Los Angeles School District could not or would not educate. It was sort of a holding tank, where very little in the way of education took place. (RT 21130)

In 1977, Jarvis was sent to the Fred C. Nelles School in Whittier, a part of the California Youth Authority. There were fights every day and weapons being made and used. Jarvis got involved in some of the fights. And the staff would assault their wards. When the kids would get angry, the staff would try to control them by putting them in various forms of headlocks, slamming them against the wall, or having other kids beat them up. (RT 21670-73) Jarvis witnessed one ward, Barrios, get his fingers cut off by a staff member slamming a door on them. (RT 21673-74)

Conditions at the CYA facilities were so bad that after he transferred to O.H. Close School in Stockton, he was returned to Southern California to testify as a witness on the conditions at Nelles, and in particularly on the conditions and staff brutality in Taft Cottage. (RT 21685)

When he arrived at Close, he was angry and violent, but there was hardly any gang presence there, and the staff gave him a chance at a fresh start. They had a much better system for handling the wards, and Jarvis got a counselor, Hershey Johnson, who helped him enormously.

Jarvis finally got to a point where he was not getting into any fights, and did not feel as if he had to put up any facades or speak in gang language all the time, or worry about being considered a punk or a coward. (RT 21686-88) Johnson confirmed both that Nellis was a far more violent place, and that Jarvis learned at Close to control his anger. (RT 20986, 20989-90) Jack Mayfield, the Senior Youth Counselor there, testified that Jarvis was on the Honor Roll for the last 9-10 months he was there, which was not an easy thing to do. (RT 20869-71) Jarvis retained that status for an unusually long period of time. (RT 20872)

He was released on parole to the Mike Smith Group Home in Stockton, and got a job in a mall as a cook's helper, and then was placed in a welding program. It was very scary to be outside, on his own, and he missed O.H., Close, and the counseling and supervision he got there. (RT 21690-93)

Meanwhile, his family had been reunited and they convinced him to return to Southern California. (RT 21694) His mother was off the streets, but still heavily into drugs, and her house was a mess. Jarvis stayed at his aunts' houses, and got a lot of pressure to get back into gang activities. He tried at first to avoid the gangs and drugs and stolen cars, but it did not last. Dope was being sold out of Nadine's house and there were guns hidden underneath his bed. (RT 21696-21700)

Jarvis and another teen robbed a USA gas station and Jarvis was caught for that robbery. (RT 21700-02) He was put into the county jail, in the juvenile tank, where he turned 18. At midnight on his eighteenth birthday, a bunch of deputy sheriffs jumped him and beat him up. (RT 21704-05)

He pled guilty to a felony, and was put into a succession of CYA facilities. (RT 21706) In August, 1980, Jarvis escaped with another boy and returned to the Harbor City area. Feeling that he was bound to be caught and sent back, he started committing the robberies for which he was later convicted and sent to San Quentin.

When he got arrested, right after Thanksgiving, he was glad, because he was tired, "just tired." (RT 21717) During the interrogation, he started out by being intimidated, then moved to a type of bragging, boasting about crimes they said he did, lying about others, as a form of intimidation, because he did not know what might happen to him there with all of those officers and no tape recorder. (RT 21722) He did not, he testified, take part in the Wilmington liquor store robbery that resulted in Hamil's death, or any robberies in Wilmington. (RT 21725)

Sociologist and prison expert John Irwin, when asked why Masters would fail on parole after leaving O.H. Close, described him as "state-raised," institutionalized at an early age and able to function within institutions but no longer able to function on the outside. (RT 21273-74)

The shock that one undergoes being released into society is, at first, a deep feeling of depression, disorganization, loss of sense of who you are, and of yourself. (RT 21276-77) The result is very rapid failure. (RT 21277) There is a need to go back to home ground, but very often the family is not familiar, and they feel like a stranger, so often they do something which appears silly, seemingly to get caught and go back to prison. (RT 21279)

4. Evidence of the Conditions at San Quentin

Robert G. Slater, who was staff psychiatrist at San Quentin from November, 1982, to November, 1984, (7 months before the Burchfield murder) painted a painfully grim picture of conditions at San Quentin in the period immediately before the murder. At the time, San Quentin had the most hardcore of the criminals and those who had been problems at other prisons. Many had emotional disturbances. (RT 21059) Confinement in lock-up in South Block controlled some of the more serious consequences of acting out simply because they were locked in so tightly, but, in terms of the tendency to act out, the lock-up conditions promoted the tendency to be violent. (RT 21059-60) That was because there were a large number of violent people together in one place under conditions that were extremely stressful to the point of being oppressive by any normal person's standards. Inmates were afraid, and as they heard about assaults and homicides that were extremely common, they

would become terrorized. (RT 21060) In fact, in an article, talking about South Block, he wrote that there was "a sense of impending and immediate annihilation." (RT 21060-61) And that sense of terror and impending, immediate annihilation was all-pervasive. (RT 21061)

That terror came from the horrific conditions:

> Ethnic gangs were vying for control of the prison in hostilities that at times became almost like an open warfare. And in addition to that, even the non-gang members were very predatory people [who] would engage in attacks for a variety of reasons. If you give somebody the wrong look or smile, gesture of disrespect, or if you're from the wrong race, or someone has identified you as an informant or child molester, you're from the wrong part of town, in some cases from the wrong part of the state, . . . just having a look that rubs somebody the wrong way, or if there had been some words or a grudge that occurred years earlier, these would all be grounds for an attack. And in the last year that I was there [1984], there were twelve murders of inmates by inmates . . . . And there were many, many more potential homicidal assaults that did not result in a completed homicide because medical care was mobilized so quickly. (RT 21062)

So, "People lived in a constant state of fear, fear that they would be assaulted or killed." Murder or murder attempts were part of the fabric of everyday life there. (RT 21063)

Another indicator of the level of violence in the lockup units in South Block at that time, according to Dr. Slater, was that nearly all of the prisoners had control of a weapon, either on their bodies or somewhere

they knew they could get it. (RT 21064) There were, of course, stabbings, but also hot, corrosive liquids thrown through cell bars, or incendiary devices made from lighters or matches. (RT 21065) Fires were set in cells, or on the cell block. (RT 21066) All of this contributed to the atmosphere of terror. (RT 21067)

Racial tension was very high, and if a black inmate was seen mingling with whites or Mexicans, there would be consequences ranging from a warning to an assault. (RT 21067-68) The prison gangs were organized along racial lines, and the authorities segregated yards by race and within races by faction. (RT 21069)

In addition, the presence of gunrail officers contributed to the atmosphere of terror, because the presence of guns in and of themselves were a very chilling factor – you were literally "under the gun." There were some cases where prisoners were blinded or otherwise injured or even killed by guns. (RT 21069) Gunshots – usually warning shots – would go off fairly often, and there was a perception among the inmates that some of the shootings of prisoners were unjustifiable. Thus, fear of being shot contributed to the atmosphere of terror. (RT 21070)

Also contributing to the horrible conditions was the unbearable noise, created by stone walls that bounce the noise, people shouting, doors slamming open and shut, radios blaring, a constant din which was very, very loud to the point of not being able to carry on conversation. It

rarely abated. It was always present when Slater was present, as early as 6 a.m., or as late as 10 p.m. The natural effect was to make inmates nervous, irritable, and tense, deprived of sleep, making some almost climb the walls with stress. (RT 21071)

All of this made it essentially impossible for an inmate to reform. "You have to marshall all the psychological energy into just surviving and dealing with the stress of day-to-day living that is overwhelming. You're putting most of the psychological energy into just maintaining. So, there's little change or improvement." (RT 21071)

Other things that were present that contributed to the inhuman conditions were bugs, the fear of authorities, the fear of possible brutality, the isolation, the inability to associate with anyone else. (RT 21072)

In visiting other prisons and working in other custody situations, and talking with psychiatrists of other California prisons, Dr. Slater had never seen or heard of that degree of terror. (RT 21073) The only reason there was not an outright riot is that they were locked up and so they could not act in concert to take over the place. But it was similar to riotous conditions most of the time. (RT 21073)

The level of fear and anxiety was very high. The inmates called it being paranoid, but unlike the psychiatric use of the term – delusions of danger – the inmates were not delusional. They were living with their fear and the fear that they described was very intense. It was suspiciousness

carried to the utmost without actually being delusional. (RT 21075) What they feared was not some imaginary threat but a real threat, and because they were so frightened, there was a misinterpretation of cues. They would misperceive some unusual behavior or some facial expression or gesture as a threat, and in some cases would take preemptive action, first strike as a means of self-defense. (RT 21076.)

Given this setting, defense counsel posed a hypothetical: Assume the Aryan Brotherhood was in possession of weapons, including bullets, in C-section, which may have been used in an attack, and BGF had intelligence that one particular officer has been spending an unusual amount of time with one of the AB leaders in C-section during this period after the Montgomery killing. In such a setting, said Slater, it was reasonable for BGF members to believe that the officer was conspiring with the AB and they must attack him first as a means of self-defense. (RT 21081-82)

Correctional Officer Bruce Stacey, Jr., described the considerable amount of physical renovation of South Block which took place between the Burchfield killing and the trial, including gutting it out, painting the cells, replacing light fixtures and plumbing, renovating the ventilation and heating, and redoing the beds. (RT 21245) Stacey, now assigned to Pelican Bay State Prison, described in detail the security measures at Pelican Bay, which, he said, led to a generally calm atmosphere. (RT 21248-62)

Prison sociologist John Irwin extensively described the prison gang scene at San Quentin, noting that the BGF was mostly political in its emphasis; the other gangs (Nuestra Familia, the Mexican Mafia, and the Aryan Brotherhood) were organized for protection of its member and narcotics trafficking. (RT 21316) Because of the hate between the Mexican Mafia and Nuestra Familia, only the former was housed at San Quentin, along with the BGF and the Aryan Brotherhood. The gangs were segregated by having several lock-up units besides the Adjustment Center. (RT 21317-18)

Irwin described the image portrayed by BGF – sternness, discipline, strict code of conduct – but also explained that the self-image of a highly disciplined organization was always overstated in relationship to the reality. (RT 21325) For example, regarding their view of strict lines of command, and orders always being followed, etc. – the reality was much looser, and there was a lack of certainty that orders would be followed, and there was not the capacity to discipline people as they purported they could. (RT 21326) Also, in the prison world, there is a large gap between what is said and the reality. "Prisoners live a world of considerable fabrication through talk." (RT 21326)

The policies of the CDC contributed to the presence and influence of the gangs in that period. The greatest period of gang power was 1980-1987.

> The area of greater influence was the lockup setting. And this is a period where San Quentin reached its height in locking prisoners up in segregation units. And many, if not most, of the . . . leaders of the gangs which were located in San Quentin, were locked up in the segregation units. And they were not only locked up in the units, but usually in those years put in the same area together. One tier would be designated affiliated, and it would have a row of black affiliated prisoners, affiliated with the B.G.F. Another row for Chicano affiliated, Mexican Mafia. And likewise, with the Aryan Brotherhood.
>
> They were released in small groups exercising together, and they were communicating with each other constantly. And this period they were in, because of the policies, they were compacted. Their communication was compacted. They were excluded from other sources of communication. So . . . a cohesion was created greatly in [that] setting. (RT 21329-30)

Irwin described the cell-blocks as,

> open front cells, [in which] the tiers all look out onto a common area. There was a constant expression of hostilities up and down the tiers between the different gangs, the different individuals in the gangs. And constant threats were going on. The noise level itself was extreme, made up greatly of these ongoing threats towards each other. So the cohesion within the groups was greatly enhanced by that, that ongoing process of being faced with the threats from an enemy gang.
>
> . . . . .
>
> On many occasions when prisoners found themselves from different gangs, an Aryan Brotherhood with a Black Guerilla Family member, even momentarily, it was very, very likely that violence immediately broke out, often stabbing, some of which resulted in death. (RT 21331-32)

Irwin also explained the "reality distortion" that arises within a prison: "The fear that circulates in prison leads to the development of very unrealistic systems of belief." Psychiatrists have said that paranoid systems of belief are developed collectively in prison systems. In lockup, this becomes even more pronounced. The behavioral result is to make plans in response to perceived threats which may or may not exist, or which have been exaggerated way out of proportion. (RT 21340-42) This also led, in 1980-1985, to exaggeration of the normal hostility that exists toward staff, and to some degree of dividing racially among the staff. (RT 21343) Conditions in that period also led to prisoners of one gang believing that prisoners of a rival gang were colluding with staff of the opposite race against them. (RT 21344) Thus, a belief by the BGF leadership that a hypothetical officer fitting Burchfield's profile was bringing in weapons to the ABs would be likely. (RT 21345)

Irwin explained how prevalent "posturing" was, both within and among gangs and gang members. Asked about false claims of past violent conduct, Irwin stated: "Many times persons make false claims in order to develop an image. In their attempts to posture, they make claims about what they have done in the past, often of a violent nature." (RT 21348)

Retired Correctional Lieutenant Lawrence Thomas, who was the gang activities coordinator at San Quentin from 1981-1886, confirmed

that once an inmate committed to a prison gang, and either dropped out or attempted to, he was subject to death at the hands of the gang. (RT 22271-72) Some who had attempted to leave the gang without debriefing, without snitching, might survive, but they would be ostracized and forced from the yard. (RT 22277)

5. Evidence Regarding Masters' Behavior in Prison

Correctional Officer Earnest Pulliam described a January, 1990, incident involving a verbal confrontation between Woodard and another officer in Courtroom D, in which Masters took steps, successfully, to defuse the situation. (RT 21415-17) Although on cross-examination Pulliam described one situation between Masters and Officer Green during jury selection, Masters had otherwise given them no problems during transport from the prison to the courthouse. (RT 21417-18)

6. Masters' Social History

Dr. Craig Haney, a Professor of Psychology at UC Santa Cruz, prepared a social history, and was asked to render an opinion regarding Masters' ability to adjust to a term of life without parole. (RT 21902)

After describing in detail the turmoil and instability of Masters' life (RT 21962-96), Dr. Haney described his arrival in D-section at San Quentin, "the worst prison in the California system at the worst time in its history." (RT 21997)

> The environment was in my opinion a terrifying environment to be in. It was an unsettling environment even to walk through. The prospect of living in this environment had a tremendous impact on everybody that I talked to who lived there. . . . .It was a frightening experience. [Jarvis] was frightened about it. He felt very vulnerable. He'd never been in an environment like that before. And suffice it to say, anybody who was placed in those units had never been in a place like that before.
>
> (RT 21997-98)

Haney described the pressures on Masters to join a gang, created in large part by the CDC's policies at San Quentin. (RT 22012-15) And finally, he described the wholesome changes he had seen in Masters between 1986 and 1988, as exemplified by the changes in the way the San Quentin guards treated Masters. (RT 22022-24)

On cross-examination, Haney reported that he had been instructed not to discuss incidents of violence involving Masters at San Quentin, but on one occasion, Jarvis came into the interview and on his own spoke of the Jackson killing, about which he had just seen some document. Jarvis stated that he had not done it, was not responsible for it, and was very upset by it. (RT 22127-28)

Finally, Haney opined that Masters would adjust well if sentenced to life in prison; indeed, that he had in his own way already begun his rehabilitation. (RT 22124-26)

XII. THE ADMISSION OF UNCHARGED CRIMES AS AGGRAVATING FACTORS VIOLATED DUE PROCESS AND THE EIGHTH AMENDMENT RIGHT TO A RELIABLE DEATH PENALTY DETERMINATION

The trial court allowed introduction, pursuant to Penal Code section 190.3, of a plethora of uncharged prior offenses. These included (1) uncharged juvenile conduct; (2) jailhouse and prison misconduct; and (3) two uncharged murders. Since most of these alleged offenses had occurred many years earlier, and appellant and his counsel did not have the opportunity to preserve evidence of his innocence, the penalty phase use of these alleged uncharged offenses was inherently prejudicial.

A. THE ADMISSION OF UNCHARGED CRIMES VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The admission of uncharged crimes for which no defense could be reasonably mounted, and on which individual jurors who had already found appellant guilty of murder, could make their own determinations respecting his guilt thereof, violated appellant's Fifth, Sixth, and Fourteenth Amendment rights

Appellant acknowledges that this Court has upheld the admission of unadjudicated crimes evidence. *See, e.g.*, *People v. Jennings* (1988) 46 Cal.3d 963 (admission of unadjudicated crimes involving violence); *People v. Gates* (1987) 43 Cal.3d 1168 (permitting relitigation of facts underlying prior violent convictions); *People v. Balderas* (1985) 41 Cal.3d

144 (upholding admissibility of unadjudicated offenses at penalty phase) (collectively, *Balderas* and its progeny); *see also*, *People v. Raley* (1992) 2 Cal.4th 870, 909-910, and cases there cited. Nevertheless, appellant's arguments against admission of unadjudicated adult and juvenile conduct, and in particular the two unadjudicated murders, will be detailed and extensive, both to encourage this Court to revisit the issue and to set the stage for federal appellate and *habeas* consideration of these issues. The admission of unadjudicated crimes was particularly unfair in this case and prejudicially affected the outcome.

Because the arguments regarding the adult and the juvenile unadjudicated conduct overlap, appellant will begin with the broadest challenge, to the admission of the two alleged but uncharged murders, and then set forth the additional arguments related to the unadjudicated juvenile conduct. Further discussion regarding these matters appears *infra* in Argument XV, F at 452-454.

1. Admission of Two Uncharged Murders Violated Appellant's Constitutional Rights to Due Process and Reliable Sentencing Procedures

The arguments set forth below have been made before. The United States Supreme Court, however, has never definitively ruled on them, and there are three distinct state-court approaches, ranging from unfettered admission to outright proscription. Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the*

Penalty Phases of Capital Trials (1993) 93 Colum.L.Rev. 1249, 1267-1282 (hereinafter cited as "*Note on Unadjudicated Offenses*").

As explained in the *Note on Adjudicated Offenses*, the wide variance in approaches arises from what has become a conflict between two principles concerning the "guided discretion" required in *post-Furman v. Georgia* ((1972) 408 U.S. 238) death penalty trials. *Gregg v. Georgia* (1976) 428 U.S. 153, 198. On the one hand, the Court advanced the principle that the death decision requires that the jury be allowed to consider "all possible relevant information about the individual defendant" bearing on aggravation and mitigation. *Jurek v. Texas* (1976) 428 U.S. 262, 276. On the other hand, the Court's view that "death is different" (*e.g.*, *Lockett v. Ohio* (1978) 438 U.S. 586, 604) led it to enunciate a due process right that the evidence adduced at the penalty hearing be both reliable and not unduly prejudicial. *Gardner v. Florida* (1977) 430 U.S. 349, 362 (reversing for the introduction of evidence which defendant had no opportunity to deny or explain.) [82]

While some courts have been said to have allowed the "all relevant evidence" doctrine to "trump" the countervailing rights to

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[82] Notably, the Court's findings of undue prejudice have focused on procedural prejudice, such as the use of a prior conviction that was later vacated (*Johnson v. Mississippi* (1988) 486 U.S. 578); the failure to provide psychiatric assistance to a defendant at a hearing on his sanity (*Ake v. Oklahoma* (1985) 470 U.S. 68, 83); and a state procedure that did not permit the jury to return a verdict on a lesser-included offense (*Beck v. Alabama* (1993) 447 U.S. 625, 637).

reliability and against unfair prejudice, *Note on Unadjudicated Offenses*, *supra*, 93 Colum.L.Rev. at 1267, appellant believes that a fresh view of the fair balance between these doctrines will lead this court to overrule *Balderas* and its progeny.

2. The Reliance on Stale Unadjudicated Offenses Violates the Due Process Requirement of Heightened Reliability

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a 'special need for reliability in the determination that death is the appropriate punishment in any capital case'." *Johnson v. Mississippi, supra*, 486 U.S. at 584, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (White, J., concurring in the judgment); *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135 (citing *Johnson*).

Focusing now on the most egregious constitutional violation, the admission as an aggravating factor of the Hamil murder, appellant submits that the use of a stale, uncharged murder as aggravation cannot possibly meet the standards of reliability required by the Due Process and Cruel and Unusual Punishment clauses.

Under *Balderas* and its progeny, the prosecution in this case was allowed to present evidence of two uncharged murders, those of Hamil and Jackson, as aggravating evidence. Appellant believes this unconstitutionally tainted his trial in the following ways:

First, by allowing evidence of uncharged and unadjudicated murders to go to a jury which had already convicted him of murder, appellant was placed in the "perilous position of having to rebut potentially unreliable or unreasonably prejudicial evidence before a jury that has already convicted him of [first-degree] murder [with special circumstances]." *State v. Bartholemew* (1984) 101 Wash.2d 631, 683 P.2d 1079, 1088. That the evidence was unreliable – that is, not tested in a full adversary proceeding – was exacerbated by the reality, never mentioned in this Court's cases, that it is simply impossible as a practical matter, without the state-wide resources available to prosecutors, for a defendant in Northern California to investigate and defend against a 10-year-old, uncharged, murder charge from Southern California, especially while being required to defend the underlying murder. Indeed, that he was required to answer those charges at all suggests that the presumption of innocence had simply been abandoned, or forgotten.[83]

This resulted in the state being able to seek the death penalty on the basis of a murder case was which weak enough never to have been

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[83] This is shown by the trial court's rather cynical reply to appellant's objection to the admission of this murder on the grounds that he could not possibly remember where he was on the night of murder. Noting that the prosecution would seek to prove the murder by Masters' alleged comments to the police who arrested him after the series of robberies, the court said, " . . . if I find that the defendant's statement may come in, it kind of should jog the defendant's memory as to where he was that day." RT 18868. That would be true, of course, only if he was guilty.

charged, on what amounts to a lower level of proof because "the facts regarding this alleged aggravating crime will never have been presented to an impartial, untainted jury, and the risk that the previously tainted jury will react in an arbitrary manner is infinitely greater." *State v. McCormick* (1979) 272 Ind. 272, 397 N.E.2d 276, 281.

As one state justice stated in dissent in another case:

> It is unfathomable to me that only prior convictions can be used in non-capital sentencing procedures, but the evidence of unadjudicated offenses, which may be nothing more than unsubstantiated hearsay, suspicion, and accusation, are admissible when a person's life is in the balance at capital sentencing.
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> *Paxton v. State* (Okl.Cr. 1993) 867 P.2d 1309, 1335 (Lane, J., dissenting; n. omitted.)

Second, regarding jury unanimity: Even at the penalty phase of a capital trial, the defendant retains a constitutionally mandated presumption of innocence of unadjudicated charges. *Johnson v. Mississippi, supra*, 486 U.S. at 585; *see also, Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-701 (at guilt trial, State has burden of proof beyond a reasonable doubt of facts which increase punishment). While a finding of guilt which overcomes the presumption of innocence need not be by a unanimous jury, it must at minimum be by a *substantial majority* of the jury. *Johnson v. Louisiana* (1972) 406 U.S. 356, 362; *In re Winship* (1970) 397 U.S. 358, 363. Indeed, even a unanimous jury of less than six does not pass

constitutional muster, *Ballew v. Georgia* (1978) 435 U.S. 223, 239; nor does the vote of five members of a six-person jury, *Burch v. Louisiana* (1979) 441 U.S. 130, 138. Therefore, allowing a minority of jurors, indeed, under this court's jurisprudence allowing just one juror to find true a charge of which the defendant is presumed innocent, and thereby to establish the existence of an aggravating factor which may lead to imposition of the death penalty, deprives the defendant of due process and a fair trial. *Johnson v. Louisiana, supra*, 406 U.S. 356. Further, because findings of guilt made by a minority of a jury are consti-tutionally unreliable, use of such findings in a capital sentencing hearing deprives the defendant of his rights under the Eighth and Fourteenth Amendments to a reliable death sentence. *Mills v. Maryland* (1988) 486 U.S. 367.

Put another way, if, within the United States Supreme Court's death penalty jurisprudence, there is a qualitatively different aspect to the death penalty, with a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment," *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opn. of Stewart, Powell, and Stephens, JJ.), then it is difficult if not impossible to see how evidence of an unadjudicated crime, which took place four hundred miles away, in another part of the state ten years previously, presented to a jury which is no longer unprejudiced and which does not have to either deliberate or unanimously find guilt beyond a reasonable doubt on the unadjudicated

prior crime, can meet this standard, this court's pronouncements to the contrary notwithstanding. Indeed, the absence of the need "for all jurors to agree" on whether or not a prior unadjudicated offense has been proved beyond a reasonable doubt, CALJIC 8.87 (1989 Revision), *People v. Caro* (1988) 46 Cal.3d 1035, 1057 (*cert. denied*, 490 U.S. 1040), may have the additional, unintended consequence of *discouraging* deliberations. If each juror may make up his or her own mind, there is no reason for deliberation, and a jury could either truncate deliberations regarding proof of a prior unadjudicated offense or affirmatively decide to forego deliberations. Thus, the resulting death penalty decision could be made on the basis of prior offenses on which there has been little or no deliberation.

In *Jones v. Superior Court* (1970) 3 Cal.3d 734, this Court invalidated a prosecution following a 19-month delay between the filing of a complaint and issuance of an arrest warrant, and his arrest. Although the right to a speedy trial clearly attaches after arrest, *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504, the right was extended to the pre-arrest, pre-indictment stage. *Jones*, 3 Cal.3d at 740; *Scherling*, 22 Cal.3d at 504.

In this case, of course, Masters was neither indicted nor charged nor even arrested on the Hamil matter, and so in the strict sense his speedy trial rights had not yet accrued. The language of *Jones*, however,

referring to a 19-month delay, cannot but be persuasive regarding the level of unfairness in charging Masters 10 years after the fact, when his very life was on the line, with the murder of Hamil. Undertaking the balancing of the competing interests involved in the possible denial of the speedy trial right, *Jones* explains:

> Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and to secure evidence of his activities at the time of the events in question. "Delaying the arrest of the accused may hinder his ability to recall or reconstruct his whereabouts at the time the alleged offense occurred. As stated by the dissent in *Powell v. United States*, 352 F.2d 705, 710 [122 App.D.C. 229], 'The accused has no way of knowing, to say nothing of proving, where he was at the time and on the day the policeman says his diary shows he made a sale of narcotics to the policeman.' " (*People v. Wright* [1969] 732, 736.) . . . Indeed, the prejudice to [Jones'] ability to reconstruct his activities at some unknown date before he knew he was suspected of some offense may well have been compounded by a false sense of security induced by the failure of the police to follow up the telephone conversation with him for 19 months . . . In far less time than 19 months he could have reasonably assumed that the police no longer had an interest in him.
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> *Jones, supra,* 3 Cal.3d at 740-741.

The delay in the instant case was far longer than the 19 months in *Jones*; and the charge here, murder, was far more serious than the sale of narcotics in that case. Murder is different, in the sense that it carries

with it no statute of limitations. But we are not dealing here with the fairness of charging him with murder for the purposes of trial, for which he would be afforded the full panoply of trial rights, including that it take place before a trial of his peers in the vicinage of the crime, and that the jury be required, after deliberation, to come to a unanimous verdict of guilt beyond a reasonable doubt. Instead, he is charged far from the scene, in another trial altogether, in circumstances precluding, or at least severely hampering, any sort of reasonable opportunity to investigate, far after he could possibly remember where he might have been at the time, and the jury need not even deliberate or find unanimously that he was guilty. And on this rests whether or not he suffers death. How extraordinarily Kafkaesque.

Under current state law, as played out in this trial, the picture presented is a grim one of the State, zealous to gain a death verdict but required to treat capital sentencing with heightened concern, nevertheless rummaging through the dung heap of a defendant's past for whatever negative gossip it can find and, aided by the passage of time, a tainted jury, and the absence of a full trial and jury deliberation, encourage the almost inevitable conclusion of guilt beyond a reasonable doubt of something unsavory in the minds of each individual juror. This is not due process, it is not heightened scrutiny, it is not constitutional.

3. The Marginal Sufficiency of the Evidence of the Hamil Murder and the Prison Setting of the Jackson Murder Make the Application of the State Rules a Denial of Due Process

Assuming, *arguendo*, that the state scheme is constitutional in the abstract – and appellant is aware that this court has demonstrated no inclination to revisit its prior rulings in this regard – it is nevertheless manifestly not constitutional as applied in this case.

(a) The Hamil murder

The evidence regarding the liquor store robbery murder of Mr. Hamil was either insufficient as a matter of law or so close to it that allowing the jurors to individually decide whether it was proved beyond a reasonable doubt can only have been a denial of due process.

Preliminarily, appellant repeats the general objection set forth above: A defendant and his counsel are in no position, in the midst of a three-defendant capital murder trial in Marin county, to conduct a defense investigation to rebut such charges. While the police may be able to track down prosecution witnesses, the defense is entirely at the mercy of prosecution records, which may well not include the names of potential defense witnesses; at the mercy of the faulty memories of those it seeks to cross-examine at the trial; unable to seek long-disappeared scene-of-the-crime exculpatory evidence; and, unless the defendant habitually kept a daily calendar and held on to it through years of incarceration – unlikely

in the extreme – at the mercy of an inability to remember the details of his whereabouts and activities.

In this case, the constitutional tenuousness was exacerbated by the fact that there was barely sufficient evidence – if that – on which appellant could be found guilty beyond a reasonable doubt. The evidence introduced at trial consisted of eyewitness accounts of the incident, which established the corpus but which did not implicate appellant directly, coupled with ambiguous statements appellant made to the police – reported in testimony unsupported by either tape recordings or verbatim transcripts – in the context of the broad-ranging interview following appellant's arrest on the multiple armed robberies for which he was charged and convicted. These statements consisted of: (1) a statement that "I'm not gonna admit to the murder. I'm not stupid. You'll have to prove that one" (RT 19665); (2) the testimony of one of the officers regarding Masters' partial admissions during the same interview; and (3) Masters' denial on the stand that he took any part in the Hamil murder.

The relevant portions of Officer Chastain's testimony were as follows:

> "Q. . . . [W]hat did you ask Mr. Masters?
>
> "A. Asked Mr. Masters what about that Liquor Store robbery.
>
> "Q. What did Mr. Masters say in response?

"A. He stated what liquor store robbery. And I stated the one in Wilmington where the clerk got shot, and you were in the Camaro.

". . . . .

"Q. Now, when you asked Mr. Masters about the liquor store robbery in Wilmington, where the clerk was shot, where you said the one in which he used the Camaro, what was Mr. Masters' response?

"A. He stated, 'Do you mean the orange Camaro?'

"Q. Okay. Now, had you mentioned the color of the Camaro prior to Mr. Masters' response?

"A. No.

"Q. What did he say next?

"A. Yes. Mr. Masters stated, 'I wasn't there, but I know who did it. I heard about it in the streets. They told me.

"Q. Then did you ask him anything else about that?

"A. I just asked him what went wrong during the robbery that would cause the clerk to be shot.

"Q. What did he say?

"A. He stated, 'Hey, man, I could only tell you what I heard.

And I responded, 'Okay. Tell me what you heard.'

"Q. Did he then tell you what he heard?

"A. Yes.

"Q. Can you tell us what he said exactly?

"A. He stated, 'Hey, first of all, man, that dude deserved to get robbed. He is drinking while he was standing behind the counter. He keeps the booze under the counter.'

"Q. And did you ask him anything else?

"A. I again asked him what went wrong during the robbery.

"Q. What did he say specifically?

"A. He stated, 'Hey, man, let me put it this way[.] If I go in a store and I tell him not to move and lay on the floor, and he reaches for something, now, what I would have done is pistol whipped him. And unless he is big and fat and plays a hero, then I'll do him. I wouldn't shoot him in the chest. I'd shoot him in the foot or the leg.'

"Q. Had you indicated how or where, what location the person was shot in terms of the body?

"A. I did not, no.

"Q. Now, what did you ask him next?

"A. I asked him if he was loaded during the robbery.

"Q. His response?

"A. He stated . . . , 'Hey, what do you mean. I told you I didn't rob that liquor store. I didn't kill that clerk.'

"Q. Okay. Did he – before he stated, 'Hey, what do you mean,' when you asked him were you loaded when you robbed that liquor store, what is his immediate response before he said that?

"A. 'No, I wasn't loaded.'

"Q. And then when he said, 'Hey, what do you mean,' can you tell us how he said that?

"A. Yes, he – he smiled and laughed a lot during our conversation. And he hesitated and stated, 'hey, what do you mean. I told you I didn't rob the liquor store. I didn't kill that clerk.'

. . . . .

'"I'm too slick to fuck up a robbery like that. I heard the clerk was a hero, a hero man. They went in and saw him drinking, tried to rob him, and he laughed and thought they were playing.'

"Q. Okay. Did you ask any questions about the Camaro?

"A. Yes, I asked him where [the Camaro had been abandoned].

"Q. What did he say?

". . . . .

"A. 'Just to show you that I couldn't have pulled this robbery, this is how stupid those dudes were. They parked the car in a red zone right in front of the store and go in to rob the dude. That's dumb. First off, the car is stolen, and they park in a red zone.'

"Q. Did you ask him how the car is stolen?

"A. Yes.

"Q. Do you recall what you asked him?

"A. I asked him if they punched the ignition.

". . . . .

"Q. And what was his response?

"A. He stated, 'Yeah they used a snatch, a snatch bar to punch the ignition. The car was stolen in Lomita, so they drove all the way from Lomita to the liquor store, then they going to drive it all the way back. And then they park it in a red zone, and on top of that when they jumped in the

car after shooting that dude, they only got about a block away, this car stalls out on them, so they just left it in the middle of the street. Man, I'm telling you, that's not my style. I'm too slick to make all those mistakes.'

". . . . .

"Q. Did you ask him again what went wrong with the robbery?

"A. Yes.

"Q. Would you read me specifically what you noted that he said?

"A. Yes. He stated, 'The dude reached under the counter, and he looked like – and it looked like he got a gun and was going to run after us and shoot us [from] the back.'

". . . . .

"Q. Okay. Do you specifically remember that Jarvis Masters used the term 'us'?

"A. Yes.

"Q. And how many times did he use that term in that quote?

"A. In that quote, he used it twice.

"Q. Then did you inquire about the gun?

"A. Yes.

"Q. What was the answer there.

"A. He stated, 'I don't know, one of those weird ones, I think a three eight, ho, you know.'

"Q. And then did he say anything else?

"A. He then stated if you – 'If he would have just walked around, but he reached under the counter, and we thought he was going to shoot us when we were running.'

"Q. Okay.

"A. 'So, they went back and shot him.'

"Q. Now, between the time in the quote when he was using the term in the personal saying "us" and "we" and during the time that he shifted to "they," did his demeanor change in any way?

"A. Yes.

"Q. Describe that to me.

"A. He hesitated and smiled at me and then continued.

"Q. Now, did he say anything else?"

"A. He stated, 'You should have heard the noise when the shot hit the whiskey bottle.'

"Q. Did you ask him how many people were involved in that robbery?

"A. Yes.

"Q. What was his answer?

"A. 'Two is normal.'

"Q. And then what did you ask him, if anything?

"A. I asked him why did he take a partner on this one.

"Q. What was his immediate response?

"A. 'Because the dude really knows the freeways, man.'"

(RT 19717-26.)

Masters' direct testimony regarding the Hamil murder was as follows:

"Q. Now, did the officers ask you about a murder that took place, a robbery murder that took place in a liquor store? Do you remember that?

"A. Yes.

"Q. And were you ever present at a liquor store when somebody was shot and killed?

"A. No.

"Q. Did you ever commit any robberies in Wilmington?

"A. No.

"Q. Do you recall what the officers asked you about this robbery murder?

". . . . .

"A. No, *not – I don't have any independent recollection* of what they asked me.

"Q. Do you remember what you said, if anything, about the robbery murder?

"A. Are you asking me do I remember the actual conversation where I said anything? No.

"Q. Right now you have had a chance to read over the printed up statement about these interviews, right?

"A. Yes.

"Q. Is everything that was said during the interview contained in that printed up statement?

"A. No.

"Q. Everything that you said contained in that printed up statement?

"A. No.

". . . . .

"Q. Did you have any particular motives when talking during the interview about giving information?

"A. My motive was to at first admit to crimes that I knew I was in Y.A.

". . . . .

"Q. Why was that?

"A. It was a way that I thought to give them information that they really demanded that I give, that I gave them during the time I was talking to them. That I could have after that discussion was over said I didn't do. And had some offer of proof why I didn't do it because I was in C.Y.A."

"Q. Any other motive later on in the interview?

"A. Bragging, boasting.

"Q. Were you ever charged with the Hammil (sic.) murder?

"A. No."

". . . . .

"Q. Do you know where you were on [the night of the murder]?

"A. I was AWOL from Y.A."

(RT 21725-27.)

On cross, when asked whether he remembered saying what was in the printed statement to the officers, Masters could not remember

specifically saying what was read to him, but acknowledged that some of it sounded like what he might have said. (RT 21842-46)

The sufficiency of the evidence of Masters' involvement in the Hamil robbery-murder is marginal at best:

> Evidence of the "oral admissions" of a party "ought to be viewed with caution." . . . The reason [is] obvious: "[N]o class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission of the changing of words, to convey a false impression of the language used."
>
> 3 *Witkin*, Cal. Evidence (3d ed. 1986) § 1775, citing former Code Civ. Proc. § 2061, *People v. Bemis* (1949) 33 Cal.2d 395, 399.

Moreover, the two officers were relating events, on the basis of police reports rather than tape recordings or verbatim transcripts, which had occurred some ten years earlier.[84] And Masters' "admissions" were ambiguous, laced with as many denials as anything that could be considered admissions. Moreover, the officer in charge of investigating the Hamil murder, in yet another evidentiary error, was prevented by the court from answering whether he thought the information given by Masters was bogus (RT 20586), although he did admit that following the interview he took no steps to charge Masters with the murder following Masters' admissions. (RT

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[84] The officers' testimony took place on April 6, 1990 (RT 19634); the interview that formed the basis of that testimony took place in November 26-27, 1980. (RT 19639, 19646)

20586) Accordingly, the evidence connecting Masters with the Hamil murder should be found to have been insufficient to allow a juror to have found him guilty thereof beyond a reasonable doubt.

Even if it is not insufficient as a matter of law, however, the marginal nature of the proof makes apparent the multiple due process violations inherent in this court's current penalty phase jurisprudence: First, as noted above, while prosecutors may access and make use of the records kept in police and prosecutorial files, the defense is severely limited by the passage of time in attempting to reconstruct events or find other witnesses. Second, any potential alibi defense had surely been erased by the sands of time. Third, and most disturbing, the absence of jury unanimity and a concomitant assurance of jury deliberation precludes a constitutionally valid finding overcoming the presumption of innocence. Appellant had no defense to the robbery-murder charge except his own denials. Allowing each juror, who had already convicted appellant of the underlying crime and thus was the antithesis of an unbiased juror, to further make his or her own independent assessment of appellant's credibility, without deliberation, makes a mockery of this court's requirement that the prior crime be proved "beyond a reasonable doubt." With regard to the specific facts of this case, even assuming *arguendo* that a reasonable juror *could* have taken his statements as admissions, appellant's point remains the same: although one or more jurors might have considered the Hamil murder proven beyond a reasonable

doubt, it is highly improbable that 12 unbiased jurors, in the context of a full trial with full opportunity for deliberation, would have.

Finally, the marginal levels of reliability of the evidence presented against Masters is at odds with the Eighth Amendment requirements of *heightened* reliability for determination that death is the appropriate punishment. *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305 (plur. opin.); *Mills v. Maryland* (1988) 486 U.S. 367, 383-384; *People v. Weaver* (2001) 26 Cal.4th 876, 930 (need for heightened reliability in capital cases refers to penalty determination).

(b) The Jackson murder

The evidence of the prison murder of Jackson is similarly suspect, because it relies entirely on the testimony not of any eyewitnesses who actually saw Masters commit the murder, but on the testimony of an inmate informant relaying what Masters allegedly said about it.[85]

This evidence suffered from multiple layers of unreliability: First, although Masters was at the scene – the prison yard – and in a group of inmates near where the crime occurred, there was no eyewitness account linking him directly to the stabbing of inmate Jackson. (RT 20192-20194) On the contrary, the testimony of several inmate witnesses placed Masters some distance away from Jackson. (RT 20640; 20690; 20729) Second, the informant, Hoze, who claimed he heard Masters boast of the murder had

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[85] The prosecution's facts are set out at pages 305-307, *supra*.

motives to falsify, since he admitted that he wanted to destroy the BGF and "get" one of them. Indeed, he told a defense investigator that he hoped the state killed Masters (RT 20402), and that Masters had threatened to kill his whole family. (RT 20484) And third, even if Hoze were telling the truth about what Masters later said, Masters could have had motives--increasing his status in the eyes of his gang mates--to boast of a murder which he did not commit. Masters maintained his innocence and denied taking part in the killing.

In such a setting, credibility is all, and yet the sentence of death was imposed by jury which was not required either to deliberate on or to find unanimously that Hoze was more credible than Masters about the Jackson murder. Moreover, in terms of fundamental fairness, the jurors were allowed to make their individual assessments in a setting in which on the prosecution side was an informant willing to gain what he might by throwing charges at Masters, while the defense faced the insurmountable difficulties of an investigation of a prison crime, some years after it occurred, in the closed-off setting of a prison and a prison gang. The hurdles facing such an investigation are staggering, especially when the entire prison establishment is arrayed against the defendant because his alleged crime was killing a correctional officer.

To even consider, in such a setting, that due process is satisfied with individual-juror, possibly non-deliberative findings that result in sending a

defendant to his death is mind-bogglingly beyond any possible notion of fairness.

4. Evidence of Other Unadjudicated Adult and Juvenile Crimes Suffer the Same Due Process Objections as the Foregoing Uncharged Murders, and Are Exacerbated by Staleness

All of the due process and Eighth Amendment problems argued in the foregoing sections apply to the remaining unadjudicated adult and juvenile conduct introduced in aggravation in the penalty phase. There is, in addition, the problem of staleness and, unlike the uncharged murders, each of the alleged but uncharged adult and juvenile offenses carried with it a statute of limitations, "the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell* (1966) 383 U.S. 116, 122. Statutes of limitation are designed to "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time . . . ." *Toussie v. United States* (1970) 397 U.S. 112, 114-115. Appellant is not, however, merely asserting that the respective statutes of limitation related to the admitted prior crimes present lines of demarcation improperly crossed, an argument this court has rejected. *People v. Jennings* (1988) 46 Cal.3d 963, 981-982. Rather the question is whether, as a constitutional matter of fundamental fairness and due process, these charges were too stale to be defended against, and thus

must be considered too stale to contribute to imposition of the ultimate penalty?

Three statements of the United States Supreme Court, speaking in *United States v. Marion* (1971) 404 U.S. 307, at 322-323, put the case most strongly and succinctly:

> [Statutes of limitation] are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defense. *Public Schools v. Walker* (1870) 9 Wall. 282, 288, 19 L.Ed 576, 578.
>
> [Statutes of limitation] provide predictability by specifying a limit beyond which there is an *irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.* (Emphasis added; *accord*: *United States v. Lovasco* (1977) 431 U.S. 783, 789.)
>
> "Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." (Quoting *Toussie v. United States* (1970) 397 U.S. 112, 115)

State procedures for considering a defendant's commission of other crimes in aggravation of a capital sentence must conform to the constitutional standards governing proof of the substantive offense. *Johnson v. Mississippi* (1988) 486 U.S. 578. Similarly, this court has recognized that statutes of limitation reflect the difficulty "faced by both the government and a criminal defendant in obtaining reliable evidence . . . as time passes

following the commission of a crime." *People v. Zamora* (1976) 18 Cal.3d 538, 546; *accord*, *Lackner v. Lacroix* (1979) 25 Cal.3d 747, 751.

The passage of time is closely related to an accused's right of confrontation. Given the heightened need for reliability of a death determination, *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"), an accused cannot be sentenced to death on the basis of information which he does not have a fair opportunity to deny or explain. *Ake v. Oklahoma* (1985) 470 U.S. 68, 83-84; *Gardner v. Florida*, *supra*, 430 U.S. 439, 359-362. Where circumstances prevent effective cross-examination of the evidence upon which a death sentence is based, the reliability of that death sentence is called into question and the sentence may not stand. *Gardner v. Florida*, *supra*, 430 U.S. at 359-362; *Proffit v. Wainwright* (11 Cir. 1982) 685 F.2d 1227, 1253-1254 (*cert. den.* 464 U.S. 1002, 1003); *Gholson v. Estelle* (5 Cir. 1982) 675 F.2d 734, 738-739; *Smith v. Estelle* (5 Cir. 1979) 602 F.2d 694, 698-703 (*affirmed on other grounds sub. nom., Estelle v. Smith* (1981) 451 U.S. 454). In the instant case, it was the passage of time, well beyond the bounds of the respective statutes of limitations of the uncharged crimes, which prevented the defense from any meaningful opportunity to deny or explain the evidence of the uncharged priors, fatally tainting the death decision.

In *United States v. Sherbondy* (9 Cir. 1988) 865 F.2d 996, 1008, the court held that the federal government could not present evidence to show the facts underlying prior crimes for the purpose of federal enhancement statutes. The Court of Appeals explained:

> The problems with such hearings are evident. Witnesses would often be describing events years past. Such testimony is highly unreliable . . . . [T]he witnesses might be persons who did not even testify at the earlier criminal proceeding. In many cases, witnesses to the events in question might be unreliable altogether.

If such evidence is "highly unreliable," it is difficult to understand how it can be admitted consistent with the "heightened reliability" required in a death penalty determination. Moreover, this Court's determination that the relevant statute of limitations for aggravating prior offenses is the underlying murder for which appellant is on trial relies entirely on cases which pre-dated *Furman v. Georgia* (1972) 408 U.S. 238. Thus, *People v. Heishman* (1988) 45 Cal.3d 147, 192, cites *People v. Terry* (1969) 70 Cal.2d 410, 422; *see also, People v. Jennings* (1988) 46 Cal.3d 963, 981.

Although there is a technical sense in which defendant is not in the penalty phase of a capital trial being *prosecuted* for the former crimes, his most fundamental rights under the Sixth, Eighth, and Fourteenth Amendments are nevertheless implicated. Given the inherent unreliability of the stale evidence which was introduced in this case, it cannot possibly meet the federal Constitution's requirement of "heightened" reliability.

This court has avoided these problems in the past by focusing on the underlying murder as the predicate offense for limitations purposes. In the absence of a requirement of "heightened" reliability, this might be appropriate. Under the present constitutional regime, it is not. The United States Supreme Court has long recognized that it is the jury's consideration of prior crimes that is likely to have "an ascertainable and 'dramatic impact'", *Zant v. Stephens* (1983) 462 U.S. 862, 903 (Rehnquist, J., concurring), and prove "decisive" in the choice of penalty. *Johnson v. Mississippi*, *supra*, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 359. Such an impact, in a regime of heightened reliability, cannot be squared with this Court's unfettered allowance of jurors' consideration of prior unadjudicated conduct.

5. Allowing Jury Consideration of Unadjudicated Offenses and the Facts Underlying Adjudicated Offenses also Offends Appellant's Fourteenth Amendment Right to Equal Protection

A constitutional argument which this Court has rejected in the past is that allowing the jury to consider the facts underlying prior crimes and unadjudicated offenses violates equal protection guarantees. In *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243, this court rejected the equal protection argument. *See also, People v. Caro* (1988) 46 Cal.3d 1035; *People v. Melton* (1988) 44 Cal.3d 713. Appellant urges reconsideration.

In *People v. Guerrero* (1988) 44 Cal.3d 343, this Court held that in the context of *non*-death-penalty cases, relitigation of the facts underlying prior

crimes was unreliable and unfair, so that while the *record* of a prior conviction could be consulted in order to determine the nature of the offense, the *facts* behind that record could not be relitigated. One of the reasons given for allowing the record to be consulted was that it would prevent relitigation of the facts: "To allow the trier [of fact] to look to the record of the conviction – but no further – is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." *Guerrero, supra*, 44 Cal.3d at 355, quoted in *People v. Reed* (1996) 13 Cal.4th 217, 223.

Guerrero thus adhered to the Court's long-standing recognition that relitigation of the facts underlying a prior conviction creates an impermissible risk of introducing unreliable evidence and denies the accused fundamental fairness. *See, People v. Alfaro* (1986) 42 Cal.3d 627 (*overruled on other grounds, Guerrero*, at 356); *People v. Jackson* (1985) 37 Cal.3d 826, 834-836; *People v. Crowson* (1983) 33 Cal.3d 623, 634.

Depriving capital defendants of the protections of *Guerrero*, which is premised on notions of reliability and fairness, is an arbitrary denial of equal protection of the law. It also stands on its head the principle that capital sentencing requires greater, not lesser, standards of reliability and fairness than other sentencing procedures. *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320; *see also Taylor v. United*

States (1990) 495 U.S. 575 ("practical difficulties and potential unfairness of a factual approach" to proving prior convictions "are daunting."). It could be argued that death penalty defendants and other defendants are not similarly situated for equal protection purposes. To the extent that they are not, however, the argument weighs in favor of the death penalty defendants because of the Eighth Amendment's concerns for heightened reliability. Thus, if in non-death-penalty cases there are concerns about harm akin to double jeopardy and the right to a speedy trial, *Guerrero*, *supra*, 44 Cal.3d at 355, it can hardly be said that a death penalty defendant has a lesser degree of such concerns. To the contrary, his very life is at stake.

Accordingly, the conflict between this court's death-penalty and its non-death-penalty jurisprudence in this regard violates equal protection guarantees.

6. Given Masters' Secondary Role and the Decision Against Death for Woodard, there is a Reasonable Possibility that the Violations of Masters' Rights to a Fair Penalty Hearing Resulted in the Masters' Death Decision

The errors were prejudicial. The standard employed for state-law error in capital sentencing is that of whether there is a "reasonable possibility" that the error affected the verdict. *People v. Brown* (1988) 46 Cal.3d 432, 447-448 (rejecting People's suggestion that "*Watson*" standard should apply to state-law errors in capital penalty determinations). While a "mere" or "technical" possibility will not trigger reversal, "a reasonable (i.e., realistic)

possibility that the jury would have rendered a different verdict" in the absence of the error or errors will. 46 Cal.3d at 448. The "reasonable possibility" standard is the "same in substance and effect" as the federal harmless-beyond-a-reasonable-doubt standard of *Chapman v. California supra*, 386 U.S. 18, 24. *See*, *People v. Ashmus* (1991) 54 Cal.3d 932, 965. In this case, as appellant's arguments rest principally on the federal constitution, the primary discussion will reference the *Chapman* standard.

As this court recognized in *People v. Horton*, *supra*, 11 Cal.4th at 1135, "in the context of a capital case, a collateral challenge to a prior conviction that has been alleged as a special circumstance . . . may be based upon at least some other types of fundamental constitutional flaws [in addition to denial of the right to counsel at the prior-crime adjudication]." At issue in *Horton* was whether the trial court erred in not considering the defendant's motion to strike evidence of a prior conviction introduced to support a special circumstance allegation which defendant alleged was flawed by his attorney's absence at a critical stage of the proceedings. This court reasoned that where a constitutional right as fundamental as the right to counsel is involved, the denial of that right gives rise to a presumption of prejudice. "A conviction flawed by a constitutional violation of this magnitude is antithetical to the heightened need for reliability in the determination that death is the appropriate sentence." *Id.* at 1136.

Appellant is at a loss to understand how the right to a determination of the truth of a prior uncharged offense by a unanimous, unbiased jury after appropriate deliberation and a fair opportunity to present a defense, is any less a fundamental right than that upheld in *Horton*, especially in the context of "heightened reliability in the determination that death is the appropriate sentence." *Id.* How can there be *heightened reliability* when a defendant is asked to defend against charges that are so old that the statute of limitations – and certainly the human limitations on anyone's memory of where he might have been at the time that would provide an alibi – has long since run? And how can there be *heightened reliability* when each individual juror, jurors who have already found a defendant guilty of the capital crime, and who may come to the decision with or without deliberation, is allowed to decide whether the uncharged allegation has been proved beyond a reasonable doubt? The fact is, realistically, and notwithstanding this court's pronouncements to the contrary, there cannot be. Indeed, there cannot even be reliability, let alone heightened reliability.

In *Horton*, although the absence of counsel at a critical stage was not prejudicial as a matter of law, "prejudice will be presumed if the denial may have affected the substantial rights of the accused. Only the most compelling showing to the contrary will overcome the presumption. The court must be able to declare a belief the denial of counsel was harmless beyond a

reasonable doubt [under *Chapman v. California*]." 11 Cal.4th at 1137 (internal quotation marks and citations omitted).

In this case, as in *Horton*, the People will not be able to make such a compelling showing of harmlessness. On the contrary, given that the same jury hung on the question of death for Woodard, whose role in planning the killing, even under the prosecution's evidence, was superior to that of Masters', the introduction of the evidence of the prior uncharged murders – especially one about which Masters was quoted as saying that doing it was "better than sex" – could not possibly have been harmless beyond a reasonable doubt. And here, as in *Horton*, 11 Cal.4th at 1140, absent evidence of the uncharged murders and other conduct, there is more than a reasonable possibility that the jury would have returned a verdict of life without parole rather than death.

XIII. THE COURT ERRED IN DENYING MASTERS' MOTION TO VOIR DIRE THE JURY AT THE COMPLETION OF THE WOODARD PENALTY PHASE

A. FACTUAL AND PROCEDURAL BACKGROUND

During the pretrial discovery and motions stage, Masters brought a motion for sanctions regarding improper subpoenas and discovery by the prosecution of, inter alia, Masters' juvenile court, school and psychiatric records. (CT 1574, 1618) Masters argued that once in the hands of the state, these records were discoverable by co-defendants and could be used by them to Masters' detriment in a joint penalty phase trial. (*E.g.*, CT 1467-1468) During arguments on the motion, Masters' counsel first suggested that these discovery violations suggested that the penalty phase trial should be separate. (12-12-88 RT 37)

The issue arose again during the discussions regarding the motions to sever the guilt phase trials. In addition to the guilt-phase related arguments discussed in Part I of this brief, Masters also was concerned that, regarding penalty phase trials, the dissemination of his school and psychiatric records, and information on counseling at CYA and the CDC, to the other defendants would allow Woodard to argue that because of their respective backgrounds, he was more entitled to mercy than was Masters. (12-13-88 RT 16) Other evidence might not be introduced by Masters for fear that it would be exploited by Woodard. (*Id.* at 16-17) The court then suggested

that rather than try to rule on the issue prior to hearing the evidence, the penalty phase trials could be heard separately, in tandem, so that neither defendant could make use of the other's records. (*Id.* at 38) If necessary to prevent cross-examination of each other's documents, there would appear to be no reason that tandem, or serial, penalty phase hearings would not be proper. (*Id.* at 38-39) Masters' counsel responded that they would support that idea, but that there would be serious questions if Masters had to go second – that such a procedure would seriously prejudice the defendant who had to go second. The court replied that it may or may not prejudice the second defendant. (*Id.* at 39) The court then denied the motion to sever the *guilt-phase* trials of Masters and Woodard. (*Id.* at 40)

By the time of setting the penalty phase trials, the issue had been decided: there were to be two separate penalty-phase trials, with Woodard going first.[86] One of Woodard's attorney's, Virginia Hart, was apparently pregnant, and finishing his penalty trial was a "race with the stork." (RT 17116)

At the end of the Woodard penalty phase, while the jury was still deliberating his fate, Masters filed a motion for a new jury, or in the alternative to reopen voir dire. (CT 5895 *et seq.*) The jury, he argued, had been

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86 The court makes reference to an earlier hearing "on the day we heard the Johnson motion," which appellate counsel has not yet been able to find. In any case, at that hearing, the court apparently decided that the Woodard and Masters penalty phases would begin in late February, beginning with Woodard's. (RT 17115)

tainted during the Woodard penalty phase, first by evidence from inmate Melvin Richardson that he had originally been sentenced to life without parole, but later went back to court to and got that reduced to 25-to-life. (CT 5898, RT 18023) That testimony prejudiced Masters because it undermined defendant's attempts to convince the jury that life-without-parole meant exactly that. Similarly, Richardson's testimony at the Woodard penalty hearing, that in his ten years at San Quentin and other institutions, it was not common for inmates to have weapons (RT 18040) undermined Masters' mitigating evidence regarding how extremely violent San Quentin in the years leading up to 1985. (CT 5899)

Second, Lieutenant Kimmel, who ran C-section as a sergeant for a year prior to the Burchfield killing, testified extensively regarding the BGF command structure during the Woodard penalty hearing. Included in his testimony was the fact that Welvie Johnson was the BGF commander at San Quentin, which would tend to corroborate the expected testimony of Johnny Hoze that Johnson ordered Masters to kill Jackson. In addition, the prosecution aggravated the prejudice by arguing to the jury during the Woodard penalty hearing by claiming in closing argument that Redmond and others, including Masters, arranged for the intake of BGF members into C-section. (CT 5900)

Third, Woodard testified in detail to the shackling of all three defendants while being transported to and from court; exposure to this information

was prejudicial for the same reasons "that unnecessary show of restraint of an accused in the presence of the jurors is prejudicial." (CT 5901, citing *People v. Duran* (1976) 16 Cal.3d 282, 290.) This not only detracted from the favorable impression arising from the lack of restraints in the courtroom, but was especially prejudicial during the penalty phase, where so much emphasis is placed on the character and propensities of the individual. (CT 5901)

Fourth, the Woodard hearing prejudiced the jury by introduction of Exhibit 390, a letter from Evans to Woodard and full of BGF references, which would tend to bolster Evans' claim regarding his connection to the BGF and defendants. (CT 5902)

Fifth, although Woodard denied knowing practically every other member of the BGF, he admitted knowing Masters from when they were both in North Block, knew him by the name Askari, and even wrote to him on a few occasions. (RT 18366-67) This evidence was prejudicial because it tended to show a special relationship between Woodard and Masters. (CT 5902)

Sixth, Woodard's refusal to name any names with regard to the BGF, or to put his life on the line by doing so, could be interpreted by the jury either as a further attempt to protect Masters or as a fear that Masters would carry out the death threat. (CT 5902-03, citing RT 18366, 18435)

Seventh, the jury heard an expert testify that there was a "low psychological probability" that Woodard could have "concocted, implemented and carried out" the planned murder. This prejudiced Masters by minimizing Woodard's responsibility, thereby enhancing Masters'. (CT 5903, citing RT 18494)

Eighth, Masters would suffer because of an accumulation of aggravating evidence – in the case of Woodard, of rapes, robberies, shootings, assaults on staff – heard in combination with the aggravating evidence introduced against Masters. The risk was too great that the jury would simply be overwhelmed by the sheer mass of this evidence, so that the violent acts of Woodard would overflow onto Masters. In addition, the relatively greater amount of violent acts by Masters would tend to show him as "worse" and more deserving on that basis of the death penalty. (CT 5903-04)

Ninth, the very substantial mitigating evidence introduced by Woodard regarding his childhood, some of which is similar to Masters', would have the effect of reducing the impact of the similar mitigating evidence introduced on behalf of Masters. Woodard's story would, in effect, have jaded the jury toward a similar emotionally trying story from Masters. In addition, to the extent that Woodard's story will have been "worse" (for instance, having suffered electroshock therapy and brain damage), the comparison would prejudice the jury against Masters. (RT 5904)

Tenth, the very fact that this jury had been through the entire process with Woodard would tend to inure the jury to the gravity of its duties. To the extent that key evidence or defense arguments would be similar, they would have far less impact the second time around. In addition, the duty to deliberate Woodard's fate necessarily would compromise its duty to keep an open mind on Masters' fate. Most important, the very verdict rendered against Woodard could factor into the jury's deliberations regarding Masters. (CT 5902) Thus, a death verdict against Woodard might lead to a belief that "equal justice" demands a death verdict against Masters, or make it simply easier for the jury to arrive at death a second time. Or, if the jury returned a life verdict for Woodard, it might compensate for that verdict by returning one of death for Masters.[87] (RT 5906)

Finally, Masters argued that to the extent that the penalty instructions during the Masters penalty phase would differ in significant respect from those given for Woodard, the jury might be misled as to Masters. More seriously, certain arguments made at Woodard's trial misstated the law, for example the argument that "everything bad" about a defendant could be weighed as aggravation. (CT 5906-07)

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87 This was in its way quite prescient, as shown by the statements of two jurors, included in Masters' post-verdict motion for reduction of the sentence, to the effect that they learned, in the process of hanging on the question of death for Woodard, how to "get to death" for Masters. (CT 6591-6596)

Having established the grounds, Masters argued in the alternative, both that the taint on the jury which arose from the Woodard penalty phase required empaneling a new jury, or, at least required reopening voir dire to allow questioning on the possibilities of prejudice, and to assess the impact of media stories run since the Woodard jury's guilty verdict.[88] In addition, Masters sought to question the jury regarding whether they could still keep an open mind about granting life without parole given the seriousness of the aggravating evidence they would hear against Masters, including the commission of a felony-murder (Hamil).

We will argue below that Masters had, indeed, asserted sufficient evidence of potential prejudice to require the empaneling of a new jury; but that, at minimum, if the failure to do so was not an abuse of discretion, certainly the failure to re-open voir dire was.

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[88] These included (1) a front page article in the local newspaper which featured the reaction of Burchfield's widow to the verdict, which included a picture of her in front of San Quentin and a caption which included her comment: "'You take a life, you lose a life.'" The story included many inflammatory quotes from her, including the devastating effect the murder had on her family (which was, at the time, inadmissable at the penalty phase hearing). (2) There was a series of articles about the upcoming execution of Robert Alton Harris. And (3) several articles about the change-of-venue proceedings in the Salcido case.

B. THE FAILURE TO EMPANEL A NEW JURY WAS AN ABUSE OF DISCRETION

There is legislative preference for having the same jury hear the guilt and penalty phases of a trial. Penal Code §190.4(c). However, where good cause is established, that preference must yield to protect the constitutional rights of a defendant charged with a capital offense. Good cause was established by the jury's exposure to evidence during Woodard's penalty phase which could then be improperly considered when that same jury later reconvened to decide Masters' fate.

1. The Extraneous Evidence Presented During Woodard's Penalty Phase Established Good Cause to Empanel a New Jury for Masters' Penalty Phase

Fundamental to a defendant's right to a fair trial is that the jury must not consider extrinsic evidence. This is why a defendant is entitled to a new trial "[w]hen the jury has received any evidence outside of court...." Penal Code §1181. "The requirement that a jury's verdict 'must be based upon evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury...." *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473. The rule which prohibits consideration of extraneous information by the jury has special force in capital cases, in which "[it] is vital . . . that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased

judgment. (*Mattox v. United States* (1892) 146 U.S. 140, 149.)" *In re Stankewitz* (1985) 40 Cal.3d 391, 397.

As set forth above, Masters was severely prejudiced by having the same jury hear Woodard's penalty phase evidence before hearing his own. In reality, no admonitions or instructions could undo the prejudicial impact on the jury of having been exposed to weeks worth of evidence regarding a co-defendant that was extraneous to their decision regarding Masters' sentence. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Burgett v. Texas* (1967) 389 U.S. 109, 115, n.7 quoting *Krulewitch v. United States* (1949) 336 U.S. 440, 453 (Jackson, J., concurring). Indeed, insofar as the evidence came from Woodard and implicates Masters, the jury is conclusively presumed incapable of following an instruction to ignore it. *Bruton v. United States* (1968) 391 U.S. 123, 134-135. As stated by the court with respect to such evidence, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.*; *see also Toolate v. Borg* (9 Cir. 1987) 828 F.2d 571, 573-574 (*Bruton* presumes that jury unable to disregard incriminating testimony by co-defendant).

Moreover, the prejudice to Masters was too wide-ranging and multi-faceted to lend itself to cure by admonition. Because of the many different

types and levels of influence on the jury from its consideration of Woodard's penalty, no one instruction or series of instructions can be formulated to insure Masters' right to the individualized determination of penalty to which he is entitled under the Eighth Amendment.

The capital sentencing decision must be based on "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens* (1983) 462 U.S. 862, 879. The jury was put in the extremely difficult position of having to ignore the evidence it properly received during Woodard's penalty phase trial to conduct a separate individualized determination of whether Masters should live or die.

As has been stated repeatedly, the penalty of death is different "both in terms of severity and finality." *People v. Keenan* (1982) 31 Cal.3d 425, 430, citing *Gardner v. Florida* (1977) 430 U.S. 349, 357.

> Because sentences of death are 'qualitatively different' from prison sentences, *Woodson v. North Carolina* 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that sentence was not imposed out of whim, passion, prejudice, or mistake.
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> *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (O'Connor, J., concurring).

A special need for reliability applies to ensure that a death sentence does not run afoul of the Eighth Amendment prohibition on cruel and

unusual punishment. *Johnson v. Mississippi* (1988) 486 U.S. 578, 584. To enhance the reliability of any death verdict in California, Penal Code section 190.3 sets forth an exclusive list of factors that may properly be considered in deciding on a death sentence. *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.

During Woodard's penalty phase, the jury was exposed to extensive evidence extraneous to the individualized consideration of life or death to which Masters was constitutionally entitled. As a result, the reliability of the resultant death verdict was fatally compromised. This result is also flawed because it seems to be directly contrary to the balancing of competing interests as required in capital cases as stated in *People v. Keenan*, *supra*, 31 Cal.3d at 430-31:

> Death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee a defendant a full defense be observed. [Citations.] Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime.

Recently, in *People v. Kraft* (2000) 23 Cal.4th 978, this court addressed the issue of the trial court's refusal to empanel a new jury (which is reviewed for abuse of discretion). What might constitute good cause for a new jury remains somewhat elusive. "More than mere speculation or the

desire of counsel is needed to establish good cause." *Id.* at 1069. The *Kraft* defendant acknowledged that no case yet had found a refusal to empanel a new penalty phase jury to constitute an abuse of discretion. *Id.* This Court rejected defendant's claim that his case was different based on "the existence of the death list and the sheer numbers of murders", and it declined to find good cause for a new jury. *Id. See also People v. Bradford* (1997) 15 Cal.4th 1229, 1354-1355, for a lengthy description of cases in which good cause was not found to exist.

Under the unique facts of Masters' case, as set forth above, there was good cause to empanel a new jury for sentencing Masters and the refusal to do so was an abuse of discretion. This is based on more than "mere speculation or the desire of counsel." There were two areas of primary concern that remain the most problematic. First, the failure of the jurors to agree on the death sentence for Woodard clearly made it easier for them to agree on death for Masters, and more likely to reach death to compensate for their previous failure. (RT 5906). Second, the fact that the jurors would invariably make comparisons between the 190.3 factors between the co-defendants (in reliance on evidence extraneous to the determination before them) and that it was likely that Masters would come out looking comparatively worse, and hence more deserving of death.

2. A New Jury for Masters' Penalty Phase Was Essential to Ensure Impartiality and Fair Consideration of Whether He Was Guilty Beyond a Reasonable Doubt of the Crimes Charged in Aggravation

Impartial determination of whether defendant has committed violent crimes such as another prison murder and a felony-murder would require the jury to ignore the fact that it has just found him guilty of committing the Burchfield murder. The commission of that crime is not relevant to the question whether he has committed the other uncharged, violent crimes.

This Court has held that a jury is not necessarily unable to fairly determine at the penalty phase whether the defendant has committed other violent crimes simply because it already has determined he committed the capital crime. *See People v. Balderas* (1985) 41 Cal.3d 144, 204-205. The Court has not before considered the prejudicial effect, however, when the alleged crimes include one such as the Jackson murder alleged herein, which contains so many points of similarity to the capital crime. For example, the Jackson crime was a fatal prison stabbing, like the capital crime; moreover, it is alleged that the stabbing was product of a BGF conspiracy like the capital one. In sum, the Jackson murder is simply too close to the Burchfield murder to permit a jury which has found defendant guilty of the latter to fairly consider whether he is guilty of the former.

The courts have recognized the need for protection from potential for prejudice where jurors previously have tried a defendant for a like offense.

See Government of Virgin Islands v. Parrott (3 Cir. 1977) 551 F.2d 553, 554. ("it violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time.") *See also Leonard v. United States* (1964) 378 U.S. 544, 545 (presence on jury of panel members who heard announcement of guilty verdict in open court on prior charge against petitioner requires new trial).

The fact that the jury was convinced as to the first murder may have a special potential for prejudice where the proof of the second murder is not great. *See People v. Williams* (1984) 36 Cal.3d 441, 453 (severance of two murder charges in capital case especially necessary where evidence of one murder weak). In this case, the evidence against defendant as to the Jackson murder consists of little more than his presence in the vicinity and the claim of an unreliable jailhouse informant that Masters confessed to him. Thus, the threat to the jury's impartiality here is especially great.

Under the peculiar circumstances of this case there was "good cause" to empanel a new jury to decide whether defendant was guilty of other violent conduct including other murders. Precisely because this Court has permitted in other cases adjudication by the penalty jury of other crimes on the ground that "the strong legislative preference for a unitary jury outweighs any 'supposed disadvantage' to defendant in the single-jury process (*People v. Balderas*, *supra*, 41 Cal.3d at 204-205), it is imperative to assess the

"actual" disadvantage to the defendant posed by the unusual circumstances of this individual case. Given the high likelihood of unfairness in this particular case posed by the penalty jury's adjudication of the other crimes charged here, empanelment of a new jury was appropriate. The failure to empanel a new jury for the penalty phase constituted an abuse of discretion.

C. AT MINIMUM, THE FAILURE TO REOPEN VOIR DIRE WAS AN ABUSE OF DISCRETION

Even assuming, *arguendo*, that the court's refusal to empanel a new jury was justified, the failure to re-open voir dire for the sake of probing the several possibilities of prejudice against Masters amounted to prejudicial error.

The defendant has a fundamental, constitutional right to have the verdict rendered by unprejudiced jurors. *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266. Due process requires state courts to conduct sufficient inquiry to determine whether jurors will be impartial despite any information that they may have seen, heard, or read about the case. *Mu'min v. Virginia* (1991) 500 U.S. 415, 424-430. "The high court has long held that due process is violated by circumstances that create the 'risk' or 'likelihood' of bias or unfairness." *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 17, n.7.

While the afore-cited cases all dealt with pre-trial voir dire, the principles set forth in them apply no less to the situation here. Indeed, questioning jurors after the jury has been chosen and trial has begun is not

new. *See, e.g., People v. Abbott* (1954) 47 Cal.2d 362, 370-371 (questioning and eventual discharge of juror mid-trial after suspicion raised as to qualifications); *People v. Knights* (1985) 166 Cal.App.3d 46, 51 (voir dire of jurors after commencement of deliberations regarding newspaper article which had appeared; and again regarding reported juror misconduct); *People v. Manson* (1977) 71 Cal.App.3d 1, 27-28 (voir dire of jury regarding publicity about a tangentially-related incident occurring during a two-week break recess; court extensively questioned those who had heard of it; one was excused).

In this case, the issue was not so much outside publicity regarding the trial; rather, it was the possibilities of bias inherent in the procedure chosen by the court. Once the Woodard penalty trial had taken place and Masters had alerted the court to the many ways in which prejudice could have arisen, the court was under a duty to make sure, via voir dire, that none of these were "circumstances that create the 'risk' or 'likelihood' of bias or unfairness." *Hovey v. Superior Court*, *supra*, 28 Cal.3d at 17, n.7. And the court need not have agreed with all ten of the listed possible dangers–only one should have been sufficient to trigger a duty to question, or allow questioning of, the jurors.

Melvin Richardson's testimony, for example, that his life-without-parole sentence was reduced, was testimony over which Masters had no control, no ability to cross-examine, yet might have heightened jurors' then-

common misconception that life-without-parole was no guarantee that the defendant would live out his live within the prison walls. Thus, for the same reasons elucidated by this court in *People v. Ramos* (1984) 37 Cal.3d 136, 152-159, which struck the so-called "Briggs instruction" that the Governor could commute a life-without-parole sentence, Melvin Richardson's testimony raised precisely the same dangers.

Similarly, Woodard's extensive testimony regarding the details of the defendant's shackling while coming to and from trial was directly contrary to this Court's concerns, expressed in *People v. Duran* (1976) 16 Cal.3d 282, 290, that "it is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors . . . [and] is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged." During his penalty trial, in connection to evidence about the incident between Woodard's assault on Officer Holley while being brought to court in 1987, Woodard explained how they come to court "in chains and shackles" and how the escorting officer holds onto the chains during all movement. (RT 18222) Woodard described how the defendants were required to face the wall in the elevator when others were present and were "waist ironed and shackled up" and "handcuffed and in leg irons." (RT 18244) He also explained that "when they take the handcuffs off you, there's usually two or three officers around you while they're taking them off." (RT 18226) After that testimony, Masters did not need to have been

shackled during his penalty phase; he already had a virtual sign around his neck – "THIS IS A DANGEROUS MAN." Yet the court would not allow counsel, or would not itself conduct any questioning of the jurors to determine the effect of Woodard's testimony on them.

As just one more example, once the jury had been unable to reach a verdict of death for Woodard, they may have felt added psychological pressure, either from within or without, to be sure that at least one of the defendants suffered the ultimate penalty. This was especially true if any of them read the comments of Burchfield's widow, in a front-page article in the Marin Independent Journal, following the guilty verdict, comments such as the one noted above, "You take a life, you lose a life," from the picture caption; or that she "has prayed for justice since June, 1985," and that justice "means sending the killers to the gas chamber." (CT 5921-23)

These are but three of the ten different factors–eleven, actually, including the last-mentioned–raised by the defense in its effort to question the jury anew after the Woodard hearing. There is no way, of course, that appellant can say now that any of the eleven items *did* have a prejudicial effect, but that is the very point the defense made in its request that, if a new jury were not empaneled, the court should at minimum permit reopened voir dire. In the context of a case in which both the chief planner and the actual killer were sentenced to life without parole, it is hard to imagine that none of

these factors had any effect on a jury which handed Masters, the least culpable of the defendants, a sentence of death.[89]

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[89] Following the verdict, Masters filed a motion for modification (CT 6565, *et seq.*) and, in his reply to the People's response, included the declaration of psychologist and jury expert, Dr. Ronald Dillehay. Although this evidence was not before the court until after the Masters penalty verdict, it confirms the dangers Masters raised before his penalty trial. Dillehay concluded that "the use of the same jury to make the life or death decision first as to Lawrence Woodard and then as to Jarvis Masters made it more likely that it would return a death verdict in the case of Masters than if he had been tried by a different or new jury." (CT 6617) Dillehay cited research on non-capital juries indicating that prior jury experience may induce conviction proneness and a disposition to harsher sentences. (CT 6623-6624) In addition, despite the court's admonitions and despite the best intentions of the jurors, their mere exposure to the Woodard penalty trial affected their judgments about Masters; a comparison between the two defendants, their histories, the respective mitigation, and aggravating circumstances "would simply be too compelling to avoid." (CT 6624)
Regarding mitigation, Dr. Dillehay opined that, based on his experience in criminal trials, the mitigating evidence introduced by Woodard on his own behalf would necessarily reduce the force of Masters' mitigating evidence. "[W]hat seems a plausible reason when first encountered may become an implausible excuse on subsequent encounter." Accordingly, similar mitigation evidence presented by Masters would lack the force it would carry if encountered the first time around, thereby increasing the likelihood of a death penalty decision for Masters. (RT 6625)
Finally, Dr. Dillehay asserted that the jury's failure to reach a unanimous decision in the Woodard penalty trial contributed to a bias against Masters, both because the experience of a hung jury is extremely unpleasant, leading to attempts both to accomodate and, in this case, to make up for the fact that death was not imposed against Woodard. To be consistent with their beliefs in the death penalty which qualified them for service on the jury, the jurors would feel a pressure to return a death verdict against Masters after having failed to do so against Woodard. (CT 6626-27)

(continued...)

The court's refusal to reopen voir dire was an abuse of discretion requiring reversal of the penalty verdict.

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[89](...continued)
As noted above, Masters also introduced the declarations of two of the jurors indicating that, indeed, having failed to reach a death verdict for Woodard, the jury learned thereby how to "get to death" for Masters. (CT 6591-6595)

XIV. LIMITING THE PENALTY PHASE CLOSING ARGUMENT TO ONE AND ONE-HALF HOURS WAS REVERSIBLE ERROR

The trial court limited closing argument at the penalty phase to one and one-half hours. The penalty phase of the trial lasted over one month and raised numerous complex issues in aggravation and mitigation. Having already found Masters guilty of a capital crime, his life was hanging in the balance. The court abused its discretion and committed reversible error by unnecessarily limiting the length of closing argument and depriving defense counsel of the time needed to properly explore the voluminous evidence.

A. THE PRINCIPAL FACTS

This is a case with a 67,000 page record (including exhibits), in which the guilt phase consumed three and one half months (not including deliberations), and Masters' penalty phase testimony consumed nearly five weeks. The list of charges of prior criminal conduct, set forth *ante* at pp. 297-307, was both voluminous and, in the case of the two uncharged murders, quite serious. Some 40 penalty-phase witnesses gave testimony. Defense counsel needed a full opportunity to assist the jury to understand the weight that the extensive evidence, much of which it believed to have been wrongly admitted, should be given. Despite this, the defense was limited to one hour and 40 minutes for closing argument.

The trial court decided to rush this matter along because it felt it needed to conclude the penalty phase so that the jury could begin its

deliberations and the court could proceed with the Johnson penalty phase the following Monday. (RT 22357-68, especially 22367-68) For the sake of expediency, the court announced that closing arguments were to be completed by 2:30 p.m. The court proceeded to quickly calculate how much time was available, and stated that there was "Three and a half hours to divide between you." (RT 22358) The prosecution requested more time "due to the voluminous amount of prior violent crimes". (RT 22358) After discussing a variety of issues relating to closing arguments, the court then announced "I'll give each side an hour and a half." (RT 22367) The prosecution objected and again requested more time (two hours each side). (RT 22367) The court again rejected the prosecution's request for more time and concluded "Hour and a half each side." (RT 22368)

Mr. Rotwein's argument ran a little bit over the half hour estimate he had given. The court indicated it would be deducting that time from Mr. Satris's time allotment, but he balked and stated "How much time will I have, your honor, because I would like an hour. At least an hour. We object to the time limitation to begin with." (RT 22454) The prosecution gave Mr. Satris an additional ten minutes so that he would still have the full hour he had been allotted for his part of the closing argument. In total, it appears that Masters' defense counsel took one hour and forty minutes for the closing argument for the penalty phase of trial, despite both sides having voiced objections and requesting more time.

B. DEFENDANT'S CONSTITUTIONAL RIGHT TO ARGUE HIS CASE TO THE JURY WAS UNFAIRLY DENIED BY THE TRIAL COURT'S RESTRICTING THE PENALTY PHASE ARGUMENT TO ONE AND ONE-HALF HOURS

The defendant in a criminal case has a constitutional right to present closing argument. *Herring v. New York* (1975) 422 U.S. 853, 856-862; *People v. Bonin* (1988) 46 Cal.3d 659, 694. That right is subject to reasonable constraints. "The trial judge has broad discretion to limit counsel to a reasonable time and to terminate argument when continuation would be repetitive or redundant." *People v. Rodrigues* (1995) 8 Cal.4th 1060, 1184.

The Supreme Court acknowledges that there are some cases which may appear to a judge to be "open and shut" where the closing argument may not change the mind of the trier of fact. But the Supreme Court offered a warning:

> But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be until the judge has heard the closing summation of counsel.
>
> *Herring v. New York*, *supra*, 422 U.S. at 863.

The message is clear that the importance of presenting a complete closing argument cannot be ignored as it may be outcome-determinative. As set forth in the next section, the balance of the specific factors a court must

consider to determine whether the court has abused its discretion and the defendant has been deprived of his constitutional right leads to the conclusion that the court prejudicially erred in this case.

C. BY ANY MEASURE, THE LIMITED TIME ALLOTTED THE DEFENSE FOR CLOSING ARGUMENT CONSTITUTED A PREJUDICIAL ABUSE OF DISCRETION

Based on the relevant precedent and the facts of this case, a thoughtful analysis reveals the trial court abused its discretion by imposing the hour and one-half time limit for closing argument. The first case that presented this issue to this court was *People v. Keenan* (1859) 13 Cal. 581. This was a capital murder case where the trial judge limited closing argument to one and half hours. In finding an abuse of discretion, the court offered critical words of wisdom for later guidance.

> Nor do we here question the right of a District Judge to limit counsel to a reasonable time in their arguments to the jury, though from the danger to which this power is exposed, *it is, perhaps, better, if ever done at all in capital cases, that it should only be done in very extraordinary and peculiar instances.* It is, unquestionably, a constitutional privilege of the accused to be fully heard by his counsel. An opportunity must be afforded him for full and complete defense; and *it is very difficult for a Judge to determine what effect a given line of argument may have upon a jury, or some one of them, or what period may be necessary to enable counsel to present, in the aspect deemed by them important, the case of their client.*
>
> 13 Cal. at 584; emphasis added.

This court concluded that if the trial court restricts closing argument, the cause must be remanded if it is shown that the defendant "was deprived by the limitation of the opportunity of a full defense: for this is his constitutional right, without which he cannot be lawfully convicted." *Id.* at 584-585.

Apparently trial courts have followed the early wisdom insofar as there do not appear to be many capital cases in which a time restriction on closing argument has been an issue. After factually specific analyses, this Court has found no abuse of discretion when addressing the related issue of subject matter limitations on closing arguments in capital cases. *People v. Marshall* (1996) 13 Cal.4th 799, 855 (no abuse of discretion where trial court in capital case limited closing argument to exclude a time-consuming argument consisting of a "specific and detailed comparison of the facts of this case with those of other Stanislaus County capital trials" although the court permitted counsel to argue "that this case lacked the cruelty and callousness found in other murder cases.") See also *People v. Rodrigues*, *supra*, 8 Cal.4th, at 1184-1185.

Other California *non*-murder cases have found two hours or less for closing argument to be an abuse of discretion. This Court found an abuse of discretion in *People v. Green* (1893) 99 Cal. 564. After a five day trial on a robbery charge, the trial court limited closing argument to one hour. Due to that time constraint, "counsel for defendant were prevented from presenting

several points to the jury" which they otherwise would have presented. *Id.* at 565. In reliance on *Keenan*, *supra*, the court concluded that this time restriction constituted an abuse of discretion. See also *People v. Fernandez* (1906) 4 Cal.App. 314 (error to limit closing argument to approximately two hours after five day trial for attempted rape).

The California murder cases that have found no abuse of discretion in the court's time restrictions for closing argument have done so based on the simplicity and brevity of the issues presented, the lack of prejudice, or the failure to object.[90] The time limit imposed by the court was more than two hours in the majority of these cases. These cases are all readily distinguishable from Masters' case based on the above criteria. *See, e.g., People v. Phillips* (1932) 120 Cal.App. 644, 656-657 (no prejudice with limiting closing argument to two and one-half hours in a murder case that lasted six days where "[t]he issues were neither many nor complex."); *People v. McCurdy* (1934) 140 Cal.App. 499 (no prejudice shown in limiting defense counsel in murder trial to five and three-quarters hours after a three

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[90] In light of the court's response to the prosecutions' objection and requests for more time, it was clear that the court would not be persuaded to give up its determination to fast track the conclusion of this trial. (RT 22357-68) Any further objection at that time would have been futile. "Counsel is not required to profer futile objections." *People v. Anderson* (2001) 25 Cal.4th 543, 587. Given the court's refusal to consider granting more time pursuant to the prosecutions' requests, it would have been futile for defense counsel to object at that time.

day trial); *People v. Castro* (1919) 42 Cal.App. 453 (no objection noted and no prejudice shown where closing argument was limited to two and one-half hours in a murder trial that lasted three days.); *People v. Prewitt* (1919) 40 Cal.App. 416 (no objection to one and one-half hour limit in murder trial where defense counsel argued two hours and twenty minutes, but no prejudice shown).

Other jurisdictions outside of California that have dealt with the issue in the context of capital cases support the conclusion that the trial court abused its discretion in unduly limiting the time for closing argument. The most procedurally similar case to *Masters* that has addressed this issue concluded that there was an abuse of discretion where the trial court imposed too short of a time restriction on closing argument in the penalty phase of a capital murder case. In *Willie v. State* (Miss. 1991) 585 So.2d 660, at 676, the Supreme Court of Mississippi, in criticizing the trial court's restricting closing argument to fifteen minutes, rhetorically asked and answered the key question underlying all of these cases wherever they occur.

> Life is at stake during this stage of the proceeding. Do we, the judiciary, so little value a defendant's life that we cannot grant more than fifteen minutes to allow a defendant to make a full and complete plea or argument to a jury to spare him from execution? We think not. A defendant must be allowed, within reason, whatever time he believes is necessary to seek a penalty less than death.

Surely Masters' life is of such value that he too was entitled to "whatever time he believes is necessary to seek a penalty less than death."

In *Collier v. State* (Nev. 1985) 705 P.2d 1126, the court found an abuse of discretion by the trial court's limiting closing argument to one hour. While that time limit might be reasonable in another case, it was unreasonable in a capital case. In *Collier* the guilt phase trial lasted five days and the penalty phase another two days and an hour was found to be an abuse of discretion. *See also Tighe v. State* (Mont. 1903) 71 P. 3, 9 (d*isapproved on other grounds, State v. Sherman* (Mont. 1907) 90 P. 981, 982), (one and three-quarter hours limit for closing argument was an abuse of discretion in a capital murder case which lasted five days.)

The Time Restriction for Closing Arguments Was Prejudicial

In the half-hour (which became 40 minutes) allotted to him, attorney Geoffrey Rotwien felt compelled to speak so fast that the court twice had to warn him to slow down for the sake of the court reporter. (RT 22425, 22437-38) His argument regarding the Hamil murder – one of the two uncharged murders introduced as aggravation – consumes all of four pages of transcript, while that concerning the Jackson murder, is limited to five. (RT 22438-42, 22442-47)

By any measure, the time allotted was too short, and a constitutional violation. As this court noted in 1859, "it is very difficult for a Judge to

determine what effect a given line of argument may have upon a jury, or some one of them, or what period may be necessary to enable counsel to present, in the aspect deemed by them important, the case of their client." *People v. Keenan*, *supra*, at 584.

The time limits at minimum require a remand for a new penalty hearing. As the Ninth Circuit has explained:

> We have held that a deficient closing argument that "lessened the Government's burden of persuading the jury" caused the "breakdown of our adversarial system" and required reversal. *United States v. Swanson*, 943 F.2d 1070, 1074 (9 Cir. 1991); . . . .
>
> *Conde v. Henry* (9 Cir. 1999) 198 F.3d 734, 739.

After five weeks of testimony regarding six juvenile incidents, six robbery and gun incidents, five jail and prison incidents, and the two uncharged murders, an hour and 40 minutes' argument on behalf of a defendant facing the death penalty was unwarranted, inexcusable, and unconstitutional.

XV. IT WAS AN ABUSE OF DISCRETION TO ADMIT GRUESOME PHOTOGRAPHS OF THE VICTIM OF AN UNCHARGED CRIME DURING THE PENALTY PHASE

The trial court abused its discretion in admitting unduly gruesome photographs of murder victim David Jackson during the penalty phase. Jackson was an inmate when he was stabbed to death. The photographs were offered against Masters as evidence of uncharged crimes. In light of the offered stipulations, the photographs retained no probative value. The risk of prejudice from their admission was high compared with their virtually non-existent probative value.

A. THE PRINCIPAL FACTS

Prior to the penalty phase hearing, the defense challenged the admission, under Evidence Code section 352, of what it termed "inflammatory and grotesque" photos of inmate David Jackson, who Masters was accused of killing.

Masters was in a group of about six inmates when Jackson was stabbed in the neck, leading to his death. (RT 20191-20194) The murder was tied to Masters by the testimony of inmate Johnnie Hoze. Hoze was a member of the BGF, and the gang security chief in the AC unit from 1981 to 1985. (RT 20354) When Masters was assigned to the AC, he told Hoze that he was assigned to the AC for killing Jackson, and described leaving the weapon in Jackson's neck. (RT 20362) During the ensuing year,

Masters bragged many times to Hoze about the Jackson killing, without mentioning the victim's name (RT 20366-20367), and told Hoze individually and told other BGF members in a "hit cadre" that the adrenalin rush "was better then having sex." (RT 20367, 20371)

The defense indicated that it was willing to stipulate both as to the identity of Jackson and the description of the wounds. (RT 19888-19889) The court acknowledged that the photos, marked as Penalty Phase Exhibit 74, showed wounds that were "far more gruesome-looking" than those of the photos admitted from the Hamil murder. (RT 19889) Nevertheless, the court allowed two of the four photos. (Penalty Phase Exhibits 74-B and C). The defense again offered to stipulate "to as detailed a description of the wounds as can be given, location, size, everything." (RT 19890) (The admitted photos were re-designated Penalty Phase Exhibits 74-A and B for introduction to the jury.)

B. IT IS ERROR TO ADMIT EVIDENCE OF MARGINAL RELEVANCE WHERE THE PREJUDICE OUTWEIGHS THE PROBATIVE VALUE

The precise issue here requires weighing the prejudice from the admission of gruesome photographs of a murder victim from an uncharged crime as compared with the photographs' probative value. These photographs were admitted at penalty phase instead of accepting the above-described stipulations regarding the victim's identity and a description of his wounds. Evidence of uncharged crimes at penalty phase may be admissible

under Penal Code §190.3(b). However, the admissibility of such evidence is not without limits. If the prejudice from the evidence outweighs its probative value, the evidence is irrelevant and should be excluded. *People v. Terry* (1964) 61 Cal.2d 137, 144-145; Evidence Code §352. The admission or exclusion of photographs "lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." *People v. Crittenden* (1994) 9 Cal.4th 83, 133.

1. The Gruesome Photographs Were Irrelevant to Any Disputed Fact in Light of the Stipulations

Generally speaking, the prosecution "cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." *People v. Garceau* (1993) 6 Cal.4th 140, 182. If the evidence retains probative value which exceeds the scope of the defendant's stipulation, the prosecution may reject the stipulation. *Id.* However, if the defendant is willing to stipulate to facts which encompass the probative value of the evidence, those facts are no longer "disputed" within the meaning of Evidence Code section 210 and evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code section 350. *People v. Bonin* (1989) 47 Cal.3d 808, 848-849.

In light of the stipulations that Masters was willing to make, these photographs retained no probative value. In this case, there was no valid reason for admitting the photos. There was no issue of how the death of

Jackson came about – the details were unimportant. The jury would know that Jackson was stabbed in the neck, and the defense was willing to stipulate to the details of that. Rather, the only significant issue was identity, whether Masters was the inmate who stabbed Jackson, and on that issue the photos were not probative whatsoever. There was no issue of malice, or of aggravation of the crime or penalty (*e.g., People v. Frierson* (1979) 25 Cal.3d 142, 171); nor of the degree of the crime (*e.g., People v. Stanworth* (1969) 71 Cal.2d 820, 839-840; *People v. Orozco* (1981) 114 Cal.App.3d 435, 447); nor the need to support the credibility of the prosecution witness (*e.g., People v. Radil* (1977) 76 Cal.App.3d 702, 710). In short, the prosecution did not have to prove the gruesomeness or the details of the Jackson murder in order to help the jury establish the appropriate punishment for that murder; it had only to establish that Jackson was murdered; that he was murdered with a prison knife; and that he was murdered by Masters. The defense was willing to stipulate to both of the first two, including the details of Jackson's wounds, and the photographs added nothing to the third. Their probative value, therefore, was *de minimis*, and obviously outweighed by the prejudice inherent in their admission.

2. It Was Highly Prejudicial to Admit these Unduly Gruesome Photographs Relating to an Uncharged Other Crime

The fact that these gruesome photographs were of the victim of an uncharged crime being offered under Penal Code §190.3(b) at the penalty

phase is critical in determining their prejudicial value. The relevant prejudice has been described as "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." *People v. Hart* (1999) 20 Cal.4th 546, 616. The admission of these grotesque and gruesome photographs could only serve to further inflame and bias this jury that had already found defendant guilty of a capital offense.

The potential for the admission of these photographs of another murder victim causing prejudicial error is high in light of "the difficulty in ascertaining '[the] precise point which prompts the [death] penalty in the mind of any one juror.' (*People v. Hines* (1964) 61 Cal.2d 164)" *People v. Robertson* (1982) 33 Cal.3d 21, 54.

> Here, the potential for prejudice was particularly serious because the error in question significantly affected the jury's consideration of "other crimes" evidence, a type of evidence which this court long ago recognized "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk* (1965) 63 Cal.2d 443, 450)
>
> *Id.*

These photographs had great potential for prejudice in this case because they were "'other crimes' evidence", and their probative value is further called into question since they related to an uncharged crime.

In light of the offered stipulations, and the high potential for prejudice from this evidence at the penalty phase, the minimal probative value of

these photographs was clearly outweighed. Accordingly, the court abused its discretion in allowing them in.

XVI. CALIFORNIA'S CAPITAL SENTENCING SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE FEDERAL CONSTITUTION

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the federal Constitution. Challenges to many (though not all) of these features have been rejected by this Court, but these challenges retain federal constitutional validity since they have not been rejected on the merits by the U.S. Supreme Court, and also because this case provides factual contexts different from those in which such arguments have already been adjudicated. *Cf., e.g., People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66 (cases not authority for propositions not considered). Appellant presents each argument in a manner sufficient to provide this Court with the nature of each claim and its federal constitutional bases. *See, e.g., People v. Ramos* (1997) 15 Cal.4th 1133, 1182-1183; *People v. Bradford* (1997) 14 Cal.4th 1005, 1059; *People v. Memro* (1995) 11 Cal.4th 786, 886-888; *People v. Turner* (1994) 8 Cal.4th 137, 207-209.

Individually and collectively, these constitutional defects require that appellant's sentence of death be set aside. They apply both to the penalty adjudication, and to the automatic modification motion (Penal Code § 190.4, subd. (e), which is supposed to encompass the matters considered by the penalty jury. *People v. Edwards* (1991) 54 Cal.3d 787, 747.

The constitutional claims of error here are reviewable because they are all arguments that the jury instructions erroneously stated the law applicable to appellant's case. Such instructional errors affecting substantial constitutional rights are reviewable despite the absence of objection below. Penal Code section 1259; *see also, e.g., People v. Cuevas* (1995) 12 Cal.4th 252, 260; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140. If any of these arguments are legally correct, the errors are reviewable because the death penalty is a legally unauthorized sentence which is freely reviewable on appeal. *People v. Nasalga* (1996) 12 Cal.4th 784, 789, n.4; *In re Harris* (1993) 5 Cal.4th 813, 838-841; *accord, e.g., People v. Zito* (1992) 8 Cal.App.4th 736, 741-742. Conviction or sentence under an unconstitutional law is also freely reviewable since no court can subject a person to punishment under an unconstitutional statute. *In re Berry* (1968) 68 Cal.2d 137, 145-146; *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 507; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 245.

A. BARRIERS TO CONSIDERATION OF MITIGATION

The first claim of error is based upon instructional barrier to the consideration of mitigation. The inclusion in the list of mitigating factors of adjectives such as "extreme" (see factor (d) in CALJIC No. 8.85, CT 6863, given at RT 22524) acted as a barrier to consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586. This

wording rendered factor (d), which the evidence supported here, unconstitutionally vague, arbitrary, capricious and/or incapable of principled application. *Maynard v. Cartwright* (1988) 486 U.S. 356; *Godfrey v. Georgia* (1980) 446 U.S. 420.

The jury's consideration of this vague factor, in turn, introduced impermissible unreliability into sentencing, in violation of the Sixth, Eighth and Fourteenth Amendments. It also may have induced the jury to ignore factor (d) if it found a mental or emotional disturbance but did not find that it was "extreme"; notwithstanding the catchall factor (k) instruction, the jury may have taken the instruction at face value and decided only "extreme" emotional or mental disturbance was mitigating. That would require only a basic principle of language interpretation, *inclusio unius est exclusio alterius,* which due to its common sense nature is presumed to be what the jury used. At least, there was a reasonable likelihood it did so. *Estelle v. McGuire* (1991) 502 U.S. 62, 72.

The error was of particular significance in this case, because there was in fact evidence that appellant, like all of the inmates at San Quentin at the time, was under the influence of prison conditions which in all likelihood produced significant mental or emotional disturbance at the time of the offenses. *See, e.g.,* the testimony of Drs. Slater and Irwin, discussed *ante* at pages 320-327.

By virtue of the rights implicitly and explicitly guaranteed by the Sixth, Eighth, and Fourteenth Amendments, capital penalty jurors must be permitted to "consider and give effect to all relevant mitigating evidence offered by" a defendant. *Boyde v. California* (1990) 494 U.S. 370 377-378; *accord, Penry v. Lynaugh* (1989) 492 U.S. 302, 328 ("*full* consideration of evidence that mitigates against the death penalty is essential" [emphasis in original]).

Limiting the jury to consideration of "extreme mental or emotional disturbance" violated this constitutional mandate. *Accord, Smith v. McCormick* (9 Cir. 1990) 914 F.2d 1153, 1165-1166 (Montana scheme unconstitutional because it permitted sentencer "to refuse to consider . . . mitigating evidence simply because it fell below a certain weight"); *Kenley v. Armontrout* (8 Cir. 1991) 937 F.2d 1298, 1309 (defendant need not be insane for mental problems to "be . . . considered mitigating evidence"); *People v. Robertson* (1982) 33 Cal.3d 21, 59-60 (violates Eighth Amendment to permit jury to consider "mental disease" as mitigating but not "mental defect").

This Court has previously held that instructing a jury with factor (d) is not necessarily error if the jury is also instructed with factor (k). CALJIC No.

8.85(k); Pen. Code, § 190.3, subd. (k).[91] Barring something to indicate otherwise, this Court has said, it will be assumed that jurors in a given case understood that factor (k) was a catch-all category that allowed them to consider as mitigating the defendant's less-than-extreme mental or emotion-al disturbance. *People v. Wright* (1990) 52 Cal.3d 367, 443-444; *accord, People v. Ghent* (1987) 43 Cal.3d 739, 776. Appellant respectfully submits that any such presumption is not supported by law, for the reasons discus-sed in this Argument. In any event, this Court should hold it inapplicable to this case, as this case lacked what the "closer" case of *Wright,* 52 Cal.3d at 444, had – an argument by any attorney that less-than-extreme mental or emotional disturbance could still be a mitigating factor despite the language of the factor (d) instruction.

In *People v. Wright, supra,* this Court left room for defendants to show that the facts and jury arguments were conducive to a jury's erroneous interpretation that "extreme" mental or emotional disturbance was required for mitigation. *Id.*, 52 Cal.3d at 444-445. In appellant's case, this Court should conclude there was a "reasonable likelihood" the jury so interpreted

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91 The jury was instructed under factor (k): "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (CT 6864; RT 22525)

the instruction. *Estelle v. McGuire* (1991) 502 U.S. 62, 72. The presumption should not be applied.

First, in both law and logic there is a principle that the specific overrides the general. *See, e.g., People v. Trimble* (1993) 16 Cal.App.4th 1255, 1259.

Second, as a related principle, *inclusio unius est exclusio alterius* is a standard principle of interpretation of language in statutes and contracts. *Courtesy Ambulance Service of San Bernardino v. Superior Court* (1992) 8 Cal.App.4th 1504, 1514; *People v. Weatherill* (1989) 215 Cal.App.3d 1569, 584 (statutes); *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1175 (contracts). Since it is a maxim of common interpretation of language, it is also how lay people would be expected to interpret a jury instruction. *Accord, People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) ("Although the average layperson may not be familiar with the Latin phrase . . . , the deductive concept is commonly understood. . . ."); *Alcaraz v. Block* (9 Cir. 1984) 746 F.2d 593, 607 ("[T]he maxim *expressio unius* is a product of logic and common sense.").

Applying these principles to factor (d), it is plain that, when factor (d) states that killing under the influence of mental or emotional disturbance may be considered a mitigating factor only if the disturbance was "extreme," this necessarily excludes any lesser disturbance. This is merely a common use of language, and thus the use jurors are presumed to use.

Factor (k) does not cure that error, among other reasons, because of the principle of language interpretation that the specific prevails over the general. *E.g., People v. Stewart* (1983) 145 Cal.App.3d 967, 975. And even if, *arguendo,* factor (k) only provided a contradiction for the jurors rather than something subsumed to the specific factor (d), there would still be error, as a contradictory instruction does not cure the error in a constitutionally infirm instruction. *Yates v. Evatt* (1991) 500 U.S. 391, 401, n.6 (*disapproved on other grounds, Estelle v. McGuire, supra*, 502 U.S. at 72, n. 4).

Third, to conclude otherwise – i.e., to conclude that factor (k) overides factor (d) – would be tantamount to declaring factor (d) extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a [single] word surplusage . . . be avoided" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factor (d) surplusage.

Fourth, the language of factor (k) in no way compelled a juror to interpret it as overriding factor (d). To the contrary, the pertinent portion of factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death. . . ." There was no reason a juror would necessarily see appellant's mental or emotional disturbance at the time of the killings – the subject of factor (d) – as an "aspect of [his] . . . character."

A juror was most likely to believe that factors (d) and (k) dealt with different subjects.

Fifth, a 1994 study discovered that, of 491 upper level undergraduates who heard factor (k) read aloud five times, 36% of them believed the factor was *aggravating*, not mitigating. Haney and Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law and Hum. Beh. 411, 418-424. That astonishing statistic (36% would be slightly over an average of 4 jurors on a 12-member jury) strongly suggests that this Court should look even more closely at the propriety of factor (d). A juror who believed that factor (k) was aggravating, obviously, was not going to conclude that factor (k) was so all-encompassing a mitigating factor that it overrode the limitation on mitigation contained in factor (d).

Accordingly, the misleading instructions, especially in conjunction with the arguments of counsel, made it reasonably likely that, in violation of the Sixth, Eighth, and Fourteenth Amendments, one or more jurors failed to "consider and give effect to all relevant mitigating evidence offered by" appellant. *Boyde v. California, supra*, 494 U.S. at 377-378.

Nor could there be any finding of "harmless error" here, because the error directly affected mitigating evidence that was in the record. Moreover, defense counsel's failure to explain that "extreme" emotional disturbance at the time of the offenses is not necessary for factor (d) mitigation is further

indicative of prejudice from the error. Third, there was a significant amount of mitigating evidence in the record (*see ante*, pp. 307-329), further underscoring the prejudice from penalty error.

As a result of the above, the State cannot carry its burden of showing no reasonable possibility the error affected the verdict under either the federal constitutional or state-law standards especially given the subjective nature of the death-selection process in California. (*See* discussion of standards *supra*, pp. 154-157.) The penalty judgment should be reversed.

B. FAILURE OF STATUTE TO PERFORM CONSTITUTIONALLY MANDATED NARROWING FUNCTION; OVERBREADTH OF STATUTORY ARRAY

The California capital statutory scheme contains so many special circumstances that it fails to perform the constitutionally required narrowing function. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.' *Furman v. Georgia* (1972) 408 U.S. 238 (conc. opn. of White, J.); *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 (plur. opn.).
>
> *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.

However, California's death penalty statute, enacted by initiative, has disregarded the Eighth Amendment by multiplying the "few" into the many. It is now difficult for the perpetrator of a first degree murder in California not to be eligible for the death penalty. Indeed, because of the breadth of

California's definition of first-degree murder,[92] nearly all murders committed in California can be capitally charged. Some thirty-two "special" circumstances now exist under Penal Code section 190.2, effectively embracing every likely type of murder.

It appears the proponents of Proposition 7, the initiative enacted into law as section 190.2, contemplated this unconstitutional purpose in drafting and advocating such expansive special circumstances. In their "Argument in Favor of Proposition 7" in the *1978 Voter's Pamphlet*, they described certain murders not covered by the then-existing death penalty statute, and then stated:

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not

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92 The California statute broadly defines first-degree murder as all murder perpetrated [1] by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, or torture or [2] by any other kind of willful, deliberate, and premeditated killing, or [3] which is committed in the perpetration of, or attempt to perpetrate, any of twelve specified felonies, or [4] "which is perpetrated by means of discharging a firearm from a motor vehicle . . . with intent to inflict death." Pen. Code § 189. Further, case law has broadened the definitions of, or lessened proof necessary to establish, various of the statutory categories of first degree murder. *See, e.g., People v. Morales* (1989) 48 Cal.3d 527; CALJIC No. 8.25 (1989 Rev.) (lying in wait); *People v. Perez* (1992) 2 Cal.4th 1117 (willful, deliberate, premeditated); *People v. Webster* (1991) 54 Cal.3d 411 (perpetration of a robbery); *People v. Hayes* (1990) 52 Cal.3d 577 (perpetration of a burglary).

> receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*
>
> *1978 Voter's Pamphlet*, p. 34 (emphasis added).

The vast overbreadth of the eligibility factors does not by itself create unconstitutionality. If beyond those eligibility factors (the special circumstances), the selection factors provided specific criteria to channel a sentencer's discretion and provide a genuine narrowing function, it would still be constitutional. *See, e.g., Arave v. Creech* (1993) 507 U.S. 463, 475 (Idaho scheme not contrary to Eighth Amendment where all first-degree and many second-degree murders are death-eligible, and narrowing for selection provided by further aggravating circumstances).

But that is not so here, or in the California sentencing scheme. The premise of our sentencing scheme is that the narrowing function is supposed to be provided by *eligibility* factors, not selection factors; the latter simply provide the jury with discretion without specific instruction. *Tuilaepa v. California* (1994) 512 U.S. 967, 978-979. Where as here, the selection factors do not provide a genuine narrowing function, and the eligibility factors also fail to, the capital sentencing scheme as a whole fails constitutional muster.

Among the most common types of murders in California are those from drug deals, robberies and/or burglaries, gang conflicts, and domestic disputes. Robbery-murder and burglary-murder are explicitly covered by

special circumstances. Drug killings are likely to be committed in connection with a robbery, section 190.2, subdivision (a)(17)(i), or a burglary, section 190.2, subdivision (a)(17)(vii), or for the purpose of silencing or retaliating against a witness, section 190.2, subdivision (a)(10). Gang conflict and domestic dispute killings are likely to be committed "while lying in wait," section 190.2, subdivision (a)(15), within the meaning of *People v. Morales* (1989) 48 Cal.3d 527. Indeed, the "lying in wait" special circumstance alone overbroadens the scope of California's special circumstances, as Justice Mosk has explained:

> [T]he lying-in-wait special circumstance . . . does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.
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> *Id.* at 575 (dis. opn. of Mosk, J.); *cf., e.g., People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1146 (reversing Court of Appeal's conclusion that evidence of lying-in-wait was insufficient]; *People v. Hardy* (1992) 2 Cal.4th 86, 163-164 (holding evidence of lying-in-wait sufficient despite no period of waiting and watching).

The problem of overinclusiveness, or stated another way, whether the California death penalty law "withstand[s] scrutiny under the Eighth Amendment as a valid predicate for the determination of death eligibility . . .

[because it] provide[s] a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not," affects more than the subdivision (a)(15) special circumstance considered by Justice Mosk. It affects nearly all murders in California. In California, death eligibility is now the rule, not the exception. The Eighth Amendment requires exactly the opposite. There must be a "meaningful basis for distinguishing the *few* cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia, supra,* 428 U.S. at 188 (quoting *Furman v. Georgia, supra,* 408 U.S. at 313; emphasis added), and there is not.[93]

In *Godfrey v. Georgia, supra,* 446 U.S. 420, the Supreme Court reversed under the Eighth Amendment a sentence of death under a Georgia capital murder statute that permitted such a sentence for an offense found beyond a reasonable doubt to have been "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 422. Despite the prosecution's claim that the Georgia courts had applied a narrowing construction to the

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[93] Even if the base against which one measures the constitutional adequacy of the narrowing effect of a capital sentencing scheme were broader than all first degree murders – *e.g.*, all persons guilty of murder of whatever degree, or all those guilty of murder with sufficient personal culpability to satisfy Eighth Amendment proportionality concerns, *see Tison v. Arizona* (1987) 481 U.S. 137, California's statutory scheme fails to adequately narrow the class subject to the death penalty.

statute, *id.* at 429-430, the plurality opinion recognized this death-eligibility statute was overbroad because it could encompass almost every murder:

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

So too with a death-eligibility scheme that permits virtually any murder to have "special circumstances" and thus be death-eligible.

That cannot properly be the state of the law. To be consistent with the Eighth Amendment, a capital murder statute must take into account the concepts that death is different *(California v. Ramos* (1983) 463 U.S. 992, 998-999), and that the death penalty must be reserved for those killings which are considered the most "grievous . . . affronts to humanity." *Zant v. Stephens*, (1983) 462 U.S. 862, 877, n.15 (citing *Gregg v. Georgia, supra,* 428 U.S. at 184). Across-the-board eligibility for the death penalty also fails to account for the differing degrees of culpability attendant to different types of murder, enhancing the possibility that sentences will be imposed arbitrarily without regard for the blameworthiness of the defendant or his act.

Further, it fails to provide legislative guidelines governing the selection of death eligible defendants.[94]

In an article authored by Harvard Professor Steven Shatz and Berkeley Lecturer in Law Nina Rivkind (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L. Rev. 1283 [hereinafter Shatz]), the authors concluded that California's statutorily defined death-eligible class is so large and the imposition of the death penalty on members of the class so infrequent, that it performs no narrowing of the death-eligible class as mandated by *Furman*. In fact, it creates a greater risk of arbitrary death sentences than the pre-*Furman* death penalty schemes. *Id.* The authors of the 60-page article state that its analysis is

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[94] Indeed, because the felony-murder special circumstance does not contain an intent element for the actual killer (*People v. Anderson* (1987) 43 Cal.3d 1104), that special circumstance permits an accidental or unintentional killing to form the basis for a death sentence, despite the U.S. Supreme Court's repeated emphasis that an evaluation of the accused's mental state is "critical" to a determination of his suitability for the death penalty. *See, e.g., Enmund v. Florida* (1982) 458 U.S. 782, 800 (appropriateness of death depends on accused's culpability and "American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical" to the degree of his culpability). As a result, *any* perpetrator of felony-murder, *by virtue of even an unintended killing*, may be sentenced to die. While appellant's special circumstance was not felony-murder, the finding of guilt was based on his culpability as an aider and abettor. (CT 4523; RT 16039, 16066) As such, to find appellant guilty of murder, the jury only needed to find that appellant encouraged the co-conspirators to follow through on their plan to hit a guard believed to be smuggling bullets to a rival gang. (RT 16372-73) As such, the jury did not have to find that Masters had an intent to kill Sergeant Burchfield.

based on California statutory and decisional law and on a study of more than 400 appealed first degree murder cases. *Id.* Appellant incorporates the argument and the authority upon which it is based by reference and provides the following summary of the points made therein.

Since each of the Justices in the majority in *Furman* wrote his own opinion, the scope of, and rationale for, the decision was not determined by the case itself. However, all five Justices focused on the infrequency with which the death penalty was imposed and Justices Stewart and White, the two swing votes, emphasized that the relative infrequency of its application created the risk that it would be applied arbitrarily. Shatz, *supra*, at 1284 (citing *Furman v. Georgia, supra,* 408 U.S. at 249-251). Justice Stewart found the death sentences at issue in *Furman* were "cruel and unusual" because, of the many persons convicted of capital crimes, only "a capriciously selected random handful" were sentenced to death. Shatz, *supra*, at 1285. This conclusion was derived from their understanding that only 15-20% of death-eligible convicted murderers were being sentenced to death. *Id.* at 1288.

While the Court did not indicate in *Furman* or later in *Gregg v. Georgia, supra,* 428 U.S. 153, what death sentence ratio (the actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy *Furman*, plainly any scheme producing a ratio of less than 20% would not. Shatz, *supra*, at 1289. The Cout's central

concern was that arbitrary administration of the death penalty was inevitable when too few murderers were being selected to death from too large a death-eligible class. *Id.* at 1286.

The Court's opinion in *Furman* that the death penalty was being applied to a "random handful" was grounded in the empirical data concerning death sentence ratios at the time. Shatz, *supra*, at 1287 (citing *Furman*, at 310). *Furman* was thus a mandate to the states to increase the death sentence ratio by procedures that limited the death-eligible pool to those convicted murderers particularly deserving of the penalty. Shatz, *supra*, at 1289.

By the time of *Zant v. Stephens, supra,* 462 U.S. 862, the requirement that states reduce the risk of arbitrary imposition of the death penalty had evolved into a requirement that there be a statutory narrowing of the category of death-eligible murders. Shatz, *supra,* at 1291. In *Zant*, the statutory narrowing requirement meant that a state must "genuinely narrow the class of persons eligible for the death penalty." Shatz, *supra,* at 1294 (citing *Zant v. Stephens, supra,* 462 U.S. at 877).

The *Furman* principle has resulted in a statutory narrowing requirement with two components: (1) the death-eligible class of convicted murderers must be small enough that a substantial percentage are in fact sentenced to death; and (2) the states' legislatures must decide the composition of the death-eligible class. Shatz, *supra,* at 295. In other

words, *Furman* is satisfied if, and only if, the legislature, by defining categories of murderers eligible for the most severe penalty, genuinely narrows the death-eligible class. *Id.*

In the quarter century since the *Furman* decision, the Court has repeatedly reaffirmed that the *Furman* principle is the cornerstone of its death penalty jurisprudence. Shatz, *supra,* at 1286 (citing *Maynard v. Cartwright, supra,* 486 U.S. at 362).

Plainly, there is no meaningful narrowing of the class of death eligible murders when a statutory scheme defines the class of death-eligible murders so broadly that it excludes so few murderers or categories of murders from being death-eligible. Shatz, *supra,* at 1302-1303. Such a statutory scheme cannot possibly satisfy the *Furman* principle. *Id.*

The narrowing effect, if any, of section 190.2 can be tested by measuring the special circumstances against the section 189 factors that define first degree murder. Shatz, *supra,* at 1318. A comparison of the two statutes leads to the conclusion that there are, even in theory, only seven categories of first degree murders excluded from death-eligibility; *i.e.*, while thirty-two categories of first degree murders are made death eligible, only seven categories of first degree murders are not. *Id.*

However, it is not the number of categories alone, but the compara-ive breadth of the "special circumstances" and "excluded" categories which determines whether the scheme genuinely narrows. *Id.* The breadth of

"special circumstances" is extraordinary, encompassing so many murders, that when compared with the breadth of the "excluded" categories, which encompass very few non-death eligible murders, it is obvious that the California scheme does not genuinely narrow the death-eligible class.

California has one of the broadest death penalty schemes in the country. *Id.* at 1307. At present, the California death penalty scheme has twenty-one separately numbered special circumstances encompassing thirty-two distinct categories of first degree murderers. *Id.* at 1318 (citing § 190.2, subds. (a)(1)-(21)). An adult murderer fitting any one of the thirty-two categories is death-eligible. *Id.* By expanding the scope of first degree murder and creating as many special circumstances as it does, California creates an extraordinarily large death pool. *Id.* at 1317.

With the exception of the "heinous, atrocious or cruel" special circumstance already held unconstitutional, *Id.* at 1318 (citing *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 800-802), any of the thirty-two individual special circumstances, when viewed in isolation, may be sufficiently objective and narrow to satisfy *Furman*. Shatz, *supra,* at 1318. However, given the number and breadth of the special circumstances, the scheme as a whole does not genuinely narrow the death-eligible class.

The breadth of the special circumstances categories is exceptional because California makes felony murder *simpliciter* and "lying in wait" murder special circumstances. *Id.* at 1319-1320. These two factors in

combination make California's scheme exceptionally broad. *Id.* at 1319. First, California, along with seven other states, makes felony murder *simpliciter* a narrowing circumstance. *Id.* at 1319 (citations omitted). This factor alone makes California's scheme exceptionally broad because any person, irrespective of mental state, who kills "in the commission of, or attempted commission of, or the immediate flight after committing or attempting to commit" any of the 12 listed felonies is not only guilty of first degree murder but is also death eligible. *Id.* at 1319 (citing § 190.2, subds. (a)(17), (b)). Second, California, along with three other states, makes "lying in wait" a narrowing circumstance. Shatz, *supra,* at 1320 (citing § 190.2, subd. (a)(15)). As interpreted by this Court, however, this circumstance encompasses a substantial portion of premeditated murders. *Id.*

The felony murder special circumstance is unduly broad for several other reasons. First, the felony murder rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which themselves are broadly defined by statute and court decision. *Id.* at 1320. Second, the felony murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape. *Id.* at 1320 (citing *People v. Cooper* (1991) 53 Cal.3d 1158, 1166-1167). Third, the felony murder rule is not limited in its application by normal rules of causation, and applies to altogether accidental and unforeseeable deaths. Shatz,

supra, at 1320-1321, citing *People v. Johnson* (1992) 5 Cal.App.4th 552, 561.

Moreover, the California "lying in wait" special circumstance makes the California scheme exceptionally broad because it makes most premeditated murders potentially death penalty cases. Shatz, *supra,* at 1322. First degree murders that are not felony murders are almost all "willful, deliberate, and premeditated" killings. *Id.* This Court has given the "lying in wait" special circumstance a very expansive interpretation. *Id.* According to this Court's decisions, lying in wait is established if the defendant: (1) concealed his purpose to kill the victim; (2) watched and waited for a substantial period for an opportune time to act; and (3) immediately thereafter launched a surprise attack on the victim from a position of advantage. *Id.* at 1322 (citing *People v. Morales, supra,* 48 Cal.3d at 557). Because the court has incorporated a premeditation mental state into the second element, *Id.* at 1323 (citing *People v. Edelbacher, supra,* 47 Cal.3d at 1021), a premeditated murder turns into a murder while "lying in wait" merely by establishing the first and third elements. Shatz, *supra*, at 1323. Most premeditated murders will satisfy the first and third elements, because it will be a rare premeditated murder where the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage. Therefore, most premeditated murders will easily turn into "lying in wait" special circumstances murder. *Id.*

The combination of the felony murder special circumstances, which themselves perform no narrowing function, and the lying in wait special circumstance, which by definition encompasses most premeditated murders, mean that section 190.2 does not effect any significant narrowing of the death eligible class. Shatz, *supra,* at 1324.

In contrast to the broad sweep of the special circumstance categories, the seven categories of first degree murders excluded from death-eligibility are very narrow. *Id.* at 1324. They include very few non death-eligible crimes, or the crimes they include are rarely committed. *Id.* at 1324-1325. Five of the seven excluded categories encompass those first degree murders committed by unusual means: (1) malicious killing by means of a destructive device that was not planted, hidden, concealed, mailed, or delivered (§§ 189, 190.2 subds. (a)(4), (6)); (2) malicious killing by armor-piercing ammunition (§ 189); (3) malicious but unintentional killing by poison (§§ 189, 190.2 subd. (a)(19)); (4) malicious but unintentional killing by lying in wait (§§ 189, 190.2 subd. (a)(15)); and (5) malicious but unintentional killing by torture (§§ 189, 190.2 subd. (a)(15).) Shatz, *supra,* at 1324.

The remaining two excluded categories encompass: (1) murderers who committed "simple" premeditated murder; and (2) accomplices to felony murders who did not actually kill, attempt to kill, intend to kill, or act with reckless indifference to human life while a major participant in a special circumstance felony (hereinafter "*Enmund/Tison* ineligibles"). Shatz, *supra,*

at 1325 (citing § 190.2, subds. (c) , (d)). These categories are not as empty or nearly as empty as the five unusual means-excluded categories, but it would be unrealistic to assume these categories contained any substantial number of real life murders. Shatz, *supra,* at 1325.

With regard to simple premeditated murders, these would have to be planned murders where the killer simply confronted and immediately killed the victim or, even more unlikely, where the killer advised the victim in advance and before initiating any assault, of his intent to kill. *Id.* at 1325. Simple premeditated murders will constitute a distinct minority of premeditated murders. *Id.* at 1325.

As for the *Enmund/Tison* ineligibles, there will be few convicted first degree murderers in this category for two reasons. First, the category is defined very narrowly, largely limited to getaway drivers who were not physically present at the murder. Most who participated to any greater degree in a felony would fall into the special circumstances category. Shatz, *supra,* at 1325. Second, minor participants in felonies where a felony murder occurs are only rarely convicted of first degree murder. *Id.* at 1326. That is because of their minor involvement. Such defendants may be allowed to plead to lesser charges or if tried, they may be tried or convicted of lesser offenses because of the prosecutor's or jury's exercise of discretion.

The same principles are derived from an analysis of the overlap between sections 189 and 190.2, which would show that most murders that qualified as first-degree under section 189 under the 1978 law *ipso facto* qualified under section 190.2 as capital murder. Brief scrutiny of the three categories of first-degree murder makes this clear.

"Means." Four of the five "means" listed in section 189 were simultaeously designated as special circumstances under section 190.2 (knowing or reckless murder by destructive device or explosive--subds. (a)(4), (a)(6); murder by lying-in-wait--(a)(15); murder involving torture (a)(18); and murder by poison--(a)(19)). Only a first-degree murder committed by means of "knowing use of ammunition designed primarily to penetrate metal or armor" would not automatically have led to death-eligibility. Appellant, however, has been unable to locate a single case where that means was the basis for a first-degree murder conviction. Thus, at the time of appellant's conviction and sentence, all or virtually all intentional murders committed by one of the listed means would have made the killer death-eligible.[95]

"Felony-murder." With respect to felony-murder, the overlap between sections 189 and 190.2 under the 1978 law was virtually complete. Five of the six felonies listed in section 189 (arson, rape, robbery, burglary

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[95] The lying-in-wait, torture, and poison special circumstances required an intent to kill. Subds. (a)(15), (a)(18), (a)(19). In quantitative terms, this was hardly a major restriction, given that the vast majority of murders committed by such means surely are intentional.

and violations of section 288(a)) were simultaneously designated as special circumstances. *See* Pen. Code, § 190.2, subds. (a)(17)(i), (a)(17)(iii), (a)(17)(v), (a)(17)(vii), (a)(17)(viii). Only mayhem could have been the basis for a first-degree felony-murder conviction without at the same time making the murderer death-eligible, and appellant is aware of only one such conviction since the passage of the Briggs Initiative. *See People v. Reese* (1986) 182 Cal.App.3d 737, 739. The felony-murder special-circumstance categories, moreover, made the killer death-eligible even in the absence of an intent to kill. *People v. Anderson, supra*, 43 Cal.3d at 1147.[96] Few states go as far as California does in permitting felony-murder to be used in the death-eligibility or selection process. *See Enmund v. Florida, supra,* 458 U.S. at 789; Rosen, *Felony Murder And The Eighth Amendment Jurisprudence Of Death* (1990) 31 Boston College L.Rev. 1103, 1126, n. 62. Among other things, eleven states do not make felony-murder robbery a narrowing circumstance, eleven do not make felony-murder burglary a narrowing circumstance, and others only apply the narrowing circumstance when the killing is intentional. *See, e.g.,* Colo. Rev. Stat., § 16-11-103(5)(g); Tex. Pen. Code, § 19.03(a)(2); and Wyo. Stats., § 6-2-102(h)(xii); *see also State v. Cherry* (1979) 298 N.C. 86 (finding it "highly incongruous" that state

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[96] Non-killers are death-eligible if, in addition to participating in the underlying felony, they intended that the victim die. *Id.*

would make felony-murder but not premeditated murder a *per se* death-eligible offense).

"Premeditated murder." Premeditated murder did not have its own special-circumstance designation under the 1978 law. However, given the expansive scope of the lying-in-wait special circumstance (*People v. Morales, supra,* 48 Cal.3d at 557-558), most premeditated murders fall into the latter category.[97] Of the few premeditated murders not falling within the lying-in-wait special circumstance, moreover, most would have qualified as capital murders because the defendant committed another murder (Pen. Code § 190.2, subds. (a)(2), (a)(3)); acted with a particular motive (subds. (a)(1), (a)(5), (a)(16)); killed a particular victim (subds. (a)(7) - (a)(13)); or were perpetrated during the commission of an enumerated felony (subd. (a)(17)).

In conclusion, the special circumstances death-eligible categories sweep so broadly that most murders are subject to the death penalty. Moreover, the seven non-death-eligible categories encompass so few first

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[97] The existence of the lying-in-wait special circumstance contributes to making the California statute far more sweeping than those in the other death penalty states. Only three of the 35 other death penalty states list lying-in-wait as one of the narrowing circumstances. *See* Colo. Rev. Stats. § 16-11-103(5)(f); Ind. Code, § 35-50-2-9(b)(3); and Mont. Code, § 46-18-303(4). Of those three, Indiana applies a much narrower version of lying-in-wait, requiring concealment of the person, *Matheney v. State* (Ind. 1992) 583 N.E.2d 1202, 1208, and it appears that Colorado has never applied its lying-in-wait special circumstance at all.

degree murders that very few are not death eligible. Taken together, this means section 190.2 does not significantly narrow the death eligible class. Shatz, *supra,* at 1326.

Furthermore, the empirical data establish that California's death penalty scheme does not comply with *Furman* because it does not narrow the death-eligible class sufficiently so that a significant percentage of the class is in fact sentenced to death, *i.e.*, a death sentence ratio greater than 20%. Shatz, *supra,* at 1332.

This conclusion is reached on the basis of a study of the fact situations of 404 direct appeals of first degree murder convictions. *Id.* at 1326. The study covers published decisions of the California Supreme Court and Court of Appeal in 243 cases decided during the period 1988-1992, and decisions of the Court of Appeal for the First Appellate District in 151 cases decided during the same period. *Id.* at 1326.

To comply with *Furman*, the class of death-eligible murders would have to be narrowed to produce a death sentence ratio greater than 20%, a ratio thought to be too low by the Justices in *Furman.* Shatz, *supra,* at 1328.) During the five-year period 1988-1992, an average of 346 persons per year were convicted of first degree murder in California. *Id.* at 1327, n. 253. An average of 33.2 persons per year convicted of first degree murder were sentenced to death. *Id.* at 1328. Thus during that period, about 9.6%

of those convicted of first degree murder were sentenced to death. *Id.* at 1328.

Moreover, the data establish that 84% of first degree murderers are death-eligible. *Id.* at 1332. If 84% of first degree murderers are statutorily death-eligible but only 9.6% are sentenced to death, then California has a death sentence ratio of approximately 11.4%. *Id.* Thus the death eligible class is so large and the percentage of those sentenced to death so low, that fewer than one out of eight statutorily death-eligible convicted first degree murderers is actually sentenced to death. *Id.* at 1327, 1332.

This 11.4 % death sentence ratio is significantly lower than Georgia's death sentence ratio at the time it was found unconstitutional in *Furman.* Shatz, *supra,* at 1332, citing *Gregg v. Georgia, supra,* 428 U.S. at 182. The Court's determination in *Furman*, that when only 15-20% of statutorily death-eligible murders are in fact sentenced to death the risk of arbitrariness is constitutionally unacceptable, remains good law. Shatz, *supra,* at 1339.

This Court has rejected claims of overbreadth of death eligibility, saying "the special circumstances 'are not overinclusive by their number or terms.'" *People v. Frye* (1998) 18 Cal.4th 894, 1029, quoting *People v. Arias* (1996) 13 Cal.4th 92, 187. *Arias* cites three cases: *People v. Stanley* (1995) 10 Cal.4th 764, 842-43, *People v. Wader* (1993) 5 Cal.4th 610, 669, and *People v. Crittenden* (1994) 9 Cal.4th 83. *Stanley* contains no independent discussion but merely cites *Wader* and *Crittenden.* In both of the cited

cases, the Court began the pertinent discussion as though it would address the instant claim. *Crittenden, supra*, 9 Cal.4th at 154; *Wader, supra*, 5 Cal.4th at 669. In both cases, however, the Court ultimately rejected, for lack of empirical support, quite a different claim: namely, that "probably the most common types of murders occurring in California are those arising from drug deals, robberies and/or burglaries and domestic disputes, all of which fall, or are likely to fall, within one category or another of the enumerated special circumstances." *Crittenden, supra*, 9 Cal.4th at 155; *Wader, supra*, 5 Cal.4th at 669. The broader claim – the one asserted here – was never addressed. Appellant here provides the kind of empirical support lacking in both cases.

The issue presented here has not been addressed by the United States Supreme Court. In *People v. Stanley, supra*, 10 Cal.4th at 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Appellant respectfully disagrees. In *Harris*, the issue before the Court was not whether the 1977 law met the Eighth Amendment's narrowing requirement. The issue was whether the lack of inter-case proportionality review in the 1977 law rendered the latter unconstitutional. The Supreme Court's assumption that the 1977 law limited death-eligibility to a "small sub-class" was just that--an assumption. It was not in any way a substantive holding on the issue raised here. It was dictum.

In any event, even if the Court in *Harris* had been rejecting an Eighth Amendment narrowing attack on the 1977 law, this would not shield the 1978 law from attack on that issue. To the contrary, if anything, it appeared that the Supreme Court in *Harris* was contrasting the two schemes – adversely to the 1978 law – when it pointed out that the 1978 law had "greatly expanded" the list of special circumstances. *Harris*, 465 U.S. at 52, n. 14.

Finally, in *People v. Sanchez* (1995) 12 Cal.4th 1, this Court stated that both this Court and the United States Supreme Court have held that the 1978 statute narrows in a constitutionally proper manner the class of death-eligible murders. *Id.* at 60-61 (citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 770-779 and *Tuilaepa v. California, supra,* 512 U.S. 967). With every respect, appellant finds no such holding in either case. In neither case, certainly, were the arguments advanced here either advanced or rejected. To the contrary, in *Tuilaepa*, after noting that the list of special circumstances in the 1978 law "creates an extraordinarily large death pool," Justice Blackmun observed: "Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing." 512 U.S. at 994 [dis. opn. of Blackmun, J.].) No one on the Court disagreed. Appellant respectfully submits that the issue remains unresolved, though the proper resolution should be clear from prior precedents.

In conclusion, California's death penalty scheme does not comply with *Furman* because it does not sufficiently narrow the class of death-

eligible first degree murders so that a significant percentage of the class is in fact sentenced to death. California's death initiatives and legislation have expanded Penal Code section 190.2 beyond consistency with the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court should hold that the California death penalty law, and appellant's sentence thereunder, is unconstitutional.

Consequently, neither the special-circumstance finding nor the judgment of death may stand. *See generally Godfrey v. Georgia, supra,* 446 U.S. at 428-429 (judgment of death reversed where state statutory scheme allowed "almost every murder" to be deemed capital murder).

C. FAILURE TO REQUIRE WRITTEN OR OTHER EXPLICIT FINDINGS

The failure to require written or other specific findings by the jury on the aggravating factors selected by it deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. *California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia, supra,* 428 U.S. at 195. That is particularly true given that the jury could have rested its decision to impose death on improper considerations as set forth elsewhere in this brief. But it is true anyway, as it is impossible to obtain meaningful review of whether the death penalty was imposed arbitrarily and capri-iously. And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances,

Tuilaepa v. California, supra, 512 U.S. at 979-980, there can be no meaningful appellate review without at least written findings because it will be impossible to "reconstruct the findings of the state trier of fact." *See Townsend v. Sain* (1963) 372 U.S. 293, 313-316. So too here.

This Court has held that the absence of such a provision does not render the scheme unconstitutional. *People v. Fauber* (1992) 2 Cal.4th 792, 859; *see also Williams v. Calderon* (9 Cir. 1995) 52 F.3d 1465, 1484-1485 (reaching same conclusion regarding 1977 law). Appellant requests that the matter be considered anew under the circumstances of this case.

First, the importance of explicit findings has long been recognized – and emphatically so – by this Court. *See, e.g., People v. Martin* (1986) 42 Cal.3d 437, 449. Thus, in a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. *Id.*; Penal Code section 1170, subd. (c). Indeed, these protections extend to even tentative statement of the grounds for the sentence imposed. *People v. Scott* (1994) 9 Cal.4th 331, 356. Since under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled, if anything, to *more* rigorous protections than those afforded non-capital defendants (*see Harmelin v. Michigan* (1991) 501 U.S. 957, at 994) – and, since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see generally, Myers v. Ylst* (9 Cir. 1990) 897 F.2d 417, 421) – it follows that the

sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating and mitigating circumstances found and rejected.

Indeed, explicit findings in the penalty phase of a capital case are especially critical because of two factors: (1) the magnitude of what is at stake (*see Woodson v. North Carolina* (1976) 428 U.S. 280, at 305); and (2) the possibility of error. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. *See, e.g., id.* at 383, n.15.

In this brief, similarly, appellant identifies several ways in which jurors could have become confused or misled regarding what they could consider in aggravation or mitigation. If the jurors had been required to identify to each other and to the trial judge the aggravating and mitigating circumstances they had relied on, all of the foregoing errors could have been identified prior to the verdict being recorded: jurors with a proper understanding of the law could have been alerted to errors being committed by fellow jurors and could have corrected them in the jury room; differences of opinion on what was required would have been brought to the surface, so that questions could have been asked of the judge; or, if all jurors had misperceived their duties in the same way, the judge or attorneys could have

gleaned this from the findings. And if the error was not caught in the trial court, the explicit findings would allow this Court to consider claims of error with a certainty that cannot now exist.

Given all that is at stake, the enormous benefit it would bring, and the minimal burden it would create, a requirement of explicit findings is essential to ensure the "high [degree] of reliability" in death-sentencing that is demanded by both the due process clause and the Eighth Amendment. *Mills v. Maryland, supra*, 486 U.S. at 383-384. In several cases, accordingly, in the course of explaining why the state death statutes at issue were constitutional, the United States Supreme Court has pointed to the fact that the statutory schemes required on-the-record findings by the sentencer, thus enabling meaningful appellant review. *See, e.g., Gregg v. Georgia, supra,* 428 U.S. at 195, 198 (plur. opn.), 211-212, 222-223 (conc. opn. of White, J.);

Proffitt v. Florida (1976) 428 U.S. 242, 250-251, 253, 259-260.[98] Most state statutory schemes, moreover, require such findings.[99]

The failure to require explicit findings here precludes meaningful appellate review and violates the Sixth, Eighth, and Fourteenth Amendments. Given the difficulty of the penalty case and the number of serious errors the jury could have committed that would have been caught by an explicit-findings requirement (as discussed herein), it is reasonably possible (*Chapman v. California, supra,* 386 U.S. at 23-24; *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; *Satterwhite v. Texas* (1988) 486

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98 In rejecting the claim advanced here, this Court has most often relied on *People v. Rodriguez, supra,* 42 Cal.3d at 777-778, which, in turn, relied on the analysis of the 1977 law in *People v. Frierson* (1979) 25 Cal.3d 142, 179 and *People v. Jackson* (1980) 28 Cal.3d 264, 317. The latter cases, however, misapplied the just-cited United States Supreme Court cases, by equating the requirement in Penal Code section 190.4 – requiring a statement of reasons from the trial court on the automatic motion for modification – with the statement of reasons from the actual sentencer in the federal cases. The equation fails. It is the reasons of the entity that actually made the decision that are the crucial ones. *Cf. Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.

99 *See, e.g.*: Ala. Code, § 13A-5-47(d); Ariz. Rev. Stat., § 13-703(D) (1995); Conn. Gen. Stat., § 53a-46a(e); 11 Del. Code, § 4209(d)(3); Fla. Stat., § 921.141(3); Idaho Code, § 19-2515(e); Ind. Code Ann., § 35-38-1-3(3); Md. Code Ann., Art. 27, §§ 413(i), (j); Miss. Code Ann., § 99-19-101(3); Rev. Stat. Mo., § 565.030(4); Mont. Code Ann., § 46-18-306; Neb. Rev. Stat., § 29-2522; N.J. Stat., § 2C:11-3(c)(3); N.C. Gen. Stat., § 15A-2000(c); 21 Okla. Stat., § 701.11; 42 Pa. Stat., § 9711(F)(1); Tenn. Code Ann., § 39-13-204(g)(2)(A)(1); Wyo. Stat., § 6-2-102(d)(ii); *see also* 21 U.S.C., § 848(k).

U.S. 249, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399), that the lack of such a requirement contributed to the verdict of death. It certainly cannot be said that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.

The judgment of death must be reversed.

D. FAILURE TO INSTRUCT ON BURDEN OF PROOF

Researchers have found that jurors have erroneous conceptions about the burden of proof applicable to aggravating factors, the burden applicable to mitigating factors, and whether unanimity on mitigating factors is required. Eisenberg and Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Corn. L. Rev. 1 (article cited with approval in *Simmons v. South Carolina* (1994) 512 U.S. 154, 163, and *Coleman v. Calderon* (9 Cir. 2000) 210 F.3d 1047, 1051). These findings document the necessity for adequate burden of proof instructions.

1. Requirement of Proof Beyond a Reasonable Doubt

The failure to require that all aggravating factors be proved beyond a reasonable doubt, that aggravation must outweigh mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt, violates federal constitutional principles of Fourteenth Amendment due process (*see Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358, 364; *State v. Wood*

(Utah 1982) 648 P.2d 71), Fourteenth Amendment equal protection, and the Eighth and Fourteenth Amendment requirement of heightened reliability in a death determination (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 447 U.S. 625), as well as the Sixth Amendment. *Sullivan v. Louisiana, supra,* 508 U.S. at 278-281.

In this case, the penalty jury was to "consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" and to "weigh[] the various circumstances . . . by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (CT 6876; RT 22530) It was told that to return a death sentence, each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (*Id.*) Thus, the penalty jury had the responsibility of determining what the aggravating circumstances and the mitigating circumstances *were*. It was never told at any time, however, who had the burden of proving each aggravating circumstance, or what the standard of proof was (except for other criminal activity). Indeed, apart from "other criminal activity," the jury was not told there *was* a burden of proof as to any aggravating circumstance.

In *Walton v. Arizona* (1990) 497 U.S. 639, at 650, the Supreme Court held that in an Arizona capital case, the prosecution had the burden of proving the existence of aggravating circumstances, just as much as it had the burden of proving every element of the charged offense. This was consonant with the general principle that a burden of proof reflects "a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer, supra,* 455 U.S. at 754-755.

Like California's, Arizona's aggravating circumstances are "'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Walton v. Arizona, supra,* 497 U.S. at 648 (citation omitted). As a result, a California prosecutor – like an Arizona prosecutor – has the burden of proof of aggravating circumstances as a matter of federal constitutional law. The jury was never told this.

Furthermore, *Walton v. Arizona, supra,* shows that the burden of proving aggravating circumstances is equivalent to the "burden of proving every element of the charged offense." 497 U.S. at 650. Under the Fourteenth Amendment, that is a burden of proof beyond a reasonable doubt. *In re Winship, supra,* 397 U.S. at 364. Consequently, the prosecution as a matter of federal constitutional law must have the burden of proving each and every aggravating circumstance beyond a reasonable doubt. What any particular juror determines is or is not an aggravating circumstance is entirely up to the juror, in conformance with California's sentencing scheme

which permits a juror to assign whatever weight he or she wants to any aggravating or mitigating circumstance. However, at the least, each juror must be satisfied that the aggravating circumstances (that go into their individual weighing equation) have been proven beyond a reasonable doubt.

Walton therefore controls. As a result, the failure to instruct on the burden of proving aggravating circumstances violates the U.S. Constitution. As for the overall burden of proof of death being the appropriate penalty, *Walton* controls as well, for the same reason; it is unacceptable as a matter of societal judgment based in the Constitution – reflected in cases such as *Winship* and *Walton* – that a defendant should be given the burden of proving he should not suffer a greater punishment, let alone the ultimate punishment. Moreover, where aggravating and mitigating evidence are in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the ultimate burden of persuasion to the state, and another assigns it to the defendant. That is even more a possibility in the case, given that the jury hung on death for Woodard – the obviously more culpable – while deciding on death for Masters. The burden of proving appropriate punishment, like the burden of proving guilt, should always be on the prosecution. Without instructions, the jury is left in the dark on these essential matters.

The United States Supreme Court has made clear the origin of the reasonable-doubt requirement in criminal cases: "the interests of the

defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Santosky v. Kramer, supra,* 455 U.S. at 755. No greater interest is at stake than in the penalty phase of a capital case. *Monge v. California* (1998) 524 U.S. 721, 732 ("the death penalty is unique in its severity and its finality"). Accordingly, the Supreme Court recently expressly found the *Santosky* statement of the reasonable doubt requirement applicable to capital proceedings, observing: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citations.]" *Monge v. California, supra,* 524 U.S. at 732 (emphasis added).

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." *People v. Hawthorne* (1992) 4 Cal.4th 43, 79. The above-quoted statement from *Monge v. California*, however, plainly contemplates application of the reasonable-doubt standard in the penalty phase of a capital case. That is both appropriate and workable. In penalty phase the reasonable doubt standard would convey – and is needed to convey – the degree of confidence necessary to return a verdict of death. *See, e.g., State v. Wood, supra*, 648 P.2d at 83-84; *see generally In re Winship, supra,* 397 U.S. at 364 (reasonable doubt standard needed to

dispel doubt of community at large "whether . . . men are being condemned" in a just manner).

In at least eight states in which the death penalty is available, moreover, capital juries are told that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. *See* Acker and Lanier, *Matters of Life or Death: The Sentencing Provisions In Capital Punishment Statutes* (1995) 31 Crim.L.Bull. 19, 35-37 & nn. 71-76, and its citations for the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington; *see also McKoy v. North Carolina* (1990) 494 U.S. 433, 437 (describing procedure in North Carolina); *State v. Wood, supra*, 648 P.2d at 83-84 (same, for Utah). The experience in the latter states demonstrates that the reasonable doubt standard can be adapted to a capital penalty phase.

Finally, the reasonable doubt standard is routinely applied in proceedings with far less serious consequences than a capital penalty trial, including proceedings which deal only with a penal sentence. *See, e.g.,* Penal Code section 2966, subd. (b) (MDO commitment proceeding); *People v. Burnick* (1975) 14 Cal.3d 306, 318-322 (proceeding for commitment under former MDSO law); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (similar, for LPS conservatorship); *In re Winship, supra*, 397 U.S. at 364 (similar, for juvenile proceeding). No compelling reason justifies applying a lesser

standard when the ultimate penalty is at stake. The disparity violates appellant's rights to due process and equal protection under the Fourteenth Amendment, and the Eighth Amendment in a capital case. *See generally Myers v. Ylst, supra,* 897 F.2d at 421 ("state . . . not . . . permitted to treat defendants differently . . . unless it has 'some rational basis, announced with reasonable precision,' for doing so"). The deprivation of a constitutionally required reasonable doubt standard also deprives a defendant of the Sixth Amendment right to a jury trial. *Sullivan v. Louisiana, supra,* 508 U.S. at 278-281.

The trial court's failure to require that the jurors apply a reasonable doubt standard to their ultimate determinations was constitutional error. The failure to apply that standard when its use is demanded by the Constitution is reversible *per se*. *Sullivan v. Louisiana, supra,* 508 U.S. at 281-282.

To summarize, the burden of proving appropriate punishment should be the same as that of proving guilt or aggravating circumstances, namely, beyond a reasonable doubt. *See, e.g., In re Winship, supra*; *Walton v. Arizona, supra*. Failure to do so renders the penalty verdict unconstitutional.

2. Requirement of Some Burden of Proof or Persuasion, at Least a Preponderance of the Evidence

Even if it is not constitutionally necessary to place a heightened burden of persuasion on the prosecution, *some* burden of proof or persuasion must be articulated, to ensure that juries faced with similar evidence will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment must be imposed fairly, *and with reasonable consistency*, or not at all." *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 (emphasis added). Furthermore, there must be some burden of proof as a matter of constitutional law, given that a burden of proof reflects the "consequences of an erroneous factual determination" *In re Winship, supra,* 397 U.S. at 370-373 (conc. opn. of Harlan, J.), and the consequences of an erroneous factual determination in a capital penalty phase can be the worst of all, death instead of life. The trial court's failure to instruct on any penalty phase burden of proof at all deprived appellant of his rights to due process and jury trial, equal protection, and freedom from cruel and unusual punishment in violation of the Sixth, Eighth and Fourteenth Amendments.

If the applicable burden of proof is not proof beyond a reasonable doubt, it must at least be proof by a preponderance of the evidence. Indeed, a burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted

in any sentencing proceeding. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. *See, e.g., Griffin v. United States* (1991) 502 U.S. 46, 51 (historical practice given great weight in constitutionality determination); *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 (due process determination informed by historical settled usages).

This Court, nonetheless, has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. *People v. Hayes, supra*, 52 Cal.3d at 643. Appellant respectfully submits, however, that the failure to impose such a burden in this case constituted both statutory and constitutional error.

First, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma, supra,* 455 U.S. at 112. It is unacceptable – "wanton" and "freakish" *(Proffitt v. Florida, supra,* 428 U.S. at 260) – the "height of arbitrariness" *(Mills v. Maryland, supra,* 486 U.S. at 374) – that one defendant should live and another die

simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

Second, the State of California *does* impose on the prosecution the burden of persuasion in sentencing determinations. It does so, however, only in non-capital cases. Cal. R. Ct. 420(b) (existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence). As explained in the preceding argument, to provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. *See e.g., Mills v. Maryland, supra*, 486 U.S. at 374; *Myers v. Ylst, supra*, 897 F.2d at 421.

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. The capital penalty determination is an issue which involves the prosecution claiming the defendant is guilty of wrongdoing, especially in this case, where the greatly predominant aggravating factors were under factors (a) and (b), and were entirely matters of alleged wrongdoing. Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. For all of these reasons, appellant's jury should have been instructed that the state had the burden of persuasion regarding both the substantiality of aggravation relative to mitigation and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. *Hicks v. Oklahoma, supra,* 447 U.S. at 346.

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments, and is reversible *per se*. *Sullivan v. Louisiana, supra*. The sentence of death must therefore be reversed.

3. Even if the Constitution Permits No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to that Effect

If, in the alternative, it is permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. *Sullivan v. Louisiana, supra*. The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard the juror believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards.

Nor is the prejudice cured by CALJIC No. 8.88 (CT 6875-6876; given at RT 22529-22531), because that instruction tells the jurors they can assign any weight they want to any factor. That does not prevent jurors from assigning any burden of proof they want, and indeed may encourage jurors to unconstitutionally put the burden of proof on the defendant to justify a sentence of less than death, since every penalty phase always begins with a "presumption of death" (*i.e.*, the aggravating factors already proven as part of the guilt phase, since every murder with a special circumstance will have some), and jurors will assume it is the defendant's burden to overcome that presumption. That permissible assumption is not the law if there is no burden of proof at all.

The error in failing to instruct the jury on what the proper burden of proof is or is not, is reversible *per se*. *Sullivan v. Louisiana, supra*. The judgment of death should therefore be reversed.

E. FAILURE TO REQUIRE JURY AGREEMENT ON AGGRAVATING FACTORS

1. Jury Agreement

Appellant has already discussed the constitutional infirmities of the failure to require jury agreement in the context of the Hamil and Jackson murders as aggravating factors (*ante* in Argument XI.A.3). The more general argument, applicable to all of the aggravating factors and particularly prior unadjudicated offenses, is that for reasons similar to those in section (C)(2) above, the trial court erred prejudicially in failing to require jury agreement on any particular aggravating factor.

Here, there is not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence, based on a perception of what was aggravating enough to warrant a death penalty, but which would have lost by a 6-6 – or even 1-11 – vote, had it been put to the jury as a reason for the death penalty.

It is inconceivable that a (hypothetical) death verdict might satisfy the Eighth and Fourteenth Amendments if it were based on (i) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants

death, and (iii) each such vote coming out 6-6 – or 1-11 – against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility.

The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 633 (plur. opn. of Souter, J.). It therefore violates the Sixth, Eighth and Fourteenth Amendments.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any form of agreement on reasons therefor. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth and Fourteenth Amendments. *E.g., Murray's Lessee, supra*; *Griffin v. United States, supra*. And it violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Eighth and Fourteenth Amendment scrutiny. *See, e.g., Gregg v. Georgia, supra,* 428 U.S. at 188-189. So too here.

For all of these reasons, the sentence of death violates the Sixth, Eighth and Fourteenth Amendments.

2. Jury Unanimity

The jury in this case was not instructed that its findings on aggravating circumstances had to be unanimous. To the contrary, the jury was explicitly instructed that unanimity was not required when it came to the unadjudicated offenses.[100] The instructions did not explicitly state that unanimity was not required with regard to other factors (*e.g.*, factor (a), circumstances of the adjudicated crimes). A reasonable juror undoubtedly would have inferred that, if no unanimity requirement applied to the most serious aggravating circumstance that had been alleged (a felony murder), *a fortiori* it did not apply to the others. The principles of language interpretation discussed *ante*, at XVI, A, incorporated by reference here, apply equally to this argument.

The failure to require unanimity, before evidence could be weighed as aggravating, violated the Sixth, Eighth and Fourteenth Amendments.

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[100] After setting forth the elements of the alleged factor (b) offenses and informing the jury that none of the latter would constitute an aggravating circumstance unless found true beyond a reasonable doubt, the instructions provided: "It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation." (CT 6854; RT 3854:9-14; CALJIC No. 8.87 (1989 Rev.)).

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; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Miranda* (1988) 44 Cal.3d 57, 99. Appellant respectfully asks the Court to reconsider. The United States Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." *Brown v. Louisiana* (1980) 447 U.S. 323, 334. Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 732; *accord Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The finding that a circumstance is aggravating is such a finding. An enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. *See, e.g.,* Penal Code sections 1158, 1158a. Since capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (*see Monge v. California, supra,* 524 U.S. at 732; *Harmelin v. Michigan; supra*, 501 U.S. at 994), and since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see generally Myers v. Ylst* (9 Cir. 1990) 897 F.2d 417, 421), it follows that

unanimity with regard to aggravating circumstances is constitutionally required.[101]

This is especially true of the unadjudicated offenses a jury is allowed to consider pursuant to Penal Code section 190.3(b).[102] Jury unanimity was deemed such an integral part of criminal jurisprudence by the framers of the California Constitution that the requirement did not even have to be directly stated.[103] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to findings that often 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 and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

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101 Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

102 One court recently observed that the unanimity requirement in the federal death penalty statute was one of the procedural protections critical in countering the potential for unreliability and prejudice introduced when evidence of unadjudicated offenses is admitted in the penalty phase. *United States v. Beckford* (E.D.Va. 1997) 964 F.Supp. 993, 1001.

103 The first sentence of Article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." *See People v. Wheeler* (1978) 22 Cal.3d 258, 265 (confirming the inviolability of the unanimity requirement in criminal trials).

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." *People v. Raley* (1992) 2 Cal.4th 870, 910. The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence. *Monge v. California, supra,* 524 U.S. at 726; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439. While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death, the "penalty . . . unique 'in both its severity and its finality,'" is imposed. *Monge v. California, supra,* 524 U.S. at 732 (quoting *Gardner v. Florida* (1977) 430 U.S. 349, 357.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." *People v. Miranda, supra,* 44 Cal.3d at 99. But unanimity is not limited to final verdicts. For example, it is not enough that jurors unanimously find that the defendant violated a particular criminal statute; where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on

at least one such act. *People v. Diedrich* (1982) 31 Cal.3d 263, 281-282. It is only fair and rational that, where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity in finding aggravation supporting that decision is also required.

The error is reversible *per se* because it permitted the jury to return a death judgment without making the findings required by law. *See Sullivan v. Louisiana, supra,* 508 U.S. at 278-281; *United States v. Gaudin* (1995) 515 U.S. 506, 522-523 (aff'g 28 F.3d 943 at 951-952); *Suniga v. Bunnell* (9 Cir. 1993) 998 F.2d 664, 668-670. In any event, given the difficulty of the penalty determination, the State cannot show there is no reasonable possibility (*Chapman v. California, supra,* 386 U.S. at 24; *Fahy v. Connecticut, supra,* 375 U.S. at 86-87; *Satterwhite v. Texas, supra,* 486 U.S. at 258-259; *Hitchcock v. Dugger, supra,* 481 U.S. at 399), that the failure to instruct correctly on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at 341. As a result, the standards for harmlessness cannot be met, and the penalty verdict should not stand.

F. PENALTY PHASE RELIANCE ON EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY

More broadly than has already been argued *ante*, in Argument XI, *any* permitted use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in Penal Code section 190.3(b), violated due process and the Sixth, Eighth, and Fourteenth Amendments, rendering appellant's death sentence unreliable. *See, e.g., Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945. In this case, the prosecution relied on a long list of unadjudicated criminal activities and juvenile incidents. The instructions which permitted such use (CT 6852-54, 6862, 6875-76; RT 22518-19; 22523-24; 22529-31) were reversible error.

Appellant also relies on and adopts by reference the dissenting opinion of Justice Marshall in *Williams v. Lynaugh* (1987) 484 U.S. 935, 938, which states:

> [I]f a defendant has a right to have a jury find that he committed a crime before it uses evidence of that crime to sentence him to die, he has a right that the jury that makes the determination be impartial. A jury that already has concluded unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice.
>
> *Id.* at 938.

That is especially true in a case such as this, where this jury has already convicted the defendant of murder and participation in a prison-gang

conspiracy to murder a correctional officer. A defendant in such a position no longer has an unbiased jury. Nor can that jury render a penalty verdict sufficiently reliable to satisfy the need for heightened reliability in death proceedings. *Id.* at 939-940 (dis. opn. of Marshall, J.), citing *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma, supra,* 455 U.S. at 117-118 (conc. opn. of O'Connor, J.).

Furthermore, and independently of the above, the Constitution does not permit the introduction of evidence of facts and circumstances underlying a prior conviction as a means of attempting to obtain a particular sentence by a jury. The Supreme Court has rejected this factual approach to jury sentencing in *Taylor v. United States* (1990) 495 U.S. 575, because "[t]he practical difficulties and potential unfairness of a factual approach are daunting." *Id.* at 601. If the potential "unfairness" of a practice is "daunting," then of necessity, the practice violates due process of law, since *any* action taken by the State which renders a defendant's trial "fundamentally unfair" constitutes a due process violation; this is one of the most basic principles in federal and state constitutional law. *Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Doyle v. Ohio* (1976) 426 U.S. 610, 618-619; *People v. Ramos* (1984) 37 Cal.3d 136, 153; *People v. Ramirez* (1979) 25 Cal.3d 260, 265-268. The Ninth Circuit has agreed with the Supreme Court's views on the prior conviction issue, citing to a case which described testimony as to such matters as "highly unreliable." *United States v. Chatman* (9 Cir. 1989) 869

F.2d 525, 529-530, quoting *United States v. Sherbondy* (9 Cir. 1988) 865 F.2d 996, 1008.

These same concerns of fairness, delay and reliability mandate a finding that where a capital defendant has suffered a prior conviction, only the fact or record of that conviction should be presented to the sentencing jury. *A fortiori*, if there is *no* prior conviction, then no facts should be presented to the sentencing jury at all, to protect against fundamentally unfair proceedings and the improper consideration of unreliable evidence.

The error was clearly prejudicial under any capital penalty standard. The penalty judgment should be reversed.

G. UNBOUNDED PROSECUTORIAL DISCRETION

In this State, the prosecutor has sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance. Irrespective of whether prosecutorial discretion in charging is constitutional in other situations, the difference between life and death is not at all analogous to the usual prosecutorial discretion situation, *e.g.*, the difference between charging something as a burglary or a theft.

As it stands, an *individual prosecutor* has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a

substantial risk of county-by-county arbitrariness. Under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, or simple arbitrariness.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme — in charging, prosecuting and submitting a case to the jury as a capital crime — merely compounds, in application, the effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. For example, under this Court's expansive interpretation of the lying-in-wait theory of first-degree and special circumstance murder, discussed *ante*, p. 416-424, prosecutors are free to seek the death penalty in the vast majority of murder cases, which further enhances the potential for abuse of the unbridled discretion conferred on prosecutors under the law.

Just like the "arbitrary and wanton" discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. at 303, such unprincipled discretion is contrary to the principled decision-making mandated by the Sixth, Eighth and Fourteenh Amendments. *Furman v. Georgia, supra,* 408 U.S. 238.

In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. *Kolender v. Lawson* (1983) 461 U.S. 352, 358. This standard applies to prosecutors as much as other state actors. *Id.*

Here, the offense with which appellant was charged was certainly awful, as is any charge that is potentially capital. However, prosecutors sometimes do not seek a death penalty for capital offenses, including murders. *See, e.g., People v. Bobo* (1990) 229 Cal.App.3d 1417,1421-1422 (defendant convicted of arson and three counts of first-degree murder [by stabbing]; death penalty not sought); *People v. Moreno* (1991) 228 Cal.App.3d 564, 567-568 (defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived). The absence of standards to guide such decisions falls under *Kolender* and other vagueness cases. For these additional reasons, appellant's death sentence violates the Sixth, Eighth and Fourteenth Amendments.

H. OVERBREADTH OF CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT, FALLING SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY

> The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [under the former *apart-heid* regime] as one of the few nations which has

> executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions.
>
> *Soering v. United Kingdom*: Use of the Death Penalty and International Thinking, *supra*, 16 Crim. and Civ. Confinement at 366; *see also People v. Bull* (1998) 185 Ill.2d 179, 225 (dis. opn. of Harrison, J.). (Since that article, in 1995, South Africa abandoned the death penalty.)

Indeed, *all* nations of Western Europe have now abolished the death penalty. Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website (www.amnesty.org).[104] *See, also, Stanford v. Kentucky* (1989) 492 U.S. 361, (dis. opn. of Brennan, J.; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).

This is especially important since our founding fathers looked to the nations of Western Europe for the "law of nations," as models on which the laws of civilized nations were founded, and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" 1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn.

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[104] These facts remain true even if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. *Id.*

of Field, J.); *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409. Thus, for example, Congress's power to prosecute war, *as a matter of constitutional law*, was limited by the power recognized by the law of nations; and what civilized nations of Europe forbade, such as poison weapons or slavery or wartime prisoners, was constitutionally forbidden here. *Miller v. United States, supra,* 78 U.S. at 315-316, n. 57 (dis. opn. of Field, J.).

However, due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." *Furman v. Georgia, supra,* 408 U.S. at 420 (dis. opn. of Powell, J.). The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958) 356 U.S. 86, 100.

In short, "cruel and unusual punishment," as defined in the Constitution, is not limited solely to whatever violated the standards of decency which existed within the civilized nations of Europe in the 18th century. As defined in the Constitution, it encompasses whatever violates *evolving* standards of decency. And if the standards of decency, as perceived by the civilized nations of Europe which our framers looked to as models, have

themselves evolved, the Eighth Amendment requires that we, as a civilized nation, evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own.

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

Thus, the very broad death scheme in California, and death's use as regular punishment, violates the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

I. VAGUENESS AND AMBIGUITY OF THE TERMS "AGGRAVATING" AND "MITIGATING" CIRCUMSTANCES

The terms "aggravating" and "mitigating" are not commonly understood terms, and they are not adequately defined for jurors. This presents a serious constitutional issue because the terms "aggravating" and "mitigating" are an integral part of the instructions given the jurors to make a penalty determination. CALJIC No. 8.88 (CT 6875-76, given at RT 22529-31). The penalty determination is unreliable if jurors may not understand what the terms are supposed to mean, or if there is a reasonable possibility that the terms will confuse jurors or fail to dispel fundamental misconceptions.

Terms such as "aggravating" or "mitigating circumstance," or "extenuate," are lawyers' terms, not lay terms, and they are unclear on their face for purposes of a lay jury determining matters of life and death. A substantial body of literature shows that jurors are very likely not to know what those terms are supposed to mean or how to apply them, and are confused by them. *See, e.g.,* Haney, Sontag and Costanzo, *Deciding To Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 J. Social Issues 149, 168-168; Haney and Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 L. Hum. Beh. 411, *passim.*

As a matter of fundamental law, jury instructions should be clear, and not create the possibility of confusion or fundamental misconception, since

jury instructions are the only guidance jurors will ever get on the law. California law requires jurors to make determinations on aggravating and mitigating circumstances. Penal Code section 190.3, last paragraph. Because a possibility of juror confusion exists as to the terms aggravating and mitigating circumstances, and because those terms are an integral part of California's capital sentencing scheme, the sentencing scheme is unreliable and ambiguous, and in violation of the Eighth and Fourteenth Amendments. The penalty judgment should be set aside.

J. INADEQUACY OF INSTRUCTIONS AS TO PENALTIES

The jurors were instructed the two possible penalties were death, or life without the possibility of parole. (CT 6860, 6875; RT 22522, 22529) These instructions are insufficient to guard against the possibility that jurors will believe life without the possibility of parole does not actually mean "without the possibility of parole."

This is no mere technicality: a national study has found only eleven percent of people believe a sentence of life without the possibility of parole means exactly that. Ramos, Bronson & Pond, *Fatal Misconception: Convincing Capital Jurors That LWOP Means Forever* (1994) 21 CACJ Forum (No. 2), at 43. To summarize, "[t]he public widely believes that LWOP is the same as straight life . . . ." *Id.*, at 44, n.16. Another study based on actual

juror interviews draws similar conclusions. Eisenberg and Wells, *supra*, 79 Corn.L.Rev. 1.

With so substantial a possibility jurors will misunderstand the LWOP instructions, a trial court fails in its responsibility of ensuring that jurors understand the central issues in the penalty case if the court fails to provide an adequate explanation of what LWOP really means. Whether jurors believe LWOP really means LWOP is central in shaping their attitudes toward a life-and-death decision. *Id.* at 44-45. The Sixth, Eighth and Fourteenth Amendments require "provision of accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia, supra,* 428 U.S. at 190 (opn. of Stewart, J.). Incomplete sentencing information with a high likelihood of misunderstanding is insufficient for such a *reasoned* determination. Moreover, due to the unique nature of the death penalty, "there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. at 305. Heightened reliability hardly exists given the substantial likelihood that jurors misunderstand this final issue due to inadequate instructions and incorrect public perceptions.

Instructions are not required as to terms that lay jurors will understand, but they are required for terms as to which there is a substantial likelihood of misunderstanding or confusion. *E.g., People v. Shoals* (1992) 8

Cal.App.4th 475, 489-491. With strong evidence the public in general suffers from severe misapprehensions over the true nature of an LWOP sentence, these instructions are as constitutionally deficient as they would be if they did not mention parole-ineligibility at all, or were vague or raised a substantial likelihood of misunderstanding in some other material fashion. *Cf. Maynard v. Cartwright, supra,* 486 U.S. 356 (jury instruction containing vague aggravating circumstance renders sentence unconstitutional).

Life-and-death decisions should not be made in a vacuum; and where the consequences of jury failure are so very high, it is essential that the sole issue given the jury be defined with clarity. The Supreme Court so held in *Simmons v. South Carolina* (1994) 512 U.S. 154, 170-171, a case with many similarities to this one in this respect. *Simmons* and many other cases show that if there is a reasonable probability a penalty jury is operating under a false idea of central issues it is required to decide (parole-ineligibility [in *Simmons* and this case]), the jury instructions cannot survive constitutional scrutiny. Accordingly, the jury instructions and appellant's death sentence violate the Sixth, Eighth, and Fourteenth Amendments. The penalty judgment should be reversed.

K. FAILURE TO INSTRUCT ON THE PRESUMPTION OF LIFE WAS UNCONSTITUTIONAL

In non-capital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused, and is a basic

component of a fair trial. *Estelle v. Williams* (1976) 425 U.S. 501, 503. Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. Note, *The Presumption of Life: A Starting Point For A Due Process Analysis Of Capital Sentencing* (1984) 94 Yale L.J. 351; *cf. Delo v. Lashley* (1993) 507 U.S. 272.

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that such a presumption is not necessary when a person's life is at stake, 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 the state's law properly limits death eligibility. *Id.* at 190. As appellant has argued in this Section, however, the 1978 law does not properly limit death eligibility: among other things, it does not properly narrow the class of death-eligible defendants, gives prosecutors unbridled discretion to seek the death penalty, and fails to require proportionality review.

Appellant respectfully requests that the Court reconsider *Arias* and hold that the presumption of life is a constitutional necessity at the penalty phase of a capital trial. U.S. Const., Amends VI, VIII, XIV; Cal. Const., Art. 1, §§ 7, 15; *see also* Wash. Rev. Code, § 10.95.060 (life sentence presumed unless jury finds beyond a reasonable doubt that there are not sufficient

mitigating circumstances to merit leniency). The failure to so instruct appellant's jury requires reversal of the judgment of death.

L. LACK OF INTERCASE PROPORTIONALITY REVIEW

The lack of any requirement or undertaking of intercase proportionality review, at trial or on appeal, violates the Constitution, because the Sixth, Eighth and Fourteenth Amendments require any death penalty not be arbitrarily or capriciously imposed (*Gregg v. Georgia, supra,* 428 U.S. 153); because all potential mitigating factors must be considered by the sentencer; and because a death-sentenced defendant must receive meaningful appellate review. *See Parker v. Dugger* (1991) 498 U.S. 308. This is particularly true in light of the vast breadth of California's eligibility factors, the 31 or so special circumstances. Also, lack of such review violates the Eighth and Fourteenth Amendments' heightened reliability requirements for capital sentencing.

In civil litigation, juries do not have absolute discretion to set the limits of compensation for injuries, because where the law cannot be completely logical, it should at least be evenhanded and predictable. Thus courts step in to review compensation awards in light of their experience with compensation awards generally.

> It should be our goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation [citation], and that similarly situated defendants be burdened by similar judgments.

> If each jury is given unbridled authority to set the level of damages, awards will vary widely and unpredictably. Great discrepancies in awards destroy the fairness of the judicial system, as well as the predictability of litigation.
>
> *Consorti v. Armstrong World Industries, Inc.* (2 Cir. 1995) 72 F.3d 1003, 1009 (vacated on other grounds (1996) 518 U.S. 1031).

If these considerations apply to essential fairness and furtherance of the goals of litigation in simple damage cases, they manifestly must apply to the ultimate litigation, capital sentencing. Even more importantly than a jury determining a money damages award, a California capital sentencing jury has nothing to guide it except its own determination of what is appropriate. The sentence is essentially unreviewable, since there are no possible criteria for review.

As a matter of fundamental fairness and avoidance of arbitrary and capricious results in violation of the Sixth, Eighth and Fourteenth Amendments, it should be the goal of a reviewing court to ensure similarly situated defendants receive similar judgments. If each jury is given unbridled authority in sentencing, then sentences will vary widely and unpredictably. However, great discrepancies in sentences and particularly in the types of cases given death sentences "destroy the fairness of the judicial system, as well as the predictability of litigation [capital sentencing]." *Id.*

The absence of proportionality review is also contrary to a capital defendant's Fourteenth Amendment guarantee of equal protection of the laws for this to be the *sole* area in our legal system where a mass of data is handed to a jury, which is told nothing more than, "You decide whatever you want to do." Accordingly, capital defendants are treated differently from other defendants in the judicial system in being subject to arbitrary sentencing. The absence of such review is contrary to fundamental concepts of justice as administered by reviewing court, and it violates a capital defendant's Eighth and Fourteenth Amendment guarantees.

The failure of the California death penalty statute to require inter-case proportionality and to provide for meaningful proportionality review also violated appellant's Fourteenth Amendment right to equal protection of the law, since, at the time of appellant's sentence, proportionality review was provided for non-capital felons under California law. Penal Code section 1170, subd. (f). This failure also violates the Eighth Amendment requirements that a death penalty not be imposed arbitrarily or capriciously (*Gregg v. Georgia, supra,* 428 U.S. at 89), and that all mitigating factors and evidence be considered by the sentencer. *See Parker v. Dugger, supra,* 498 U.S. at 315.

Thirty-one of the thirty-four states that sanction capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the state Supreme Court determine whether

"the sentence is disproportionate compared to those sentence imposed in similar cases." Ga. Stat. Ann. § 27-2537(c). The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman* . . . ." *Gregg v. Georgia, supra,* 428 U.S. at 198. Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." *Proffitt v. Florida, supra,* 428 U.S. at 259. Twenty states have statutes similar to that of Georgia,[105] and seven have judicially instituted similar review.[106]

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105 *See* Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

106 *See Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (1980) 79 Ill.2d 508; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (1977) 197 Neb. 549 (comparison with other capital prosecutions where death has and has not been imposed); *State v. Richmond* (1976) 114 Ariz. 186; *Collins v. State* (1977) 261 Ark. 195.

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

Furman raised the question of whether, within a category of crimes (here, murder) for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. Therefore, the California capital case review system contains the same arbitrariness and discrimination condemned in *Furman,* in violation of the Eighth and Fourteenth Amendments. *Gregg v. Georgia, supra,* 428 U.S. at 192, citing *Furman v. Georgia, supra,* 408 U.S. at 313 (conc. opn. of White, J.). This failure also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution, *Gregg v. Georgia, supra,* 428 U.S. at 192; *Godfrey v. Georgia, supra,* 446 U.S. at 428-429; *Stringer v. Black* (1992) 503 U.S. 222, 232; *Zant v. Stephens, supra,* 462 U.S. at 865; *see Parker v. Dugger, supra,* 498 U.S. 308, and in

violation of the Eighth and Fourteenth Amendments' heightened level of due process and requirement of heightened reliability in capital cases. *Ford v. Wainwright, supra,* 477 U.S. at 414; *Beck v. Alabama, supra,* 447 U.S. at 637-638 & n.13.

Additionally, this failure violates appellant's right to equal protection, under the Fourteenth Amendment, because such review is afforded non-condemned inmates, per section 1170, subdivision (f),[107] which, at the time of appellant's sentence, read:

> Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences in similar cases. If the Board of Prison Terms determines that the sentence is disparate, the board shall notify the judge, the district attorney, the defense attorney, the defendant, and the Judicial Council. The notification shall include a statement of the reasons for finding the sentence disparate. [¶] Within 120 days of receipt of this information, the sentencing court shall schedule a hearing and may recall the sentence . . . and resentence the defendant . . . as if the defendant had not been sentenced previously . . .
>
> Penal Code section 1170, subd. (f).

Indeed, since under the Eighth and Fourteenth Amendments, capital defendants are entitled, if anything, to *more* rigorous protections than

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[107] Appellant is aware that this Court has previously rejected similar contentions (*People v. Marshall* (1996) 13 Cal.4th 799, 945; *People v. Allen* (1986) 42 Cal.3d 1222, 1285), but respectfully requests that the issue be reconsidered.

those afforded non-capital defendants (*see Harmelin v. Michigan, supra,* 501 U.S. at 994) – and, since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see generally Myers v. Ylst, supra,* 897 F.2d at 421) – intercase proportionality review is required here.

In *People v. Allen, supra*, 42 Cal.3d at 1286-1288, this Court held that no equal protection problem arises from section 1170(f). Respectfully, appellant submits that the reasons in *Allen* do not withstand scrutiny.

First, *Allen* held that if a disparity was found to exist, it would be unseemly for a judge to second-guess what the jury would do if confronted with the disparity. *Id.* at 1286-1287. Appellant submits that, in the face of a disparity – objective evidence of a substantial possibility that a defendant was sentenced to death for arbitrary or impermissible reasons – concerns about roles and feelings of the jurors must be secondary.

Second, *Allen* stated that, because death and life without the possibility of parole are the only possible sentences for a capital offense, a death sentence would be in the "normal range" no matter what kind of disparate treatment was shown. *Id.* at 1287. The latter statement fails to reflect the fact that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina, supra,* 428 U.S. at 305.

Finally, *Allen* held that the normative nature of the jury's decision to impose a death sentence makes it more difficult to assess the reasons for a disparity than under the determinate sentencing law. 42 Cal.3d at 1287. Appellant respectfully suggests that a more likely reason for any such difficulty is the fact that the capital sentencer, unlike the non-capital sentencer, is not required to state reasons for its sentence choice. The fact that the Court has been able to conduct harmless error review for penalty phase errors in so many cases since *Allen* was decided, moreover, indicates that the Court – much more so than it believed possible in *Allen* – in fact has the capacity to understand (or make a respectable guess at) the reasons a particular jury imposed a sentence of death. *See, e.g., People v. Turner* (1994) 8 Cal.4th 137, 193-194; *People v. Wash* (1993) 6 Cal.4th 215, 261; *People v. Hardy* (1992) 2 Cal.4th 86, 200, 204-205, 212; *People v. Sanders* (1990) 51 Cal.3d 471, 521.

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

However, it has been held that comparative appellate review is not required by the Eighth Amendment "where the statutory procedures

adequately channel the sentencer's discretion." *McCleskey v. Kemp* (1987) 481 U.S. 279, 306, citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51. As argued elsewhere in this Part, the 1978 initiative under which appellant was sentenced fails to adequately channel the sentencer's discretion. Comparative review is therefore necessary under the 1978 law to prevent the "wanton" and "capricious" imposition of the death penalty and thus to ensure that the state statutory scheme is in compliance with the requirements of the Sixth, Eighth, and Fourteenth Amendments. *See generally Proffitt v. Florida, supra,* 428 U.S. at 260.

This Court has previously rejected this last contention, holding that a defendant must prove by other means that a death statute operates in an arbitrary and capricious manner. *People v. Crittenden, supra*, 9 Cal.4th at 157. Comparative appellate review, however, is the most rational means, if not the only effective means, by which to demonstrate that the scheme as a whole is producing arbitrary results. That is why 90% of the states sanctioning the death penalty require intercase review. *See supra*, pp. 467-468.

For each and every one of the foregoing reasons, appellant submits that proportionality review is both feasible and a *sine qua non* of the constitutionality of the Briggs initiative. Accordingly, in light of the lack of this essential protection, appellant's death sentence violates the

Sixth, Eighth and Fourteenth Amendments. The death sentence in this case should not stand.

M. INABILITY OF POST- CONVICTION RELIEF TO BALANCE CONSIDERATIONS ESSENTIAL IN IMPOSITION OF DEATH PENALTY

Appellant relies on the analysis in and adopts by reference Justice Blackmun's opinion in *Callins v. Collins* (1994) 510 U.S. 1141 (opn. of Blackmun, J., dissenting from denial of certiorari). The opinion is complete, and there is no need to add to it, except to say the limitations cited therein apply to California postconviction proceedings as well as federal ones.

On the same subject, appellant also relies on the analyses in and incorporates Justice Harrison's dissent in *People v. Bull* (1998) 185 Ill.2d 179, 225-228, and Judge Heaney's concurrence in *Singleton v. Norris* (8 Cir. 1997) 108 F.3d 872, 874-876. The imposition of the death penalty, once again, violates the Sixth, Eighth, and Fourteenth Amendments.

N. INSUFFICIENCY OF AVAILABLE POST CONVICTION RELIEF IN FEDERAL AND STATE COURTS

Appellant relies on the analyses in and adopts by reference Justice Blackmun's concurrence in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360, in which he grappled with the likely reality that the ever-increasing procedural barriers to meaningful federal habeas review "undermine[] the very legitimacy of capital punishment itself."

However, the procedural barriers have continued to mount since *Sawyer*. Furthermore, they have now been joined by an ever-growing set of procedural barriers in state court as well. *See, e.g., In re Clark* (1993) 5 Cal.4th 750. The severe diminution of the availability of federal habeas corpus relief and the labyrinth a petitioner must navigate to try to obtain it, as well as the ever-increasing creation of new procedural barriers in California and the combination of the two, operate to render the system of review of capital convictions and sentences more arbitrary and less reliable than was contemplated when capital punishment was resumed in 1976 (*Gregg v. Georgia, supra)*, and more arbitrary and less reliable than is necessary for there to be meaningful post-conviction review.

In this context, it is highly noteworthy that federal habeas corpus relief was much more readily available in 1976 than it is now; the federal system as it existed at the time of *Gregg* was adequate to guard against arbitrary or capricious imposition of the ultimate sentence in violation of federal constitutional law. *See Sawyer v. Whitley, supra,* 505 U.S. at 357-360 (conc. opn. of Blackmun, J.). With its severe compression, it is no longer adequate to serve this vital function. *See also People v. Bull, supra,* 185 Ill.2d at 227 (dis. opn. of Harrison, J.). The imposition of the death penalty thus violates the Sixth, Eighth and Fourteenth Amendments.

O. THE ADMINISTRATION OF CALIFORNIA'S DEATH PENALTY IS SO ARBITRARY AS TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Appellant relies on the analysis in and adopts by reference Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (9 Cir. 1994) 38 F.3d 411, 425-427. The circumstances of California's administration of the death penalty, especially as they exist now, are strikingly similar to those in Arizona discussed in the *Jeffers* dissent. The ultimate selection of who lives and who dies will always be arbitrary, for those same reasons. The increasing backlog of death cases in state courts only serves to compound the problem, since it can only serve to truncate the review eventually provided the cases caught in the backlog (and this is one). *See id.* at 426. The resulting arbitrariness surrounding the imposition of the ultimate penalty itself is an Eighth and Fourteenth Amendment violation.

XVII. THE DELAY INHERENT IN THE STATE CAPITAL APPELLATE SYSTEM, VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, AND HIS EIGHTH AMENDMENT RIGHTS

Judgment was entered in this case on August 2, 1990. (CT 6719) Appellant was not appointed counsel, however, until nearly three years later, on June 21, 1993. The record was not certified until over six years later, in August, 1999, and it was not until June 2001 that appellant's counsel were provided with the entire public record. Briefing will undoubtedly take more than a year to complete and a decision from this Court may take many years. Thus, this direct appeal may take as much, and possibly more than, fifteen years.

A timely appeal is part of the process due a defendant in a state that has direct appeals. *Harris v. Champion* (10 Cir. 1994) 15 F.3d 1538, 1558; *Rheuark v. Shaw* (5 Cir. 1980) 628 F.2d 297. Thus, prejudicial delay by a State in necessary judicial proceedings violates the U.S. Constitution. *See, e.g., Doggett v. United States* (1992) 505 U.S. 647, 651-652 (speedy trial; one-year delay presumptively prejudicial); *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 868-869. California's death penalty appeals are an essential part of the capital judicial system in this state; without the right to postconviction review of claims of record, the death penalty system would operate arbitrarily and capriciously, which would violate the Eighth and Fourteenth Amendments. *Gregg v. Georgia,*

supra, 428 U.S. at 198; *id.* at 211 (conc. opn. of White, J.); *Proffitt v. Florida* (1976) 428 U.S. 242, 253; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Zant v. Stephens, supra,* 462 U.S. at 890; *Clemons v. Mississippi* (1990) 494 U.S. 738, 749; *People v. Massie* (1998) 19 Cal.4th 550, 574.

In *Harris v. Champion, supra,* the Tenth Circuit held a delay in adjudicating a direct criminal appeal of greater than two years is presumptively excessive. *Id.* at 1546, 1556, 1560. While there is obviously some flexibility in that figure for capital cases, which by their very nature are much more complex and take substantially longer to brief and decide (*id.* at 1562), that two-year figure is *not* flexible for the amount of time it takes to appoint counsel, since it shouldn't take any longer to appoint counsel in a death case than in a non-death case.

Underfunding of a state appellate system is not a constitutionally acceptable reason for delay. *Id.* at 1547. If qualified attorneys were not taking state capital postconviction cases between 1990 and 1993, there is a strong economic component to that fact; and if the backlog of cases consequently grows, resulting in extremely lengthy delays in the appointment of counsel, that is not appellant's fault. Nor is it his fault that the appellate system engendered further delay after that, including some six years for Marin County to assemble and certify the record, and some eleven years to provide a complete copy of the record.

The three-year delay in appellant obtaining appointed counsel is already a year greater than the presumptively excessive period of two years in *Harris*, not counting any of the further delays built into this capital case. This itself gives rise to a presumption of excessive delay, and a due process claim. *Id.* at 1557. The further passage of years in this case only underscores and accentuates that presumption.

A great many things detrimental to a defendant can and do happen with such long delays. The most obvious one here is that the memories of appellant's trial counsel, who have moved on to other complex trials and appeals, have faded; questions which appellate counsel could have addressed to them within a year or two of the trial were not addressed until several more years had passed, and this necessarily has had a detrimental effect, especially to appellant's effort to secure the post-conviction relief California law guarantees him the opportunity to seek. This problem would not have existed if appellant had been appointed appellate counsel promptly. It is the type of "particularized prejudice" which *Harris v. Champion, supra,* directly addresses. *Id.* at 1564.

Accordingly, the delays in the appellate system and in this case constituted a violation of the Eighth and Fourteenth Amendments, and also bar appellant's execution under the doctrine of laches.

Beyond the due process violation and laches, there is also a violation of appellant's federal constitutional right to equal protection.

If appellant received inferior treatment due to his indigency than a person who could afford counsel would have received, he is denied equal protection. *Harris* recognized such a claim was proper in an appellate delay case, given the fact that "'[u]nfairness results . . . if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty.'" *Harris, supra,* 15 F.3d at 1567, quoting *Ross v. Moffitt* (1974) 417 U.S. 600, 611. That is so here, since a person who could afford private counsel would not need three years to secure an attorney.

The remedy may depend in part on the level of prejudice, but a longer delay requires a lesser showing of prejudice. *Harris, supra,* 15 F.3d at 1547.

The most obvious prejudice, discussed *ante* in Argument XI, is the impossibility, after so much time had passed, of mounting a defense to the Hamil murder. Whatever difficulties were present at the time of trial 10 years after that crime, for which Masters was never charged and never had notice that he might need a defense until the filing eight years after the fact of the State's section 190.3 notice, those problems are amplified by the further passage of time; 21 years have now passed, and should there be a retrial and the State allowed to charge that crime again, mounting a defense would be even more impossible.

Excessive delay in the appellate process may rise to a due process violation when state law guarantees the right to direct appeal. *Coe v. Thurman* (9 Cir. 1990) 922 F.2d 528, 530. Thus, even if there must be prejudice from appellate delay (*People v. Horton* (1995) 11 Cal.4th 1068, 1141), there at least is such prejudice here as to a penalty retrial, since appellate delay has damaged appellant's position for that retrial.

Accordingly, the delay in postconviction review creates a prejudicial constitutional violation in this case, at least as to the penalty judgment. Consequently, the penalty judgment should be reversed.

XVIII. THE CALIFORNIA DEATH PENALTY VIOLATES THE NORMS OF A CIVILIZED SOCIETY AND THUS THE EIGHTH AND FOURTEENTH AMENDMENTS

In *Lackey v. Texas* (1995) 514 U.S. 1045, in a memorandum respecting the denial of certiorari, Justice Stevens addressed petitioner Lackey's argument that executing a prisoner who has already spent seventeen years on death row violates the Eighth Amendment's bar against cruel and unusual punishment. Justice Stevens stated that "though novel, petitioner's claim is not without foundation," and "petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from . . . further study [by the courts]." *Id.* Justice Breyer agreed that "the issue is an important undecided one." *Id.*; *accord Ceja v. Stewart* (9 Cir. 1998) 134 F.3d 1368, 1369 (dis. opn. of Fletcher, J.). These concerns have also been echoed in subsequent opinions. *Elledge v. Florida* (1998) 525 U.S. 944 (Breyer, J., dissenting from denial of *cert.*); *Knight v. Florida* (1999) 528 U.S. 990, 993 (same).

While this Court has previously rejected similar claims *(e.g., People v. Massie* (1998) 19 Cal.4th 550, 574), appellant asks this Court to reconsider its position, in light of the information below which presumably was not presented to the Court at that time.

The "death row phenomenon" is the term used to describe the cumulative circumstances – including the physical conditions, as well as emotional and mental anguish – that a death row inmate necessarily faces over a period of years as part of his daily existence there. This aspect of the sentence of death is recognized by international norms as affecting whether the sentence in a particular case constitutes torture or inhuman or degrading punishment. *Soering v. United Kingdom* (1989) 161 Eur. Ct. H.R. (ser. A), at 34, reprinted in 11 Eur. Hum. Rts. Rep. 439 (hereinafter *Soering*); *accord, Lackey v. Texas, supra,* 514 U.S.1045 (opn. of Stevens, J., respecting the denial of certiorari).

> Combine a hospital ward for the terminally ill, an institution for the criminally insane, and an ultramaximum security wing in a penitentiary, and one begins to approach the horror of death row. The inherent dangerousness of the inmates, their utter despair, the futility of any efforts at rehabilitation or training all contribute to a carceral environment that combines extreme security measures, confinement to cells for most of the day, and virtual inactivity.
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> Schabas, *Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied* (1994) 5 (Rutgers Univ. School of Law) Crim. L.F. 180, 184.

Justice Stevens noted that there had been frequent commentators on the toll of those waiting years:

> *See also People v. Anderson*, 6 Cal. 3d 628, 649 (1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain

> incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture") (footnote omitted); *Furman v. Georgia*, 408 U.S. 238, 288-289 (1972) (Brennan, J., concurring) ("The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *Suffolk County District Attorney v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J. concurring) (death penalty is unconstitutional under state constitution in part because "it will be carried out only after agonizing months and years of uncertainty"); *id.* at 675-686, 411 N.E.2d at 1289-1295 (Liacos, J., concurring).
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> *Lackey v. Texas, supra,* 514 U.S. at 1045, n.; *see also* M. Radelet (ed.), Facing the Death Penalty: Essays on a Cruel and Unusual Punishment (1989).

The Eighth Amendment's proscription against cruel and unusual punishment is an evolving standard of decency. *Trop v. Dulles* (1958) 356 U.S. 86, 191; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821-822; *Weems v. United States* (1910) 217 U.S. 349, 373-374, 378; *Hutto v. Finney* (1978) 437 U.S. 678, 685.

"To borrow a phrase from Justice Potter Stewart, inhuman treatment may be difficult to define but we should know it when we see it." Schabas, *Execution Delayed, Execution Denied*, *supra,* 5 (Rutgers Univ. School of Law) Crim. L.F. at 185, citing *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 (conc. opn. of Stewart, J.).

International human rights standards are relied on to provide interpretative guidance in federal and state constitutional provisions, including the Eighth Amendment. *See, e.g., Thompson v. Oklahoma, supra,* 487 U.S. at 830-831, 851-852 (plur. opn. and conc. opn. of O'Connor, J.) (reference to international treaties and practices to preclude execution of juveniles under age 16 as an Eighth Amendment violation); *Coker v. Georgia* (1977) 433 U.S. 584, 596, n. 10 (Eighth Amendment violation in part because only three major nations retained death penalty for rape); *Enmund v. Florida* (1982) 458 U.S. 782, 796, n. 22 (death penalty for defendant who did not intend to kill found cruel based on practices of Europe); *Trop v. Dulles, supra,* 356 U.S. at 102 & n. 35 (divestiture of citizenship for desertion from military, a condition deplored by the international community); *see also Hilton v. Guyot* (1895) 159 U.S. 113, 163 ("International law . . . is part of our law . . . ."); *Filartiga v. Pena-Irala* (2 Cir. 1980) 630 F.2d 876, 886 (same); *Forti v. Suarez-Mason* (N.D. Cal. 1987) 672 F.Supp. 1531, 1539-1540; *Lareau v. Manson* (D. Conn. 1980) 507 F.Supp. 1177, 1187 n.9 (mod. o.g. (2 Cir. 1981) 651 F.2d 96);

see generally Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis* (1990) 41 Hast.L.J. 805 ("Strossen").

Appellant's contention is supported by three recent decisions of foreign courts criticizing the American "death row phenomenon"— the protracted incarceration of condemned prisoners under a sentence of death in extreme conditions of confinement. These cases represent a growing recognition of the need to redress institutional failures that have resulted in an added dimension of punishment in capital cases that was unknown in historic times.

The most recent decision comes from the Privy Council of the British House of Lords, the highest court in England and the most authoritative interpreter of British common law. *Pratt & Morgan v. Attorney General for Jamaica* (Privy Council 1993) 3 SLR 995, 2 AC 1, 4 All ER 769 (en banc). American courts have long been guided by the decisions of the Privy Council.[108]

Sitting en banc for the first time in fifty years, the Privy Council unanimously held that to execute two inmates who had been on death row

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108 *See, e.g., United States v. Raddatz* (1980) 447 U.S. 667, 679 (citing Privy Council decision with approval); *Kilbourn v. Thompson* (1881) 103 U.S. [13 Otto] 168, 186 (same); *see also Fisher v. United States* (1946) 328 U.S. 463, 486-488 (dis. opn. of Frankfurter, J.) ("This Court in reviewing a conviction for murder . . . ought not be behind . . . the Privy Council . . . .") (discussing Privy Council decisions).

for fourteen years and who had been read execution warrants on three occasions would constitute "torture or 'inhuman or degrading punishment'" in violation of section 17(1) of the Jamaican Constitution, a document rooted in the English common law tradition. Slip op. at 13, 20. The Privy Council explained: "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time." *Id.* at 16.

The Privy Council commuted the sentences of the two men to life imprisonment. Though the decision did not involve an interpretation of the Cruel and Unusual Punishment Clause of the English Bill of Rights of 1689 – the source of the Eighth Amendment of the U.S. Constitution[109] – the Privy Council surveyed English common law, and concluded that extended imprisonment on death row and the repeated setting of execution dates were not practices condoned historically at common law. *Pratt*, slip op. at 2 ("The death penalty in the United Kingdom has always been carried out expeditiously after sentence . . . . Delays in terms of years are

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109 *Harmelin v. Michigan* (1991) 501 U.S. 957, 966 (conc. opn. of Scalia, J.) ("There is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the antecedent" of the Cruel and Unusual Punishment Clause of our Eighth Amendment).

unheard of."); *Id.* at 3 ("It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment."); *Id* at 5 (noting the "common law practice that execution followed as swiftly as practical after sentence").

Such a conclusion strongly suggests that the Cruel and Unusual Punishment Clause of the 1689 Bill of Rights, and in turn the Cruel and Unusual Punishment Clause of our Eighth Amendment, would prohibit the execution of an inmate who had been under a sentence of death for a protracted period of time. *See Ford v. Wainwright* (1986) 477 U.S. 399, 405 ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."); *Riley v. Attorney General of Jamaica* (Privy Council 1983) 1 A.C. 719, 3 All E.R. 469 (dis. opn. of Lord Scarman, joined by Lord Brightman) ("There is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689 . . . .") (maj. opn. over'd by *Pratt & Morgan*

v. Attorney General of Jamaica (Privy Council 1993) 2 A.C. 1, 4 All E.R. 769 (en banc).

In regard to the State's attempt to assign fault for the delay of execution, the Privy Council reasoned:

> [A] State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.
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> *Id.* at 20.

As one commentator observed, "Yet reconciling the two norms of prompt execution and fair appeal may well be impossible, with capital punishment caught in a judicial 'Catch 22.'" Schabas, *Execution Delayed, Execution Denied, supra,* 5 (Rutgers Univ. School of Law) Crim. L.F. at 189; *see also* David Pannick, *Judicial Review of the Death Penalty* (1982) 77-89 & 84 n. 17 ("A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all. It must, at the very least, be accepted by a society committed to due process of law and the rule of law that a death sentence becomes constitutionally cruel unless

carried out within a reasonable time after it has been awarded, and without the incidental infringement of any of the other rights (such as the right to appeal against conviction and sentence) guaranteed by due process."); Strafer, *Symposium on Current Death Penalty Issues: Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 (N.W. School of Law) J. Crim. L. 860, 864 ("Inmates are put to the Hobson's choice of prolonged torture by incarceration or swift torture by execution. An inmate's 'choice' of the latter alternative over the former is no more voluntary than a confession beaten out of a police suspect during a custodial interrogation; only the method utilized to exact that 'choice' is unique").

A second foreign decision also comes from a court following the English common law tradition. In *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, S.C. 73 (Zimb. June 24, 1993), reported in 14 Hum. Rts. L. J. 323 (1993), the Supreme Court of Zimbabwe held that prolonged death row incarceration constituted "inhuman or degrading punishment" in violation of its Constitution, and thus forbade the execution of four prisoners confined under death sentences for between 4 1/3 to 6 years. Slip opn. at 9, 45-46. In reaching its decision, the Court considered such factors as the "physical conditions endured daily" on death row and "the mental anguish" of the condemned prisoners. *Id.* at 4-5.

The most developed body of international human rights jurisprudence comes from the two tribunals that enforce the European Convention on Human Rights[110]: the European Commission of Human Rights, and the European Court of Human Rights. Strossen, *supra*, 41 Hast.L.J. at 807. The European Convention does not expressly prohibit the imposition of the death penalty, but in Article 3 it does prohibit "torture" or inhuman or degrading treatment or punishment. The Court of Human Rights has stated this prohibition enshrines "one of the fundamental values of the democratic societies making up the Council of Europe," and has called the prohibition "an internationally accepted standard." *Soering v. United Kingdom, supra,* 161 Eur. Ct. H.R. (ser. A), at 34 (reprinted in 11 Eur. Hum. Rts. Rep. 439). The Eighth Amendment similarly prohibits torture, as well as inhuman or degrading treatment or punishment. *See, e.g., Wilkerson v. Utah* (1879) 99 U.S. [9 Otto] 130, 135-136 (torture); *Wright v. McMann* (2 Cir. 1967) 387 F.2d 519 (inhuman); *State v. Gladding* (1990) 66 Ohio App.3d 502, 513, 585 N.E.2d 838, 845 (torture or degrading punishments).

In *Soering v. United Kingdom, supra,* the European Court of Human Rights was presented with the issue of whether Great Britain's

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110 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, *opened for signature* Nov. 4, 1950, Europ. TS No. 5, 213 U.N.T.S 221 (entered into force Sept. 3, 1953), hereinafter referred to as the "European Convention."

extradition of a German national to the State of Virginia, where capital murder charges were pending against him, would violate the European Convention prohibition against inhuman or degrading treatment or punishment. The Commission held that the protracted delays in carrying out death sentences in Virginia, which averaged at 6-8 years, constituted inhuman and degrading punishment in violation of Article 3 of The European Human Rights Convention Charter, a provision that "enshrines one of the fundamental values of the democratic societies making up the Council of Europe." *Soering, supra,* 161 Eur. Ct. H.R. (ser. A) at 26. The Court, in a unanimous opinion by eighteen judges, held that subjecting an individual to prosecution for capital murder, so as to expose him to the "death row phenomenon," violated the prohibition against "inhuman or degrading treatment or punishment" in Article 3 of the European Convention. The Court recognized that the conditions of detention awaiting execution are examples of the factors that can render the sentence in violation of the European Convention of Human Rights. *Id.* at 41.

In California, the average stay would be much longer, in light of the length of time it takes to obtain counsel on appeal and then pursue the automatic appeal as well as meritorious habeas corpus claims in state and federal court. In federal court, an ever-increasing glut of California death cases works its way through the system. Thus, the "length of stay"

considerations in *Soering* are even greater as the death penalty is currently administered in this state.

The European Court recognized that the time required by the inmate to pursue collateral remedies was largely beyond the inmate's control, since it is within his constitutional rights to pursue every available remedy open to him. The Court weighed more heavily the consequences of the complex Virginia post-sentencing procedures; "[t]he condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." *Id.* The Court also considered the daily conditions to which the condemned person would be subjected on death row. *Soering, supra,* 161 Eur. Ct. H.R. (ser. A), at 27-28, 42. The condemned prisoner's regime is worsened, in the Court's view, because he is subjected to it for an extended time. *Id.* at 43; *see generally Soering v. United Kingdom*: *Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 354-355.

Additionally, in finding an Article 3 violation, the *Soering* Court was also influenced by the circumstance that the failure to extradite would not result in a criminal going unpunished, since Soering could be extradited to Germany and punished there. *Soering, supra,* 161 Eur. Ct. H.R. (ser. A), at 44.

The European Convention does not expressly prohibit the imposition of the death penalty, although the death penalty no longer exists in peacetime in any contracting state. *Id.* at 40. However, even if Soering's exposure to the penalty of death alone had been insufficient to constitute inhuman or degrading treatment or punishment under Article 3 of the European Convention, the Court concluded this does not mean circumstances relating to a death sentence can never give rise to an issue under Article 3. *Id.* at 41. As the Court stated: "The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, *as well as the conditions of detention awaiting execution*, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3." *Id.* (emphasis added) The Court concluded Soering's possible exposure to the "death row phenomenon" was such serious treatment that his extradition would be contrary to Article 3. *Id.*

Justice Stevens, in a memorandum respecting the denial of *certiorari* in *Lackey v. Texas, supra,* 514 U.S. 1045, observed that although the Court in *Gregg v. Georgia* (1976) 428 U.S. 153, had held that the Eighth Amendment does not prohibit capital punishment, its decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers (*see Gregg* at 177 (opn. of Stewart,

Powell, and Stevens, JJ.)), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence." *Id.* at 183. *Lackey, supra,* 514 U.S. at 1045. Justice Stevens noted that arguably, neither ground retained any force for prisoners who have spent some 17 years under a sentence of death. *Id.*

The concerns repeatedly expressed above apply equally to appellant's death sentence. He, too, "has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." Indeed, San Quentin's death row was under the scrutiny of a consent degree and court appointed monitor for over a decade in response to allegations that conditions there constituted cruel and unusual punishment and a denial of due process under the state and federal constitutions. *Thompson v. Enomoto* (9 Cir. 1990) 915 F.2d 1383, *see also Gilmore v. California* (9 Cir. 2000) 220 F.3d 987, 1010 (reversing district court order terminating supervision of prison in on-going litigation).

Appellant would have to endure these conditions even if this Court were to reverse his conviction or sentence on direct appeal, because the automatic appeal process takes years; and more time is required to present and litigate meritorious claims in collateral proceedings. Appellant will live "in the ever-present shadow of death" for many years – under

any circumstances due to the nature of the process and through no fault of his own.

It would not be a solution to emasculate the right of review, as the Privy Council recognized. *Pratt & Morgan v. Attorney General, supra,* at 20. For like reasons, the answer is not to fault the defendant for invoking his rights of review. Appellant's case has involved a three-year delay before appellant could even obtain counsel, over six more years for the record to be certified, two more years for the record to be completely provided, and it is not appellant's fault that it may take five or more years to decide his case after briefing.

The claim here is twofold, that delay in itself constitutes cruel and unusual punishment, and the actual carrying out of appellant's execution serves no legitimate penological ends. These are issues that have not been addressed by the Supreme Court. *Lackey v. Texas, supra,* 514 U.S. at 1045 (opn. of Stevens, J., respecting the denial of certiorari); *Ceja v. Stewart, supra,* 134 F.3d at 1370 (dis. opn. of Fletcher, J.). Federal appellate courts have only addressed the first of these issues, and to date have rejected that argument. *Id.*; *Carter v. Johnson* (5 Cir. 1997) 131 F.3d 452, 466; *Bonin v. Calderon* (9 Cir. 1996) 77 F.3d 1155, 1160-1161; *White v. Johnson* (5 Cir. 1996) 79 F.3d 432, 437-438; *Stafford v. Ward* (10 Cir. 1995) 59 F.3d 1025, 1025; *Andrews v. Shulsen* (D. Utah 1984) 600 F.Supp. 408, 431, aff'd (10 Cir. 1986) 802 F.2d 1256.

Nonetheless, as opinions such as *Lackey*, *Elledge* and *Knight* show, the delays involved in this case are also contrary to long-established Anglo-American jurisprudence which establishes and further underscores the Eighth and Fourteenth Amendment violations here. *See, e.g., Brown v. Mississippi* (1936) 297 U.S. 278, 286 (due process clause requires that state actions be "'consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'", quoting *Hebert v. Louisiana* (1926) 272 U.S. 312, 316); *Murray's Lessee v. Hoboken Land and Improvement Co., supra,* 59 U.S. at 277 (due process requires examination of settled usages and modes of proceeding in England as adaptable to civil and political institutions in this country).

In appellant's case should his capital sentence be reversed, he would not be unpunished. As in *Soering* he would be sentenced to life imprisonment without possibility of parole, the only alternative for such crimes in this state.

Soering and like cases represent international law as interpreted by civilized Western nations this country purports to follow in determining international standards. Its holding is solidly in accord with Eighth Amendment jurisprudence as interpreted and expressed in United States Supreme Court opinions. *See, e.g., Sawyer v. Whitley* (1992) 505 U.S. 333, 360 (conc. opn. of Blackmun, J.); *Maynard v. Cartwright* (1988) 486

U.S. 356, 362; *Godfrey v. Georgia* (1980) 446 U.S. 420, 438-439; *Hutto v. Finney, supra,* 437 U.S. at 685-687; *Gregg v. Georgia, supra,* 428 U.S. at 169-173; *Woodson v. North Carolina* (1976) 428 U.S. 280, 288-301; *Furman v. Georgia* (1972) 408 U.S. 238, 271-272, 288 (conc. opn. of Brennan, J.); *Trop v. Dulles, supra,* 356 U.S. at 100-101; *Weems v. United States, supra,* 217 U.S. at 372, 378. These principles should be followed here as well. Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v. Balkcom* (1950) 339 U.S. 9, 14 (dis. opn. of Frankfurter, J.).

Until a system of postconviction review is developed that avoids the death row phenomenon, and especially under the particular circumstances of appellant's case, maintenance of the pending sentence of death would be cruel and unusual punishment in violation of the federal and state constitutions, irrespective of whether such a sentence is ever ultimately imposed. To carry out the execution long years after the death sentence serves no legitimate penological needs and it is cruel and unusual in violation of the federal and state Constitutions.

Consequently, if the guilt phase verdict is not reversed, the judgment of death should be vacated, and a sentence imposed of life imprisonment without the possibility of parole.

XIX. APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED BECAUSE IT IS UNCONSTITUTIONAL, AND BECAUSE NO CONSTITUTIONAL DEATH SENTENCE CAN BE SUBSTITUTED IN ITS PLACE

On July 30, 1990, the trial court imposed the following sentence: "It is the order of this court that you shall suffer the death penalty, said death penalty to be inflicted within the walls of the state prison at San Quentin, California, in the manner prescribed by law at the time to be fixed by this court in a warrant of execution." (RT 23487)

To the extent that that sentence, pursuant to Penal Code section 3604, orders appellant to die by the administration of lethal gas (one of the two statutory methods), it violates the Eighth and Fourteenth Amendments to the U.S. Constitution. *Fierro v. Gomez* (9 Cir. 1996) 77 F.3d 301, *vacated on other grounds in light of statutory amendment* (1996) 519 U.S. 918; *see also (Karl) LaGrand v. Stewart* (9 Cir. 1999) 173 F.3d 1144, 1149, *vacated on other grounds* (1999) 525 U.S. 1173 ("Since we have held the method chosen . . . to be unconstitutional, the death warrant must be reissued in a form that does not require execution by lethal gas.").

The only statutory alternative to lethal gas is death by lethal injection. Under the 1996 amendment to section 3604, lethal injection is the default method of execution. To this date, appellant has not elected, and there is no indication that he will elect, to be executed by lethal gas.

Appellant thus has standing to challenge his impending execution by this method as a violation of his rights under the Federal Constitution. Appellant hereby challenges death by lethal injection. That method of inflicting the death penalty is also unconstitutional.

This Court, in *People v. Samayoa* (1997) 15 Cal.4th 795, 863, has rejected a challenge to the constitutionality of lethal injection. The challenge is presented here as it retains its federal constitutional validity, since it has not been rejected on the merits by the United States Supreme Court. Appellant thus asks this Court to reconsider its position, for the following reasons.

The Eighth Amendment proscribes punishment that would inflict torture or a lingering death or involve the wanton infliction of pain. *In re Kemmler* (1890) 136 U.S. 436, 447; *Gregg v. Georgia* (1976) 428 U.S. 153, 173; *Hudson v. McMillian* (1992) 503 U.S. 1. It prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958) 356 U.S. 86, 101. The Eighth Amendment embodies concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures. *Estelle v. Gamble* (1976) 429 U.S. 97. In essence, "no court would approve any method of implementation of the death sentence found to involve cruelty in light of presently available alternatives." *Furman v. Georgia* (1972) 408 U.S. 238, 430.

To discern the "evolving standards of decency," courts look to objective evidence of how society views a punishment *today*. *Coker v. Georgia* (1977) 433 U.S. 584, 593-597; *Enmund v. Florida* (1982) 458 U.S. 782, 788-796.

Lethal injection presents a great risk of malfunction and, consequently, of imposing unnecessary pain. The chance for human error compounds the probability of unnecessary pain. "Lethal injection, meant to be the neat and a modern execution method, [has been] plagued with problems, or 'execution glitches,' as they are also referred to in the business." S. Trombley, *The Execution Protocol* (1992) 14.

Lethal injections are the most frequently botched means of execution, defined to include unanticipated problems or delays that caused, or could have caused, unnecessary agony for the prisoner and/or witnesses. Eyewitness testimonials describing pain, suffering and delay during lethal injections challenge the contention that this execution method is neither cruel nor unusual. In Oklahoma in 1992, for example, Robyn Lee Parks finally died after gasping, coughing and gagging for eleven minutes after the drugs were first administered. One reporter who witnessed Parks' death wrote that the execution looked "painful and ugly and scary." "It was overwhelming, stunning, disturbing — an intrusion into a moment so personal that reporters, taught for years that intrusion is their business,

had trouble looking each other in the eyes after it was over." *11-Minute Execution Seemingly Took Forever*, Tulsa World, March 11, 1992, at A13.

Stephen Peter Morin's execution technicians were forced to probe both of Morin's arms and one of his legs with needles for nearly 45 minutes before they found a suitable vein because of Morin's history of drug abuse. *Murderer of Three Women is Executed in Texas*, New York Times (Mar. 14, 1985) at 9. After repeated failures in trying to find a suitable vein, Randy Wools, a drug addict, eventually helped the execution technicians find a useable vein. *Killer Lends a Hand to Find a Vein for Execution*, Los Angeles Times (Aug. 21, 1986) at 2. It took nearly an hour to complete the execution of Elliot Rod Johnson due to collapsed veins. *Addict is Executed in Texas for Slaying of 2 in Robbery*, New York Times (June 25, 1987) at A24.

Death was pronounced 40 minutes after Raymond Landry was strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. *Drawn-out Execution Dismays Texas Inmates*, Dallas Morning News (Dec. 15, 1988) at 29A. Two minutes after the drugs were administered, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. *Landry Executed for '82 Robbery-Slaying*, Dallas Morning News (Dec. 13, 1988) at 29A. The curtain separating the witnesses from the inmate was then closed, and not reopened for fourteen minutes while the execution team

reinserted the catheter into the vein. *Id.* A spokesman for the Texas Department of Correction, Charles Brown, said, "There was something of a delay in the execution because of what officials called a 'blowout.' The syringe came out of the vein, and the warden ordered the [execution] team to reinsert the catheter into the vein." *Id.*

It took medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were kept behind a drawn curtain, but reported hearing Rector utter eight loud moans. During the ordeal Rector helped the medical personnel find a vein. The administrator of State's Department of corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The difficulty in finding a suitable vein was later attributed to Rector's bulk and his regular use of anti-psychotic medication. *Rector, 40, Executed for Officer's Slaying*, Arkansas Democrat Gazette (Jan. 25, 1992) at 1; *Rector's Time Came, Painfully Late*, Arkansas Democrat Gazette (Jan. 26, 1992) at 1B; Frady, *Death in Arkansas*, The New Yorker, (Feb. 22, 1993) at 105.

Billy Wayne White was pronounced dead some 47 minutes after being strapped to the execution gurney. *Another U.S. Execution Amid Criticism Abroad*, New York Times (April 24, 1992) at B7. The delay was caused by difficulty finding a vein; White had a long history of heroin

abuse. *Id.* During the execution, White also attempted to assist the authorities in finding a suitable vein. *Id.*

After the execution began, the lethal chemicals unexpectedly solidified, clogging the IV tube that lead into John Wayne Gacy's arm, and prohibiting any further passage. Blinds covering the window through which witnesses observed the execution were drawn, and the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were reopened and the execution process resumed. It took 18 minutes to complete. Anesthesiologists blamed the problem on the inexperience of prison officials who were conducting the execution, saying that proper procedures taught in "I.V. 101" would have prevented the error. *Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction*, Chicago Sun-Times (May 11, 1994) at 5; *Witnesses Describe Killer's 'Macabre' Final Few Minutes*, Chicago Sun-Times (May 11, 1994) at 5; *Gacy Execution Delay Blamed on Clogged IV Tube*, Chicago Tribune (May 11, 1994) at 1 (Metro).

Seven minutes after the lethal chemicals began to flow into Emmitt Foster's arm, the execution was halted when the chemicals stopped circulating. *Witnesses to a Botched Execution*, St. Louis Post-Dispatch (May 8, 1995) at 6B. With Foster gasping and convulsing, the blinds were drawn so the witnesses could not view the scene. *Id.* Death was pronounced thirty minutes after the execution began, and three minutes

later the blinds were reopened so the witnesses could view the corpse. *Id.* Because they could not observe the entire execution procedure through the closed blinds, two witnesses later refused to sign the standard affidavit that stated they had witnessed the execution. *Id.* In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." *Id.* According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney; it was so tight that the flow of chemicals into the veins was restricted. *Too-Tight Strap Hampered Execution*, St. Louis Post-Dispatch (May 5, 1995) at B1; *Execution Procedure Questioned*, Kansas City Star (May 4, 1995) at C8.

Richard Townes, Jr.'s execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. *Store Clerk's Killer Executed in Virginia*, New York Times (Jan. 25, 1996) at A19.

It took one hour and nine minutes for Tommie J. Smith to be pronounced dead after the execution team began sticking needles into his body because of unusually small veins. *Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of*

AMA's Policy Forbidding Active Role in Execution, Indianapolis Star (July 19, 1996) at A1. For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. The physician made two attempts to insert the tube in Smith's neck. When that failed, an angiocatheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. *Id.* The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. *Problem with Veins Delays Execution*, Indianapolis News (July 18, 1996) at 1.

It took nearly an hour to find a suitable vein for the insertion of the catheter into Michael Eugene Elkins. *Killer Helps Officials Find a Vein at his Execution*, Chattanooga Free Press (June 13, 1997) at A7. Elkins tried to assist the executioners, asking "Should I lean my head down a little bit?" as they probed for a vein. After numerous failures, a usable vein was finally found in Elkins' neck. *Id.*

More recently, Bennie Demps' final words before his lethal injection execution on June 8, 2000 were a plea to his lawyer to investigate the way the state's executioners had handled him. Demps said he was strapped to a gurney for 33 minutes while technicians struggled to find a vein. From the gurney, Demps told his lawyer, "They butchered me back there. I was in a lot of pain. They cut me in the groin, they cut me in the leg. I was bleeding profusely." He said the executioners sliced twice into

his leg painfully, and had stitched up one wound before taking him to be executed. *Lethal Injection/Killer Was Strapped To Gurney For 33 Minutes; Dying Man Says State Of Florida Botched His Execution*, *Wilmington* (N.C.) Star (June 9, 2000) (from newspaper website, www.wilmingtonstar.com). Demps, of course, could not then have known that his pleas would be corroborated, since he was minutes away from his death. However, an attorney who examined photos of Demps during the execution procedure found blood-soaked sheets and a deep four-inch gash on Demps' inner thigh–the place where Demps complained he had been painfully cut. *Execution Protocols Questioned In Demps' Death*, The Independent Florida Alligator (Univ. of Fla.) (June 13, 2000) (obtained from website, www.northernlight.com).

The above incidents emanate in part from a factor unique to lethal injection: Unlike other methods of execution, lethal injection relies on administration of drugs. *See, e.g., Chaney v. Heckler* (D.C. Cir. 1983) 718 F.2d 1174, 1177, *reversed on other grounds* (1985) 470 U.S. 821. It seeks to create certain chemical reactions within the body resulting in death. However, there is a danger of torture by this process. For example, "the wrong combination of drugs given in the wrong order or in insufficient doses could actually leave the prisoner paralyzed but conscious and excruciatingly aware of his or her protracted asphyxiation." Stryker, *The Role of the Professions in the Execution Process*, The

Recorder (April 23, 1992) at 6. Dosages would have to be specifically determined for each patient based on his/her body chemistry, for that very reason, and there would certainly be a possibility of error. *Id.* The possibility of such an intolerable result – which unquestionably exists, *see also Singleton v. State* (1993) 313 S.C. 75, 437 S.E.2d 53, 61, creates an unacceptable risk of torture and inhumane treatment, in violation of the Eighth and Fourteenth Amendments.

Another reason lethal injection is unlike any other previous execution procedure is that it is the only procedure which requires invasion of the inside of the human body – in particular, adequate penetration of a vein, itself an invasive procedure. Many of the botched executions described above involved problems with finding veins on condemned persons. There is, of course, no way to know in advance how easy or difficult it will be to find a suitable vein, but the problem is clearly a difficult one in a significant number of cases.

The risk of these problems is all the greater because there is no law requiring that a trained physician be involved in the execution process. Therefore, it cannot be assumed one will be. Indeed, the contrary may be assumed: The medical profession prohibits involvement of physicians in executions, since the role of a physician is to alleviate suffering and not to kill people. AMA Council on Ethical and Judicial Affairs, Opinion No. 2.06; *Singleton v. State, supra,* 437 S.E.2d at 61.

The direct participation of physicians in lethal injection executions has in fact been equated to the participation by physicians of torture in various countries. *Doctors and Torture, Usage of Medical Personnel Condemned* (1981) 283 Brit. Med. J. 255. Indeed, a United Nations General Assembly resolution states that it is a contravention of medical ethics for *any* health personnel to be involved in any professional relationship with prisoners, the purpose of which is not solely to evaluate, protect, or improve their physical and mental health. G.A. Res. 194, U.N. Doc. A/RES/37/194 (1983).

Furthermore, the process of administering lethal injection is patient-specific. It involves finding a suitable vein, which can be extremely difficult in some inmates. *E.g.*, Stryker, *supra*, at 6-7. While one supposes anyone can try to put a needle in a vein, the possibility that an insufficiently competent person will be poking around with needles in an inmate's body looking for a suitable vein itself raises an Eighth Amendment issue, especially when coupled with the possibility that the process will also result in barfbaric or inhuman suffering, or a torturous form of death. The examples above, where a condemned person felt compelled to assist in his own execution only underscore the Eighth Amendment issues; it is barbaric and inhuman to force an inmate to actively assist in his own execution as his only possible means of avoiding suffering and pain. Even if as above the participation of a fully trained physician might help to alleviate that

problem, once again, that is prohibited by the medical profession. Appellant is unaware of such a legal requirement in any event.

Throughout the history of this country, a vast array of execution methods have been employed. As one commentator observed, "[w]e've sawed people in half, beheaded them, burned them, drowned them, crushed them with rocks, tied them to anthills, buried them alive, and almost every way in fact except perhaps boiling them in oil." I. Gray & M. Stanley, *A Punishment in Search of A Crime* (1989), pp. 19-20. Death sentences in the post-*Furman* era have been carried out by firing squad, hanging, electrocution, gas, and lethal injection. R. Coyne & L. Entzeroth, *Capital Punishment and the Judicial Process* (1994) at 6-11.

The various forms of execution chosen by society reflect not merely the fact that an individual should forfeit his or her life but also that the manner of taking life is central to the process. Indeed, the ritualistic way most executions are carried out and the extent to which prison officials attempt to prevent suicide before executions prove that the manner of killing is an integral part of the process. *See, e.g.,* McLaughlin, *Perspectives: High-Tech Lynchings in an Age of Evolving Standards of Decency* (1995) 3 San Diego Justice J. 177, 196-197; Doss, *Baptism and the Death Penalty: A Contrast of Rituals*, Liturgy: Journal of the Liturgical Conference, Vol. 7, No. 4.

Punishments that inflict torture or a lingering death or involve the unnecessary and wanton infliction of pain, or a substantial risk of any of the above, violate the Eighth Amendment. *See Fierro v. Gomez, supra,* 77 F.3d at 308. Use of lethal injection constitutes a barbaric means of execution that inflicts torture and unnecessarily cruel and wanton pain and suffering on those subjected to it. Lethal injection is therefore prohibited by the Eighth and Fourteenth Amendments.

Finally, because Eighth Amendment standards are evolving ones of human decency (*Trop v. Dulles, supra*; *In re Foss* (1974) 10 Cal.3d 910, 923), any future evolution in these standards with respect to execution by lethal injection should be applied to this case as well.

XX. CUMULATIVE ERROR REQUIRES REVERSAL OF MASTERS' DEATH SENTENCE

As discussed in our cumulative error argument at the end of the guilt phase discussion above, reversal is required if the cumulative prejudice flowing from the errors below denied Jarvis Masters a fair trial. *Taylor v. Kentucky* (1978) 436 U.S. 478, 488 n.15; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *McDowell v. Calderon* (9 Cir. 1997) 107 F.3d 1351, 1368. Appellant submits that this rule applies with special force when the penalty phase results in a death sentence.

A criminal defendant is entitled to a fair trial. *People v. Hill* (1998) 17 Cal.4th 800, 844. When cumulative errors result in a trial which is fundamentally unfair, reversal is required. *Id.* If the cumulative errors occur during the penalty phase, a retrial of the penalty phase is required. *People v. Purvis* (1963) 60 Cal.2d 323, 353.

Reversal is warranted in this case because there were numerous penalty phase errors which, when taken together along with the guilt phase errors, resulted in appellant having been sentenced to death as a result of a fundamentally unfair trial. The penalty phase errors included the following:

- The denial of Masters' motion to *voir dire* the jury or empanel a new jury at the completion of the Woodard penalty phase;
- The extreme time limit imposed on closing argument;

- The extreme time limit imposed on closing argument;
- The admission of uncharged crimes as aggravating factors;
- The admission of gruesome photographs of the victim of an uncharged crime; and
- The violations of the federal constitution inherent in the sentencing scheme as interpreted by this court and applied at appellant's trial.

Appellant's death sentence requires reversal due to the prejudicial effect of the cumulative errors at the penalty phase. It bears repeating: Death is different.

> Because sentences of death are 'qualitatively different' from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that that sentence was not imposed out of whim, passion, prejudice, or mistake.
>
> *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118. (O'Connor, J., concurring)

Cumulative error at the penalty phase renders a trial fundamentally unfair, and the death sentence arising out of such a fundamentally unfair trial must be reversed. *People v. Purvis*, *supra*, 60 Cal.2d at 353. "Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee a defendant a full defense be observed." *People v. Keenan* (1982) 31 Cal.3d 425, 430-431.

CONCLUSIONS

The stark reality of this case is that a man very likely innocent has been condemned to die without a real test of his guilt. Masters wasn't allowed a simple lineup after Willis, his principal accuser, totally misdescribed him. The jury also never heard the defense case. They never learned that Harold Richardson, who closely matched Willis' description of the fourth co-conspirator, fully admitted his role in the murder of Sergeant Burchfield. The jury likewise didn't learn that co-conspirator admissions undermined most of the State's case against Jarvis Masters. Finally, the jury didn't learn that Bobby Evans, Masters' other principal accuser, lied to them and that the State promised and awarded him an early release from state prison. Had they learned all these facts, Jarvis Masters would probably be a free man today.

The State will justify this arbitrariness. The defense, it will be argued, waited too long to ask for a lineup. Richardson's and Drume's rights to remain silent were protected by the Fifth Amendment. Hearsay about what they said must be deemed unreliable. The State, it will be argued, wasn't shackled by these rules since important interests are served by the State's power to grant immunity, protection, and legal benefits to its witnesses.

The undisputed facts and California law are themselves sufficient to resolve this constitutional dilemma. The lineup request was made

when the facts cried out for a lineup. Any delay was caused by the State. Admissions which expose a man to the penalty of death from all sides — both at the hands of the State and the hands of the Black Guerilla Family — are not hearsay. As a matter of California law, the lineup request should have been granted, and the Richardson and Drume admissions should have been admitted. The trial court's rulings denying the defense the opportunity to impeach Bobby Evans were contradicted by undisputed facts.

Fundamental fairness calls for a new trial in which appellant is allowed to prove his innocence with the actual facts of his case. If this basic right cannot be granted in a capital trial, the sobering reality should be admitted. "[T]he practical and human limitations of [our] system cannot be ignored." *Bruton v. United States* (1968) 391 U.S. 123, 134-135. If a man can be condemned to die without a real test of his guilt, the penalty of death cannot be imposed.

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