IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CARL DEVON POWELL,

Defendant and Appellant.

No. S043520

APPELLANT POWELL'S OPENING BRIEF

Volume II, pages 343 - 690

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
In and For The County of Sacramento, No. 113126
The Honorable James I. Morris, Presiding

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XII.

THE TRIAL COURT ERRED, TO APPELLANT'S PREJUDICE, BY INSTRUCTING THE JURY UNDER CALJIC NO. 2.50 THAT EVIDENCE OF APPELLANT'S UNCHARGED CRIMES COULD BE USED TO PROVE INTENT, IDENTITY, KNOWLEDGE OR POSSESSION OF THE MEANS NECESSARY TO COMMIT THE CHARGED OFFENSES.

Based on evidence that appellant had committed uncharged crimes by carrying concealed firearms, the trial court gave CALJIC No. 2.50 over appellant's objection. The instruction provided that evidence of appellant's uncharged crimes could not be used to prove bad character but was relevant to prove intent, identity, knowledge and possession of means to commit the charged offenses. This was error. At best, the evidence that appellant had carried concealed firearms was relevant to prove only identity. The irrational inferences authorized by the instruction lightened the prosecution's burden of proof to appellant's prejudice.

A. Background Facts

The evidence showed that appellant carried a concealed firearm on three occasions: (1) when he displayed a handgun to KFC employees Martinez and Rodriquez around Halloween of 1991 (see Argument VI, §§ A.1-A.2 & C.1); (2) when he threw bullets at a park trashcan in the company of Eversole and Brogdon about one week before the charged crimes (17RT 6841-43, 6845, 6918-19; 23RT 8845-46); and (3) during his return trip from Los Angeles, when he surrendered a handgun to Littlejohn, who later threw it in a dumpster and led police to it. (31CCT 9264, 9275-76; 19RT 7543-45; 28RT 10403-05.)

At the first jury instruction conference on August 23, 1994, the prosecution requested that the trial court give CALJIC No. 2.50 because appellant's possession of a concealed weapon was "a step in the direction of doing an armed robbery." (30RT 10943-10944; 2CT 580.) Defense counsel contended that the evidence did not support the instruction. (30RT 10942-10944.) The trial court questioned the instruction's applicability (*ibid.*) but ultimately decided to give it. (30RT 10944-10945). It told defense counsel that he could "make a note about objecting when we go back over the instructions." (30RT 10945.) Counsel did not do so at the second jury instruction conference held on August 24, 1994. (31RT 11061.)

The trial court instructed the jury with CALJIC No. 2.50. (31RT 11110; see also 2CT 580-581.) The instruction provided that evidence "that the defendant committed crimes" other than those charged could not be considered to prove he was a person of bad character or was predisposed to committing crimes. (*Ibid.*) Such evidence could be considered only for the limited purpose of showing "the existence of the intent which is a necessary element of the crime charged, the identity of the person whom committed the crime, if any, of which the defendant is accused, [or] the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged." (*Ibid.*)

In closing argument, the prosecutor stated that CALJIC No. 2.50 pertained to "when witnesses testified that [appellant] had a gun around Halloween, he's not allowed to have a gun. That's a crime, but that's not

charged" because it was a relatively minor offense. (31RT 11162-11163.) The evidence presented did not indicate that appellant was prohibited from possessing a gun. (See Pen. Code, § 12021 [convicted felons and other specified individuals cannot possess a firearm].) Nevertheless, it demonstrated that appellant engaged in the offense of carrying a concealed firearm. (Pen. Code, § 12025.)

The prosecutor also argued that the Halloween gun display showed that appellant: was "on the ... criminal path ... thinking about doing an armed robbery;" thought of robbing KFC as early as October 1991; and premeditated and deliberated the murder. (31RT 11186; 32RT 11359.) He contended, "[y]ou can premeditate and consider beforehand and then do the murder later," and, although deliberation and premeditation are not elements of robbery, they pertain to escape after a robbery. (31RT 11186, 11342.)

In his closing and rebuttal arguments, the prosecutor also contended that the bullet that killed McDade, the bullets appellant threw at the park trashcan and the bullet found in the alley behind Isolde's Flower Shop, where the homicide weapon may have been loaded, were all consistent. (31RT 11186-11187, 11349-11350.) Additionally, the prosecutor linked appellant to the robbery and slaying through the gun recovered through Littlejohn. (31RT 11186-11187, 11200-11201, 11203.) He emphasized Littlejohn's testimony that appellant was walking around with a gun in his pocket, acting "stupid" and without remorse. (31RT 11207.)

Defense counsel countered in his closing argument that the Halloween

gun display tended to show simply that appellant armed himself, not that he was contemplating a robbery. (31RT 11273-11274.)

B. The Challenge to CALJIC No. 2.50 Has Been Preserved for Review

Appellant's challenge to CALJIC No. 2.50 has been preserved for review. Generally, a party forfeits review of an instruction correct in law and responsive to the evidence by failing to object to it below. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) An objection need not be lodged in any particular form. In context, it must simply inform the trial court of the specific reason for why the party takes exception to its ruling so as to give the court an opportunity to correct it. (See generally, *People v. Marks* (2003) 31 Cal.4th 197, 228-229 [discussing adequacy of evidentiary objections].)

Defense counsel contended that CALJIC No. 2.50 was inapplicable under the evidence. Whenever the trial court voiced a potential permissible use of appellant's uncharged crimes, counsel contended it did not make sense. (30RT 10942-10944.) He maintained that appellant's possession of concealed firearms did not logically tend to show that appellant intended, planned or possessed the means necessary to commit the charged robbery, the purposes for which the prosecutor wanted the instruction. (*Ibid.*) Defense counsel sufficiently apprised the court that he opposed the instruction on these grounds.

Although counsel did not renew his opposition at the second jury instruction conference (30RT 10945; 31RT 11061), doing so was unnecessary to preserve the issue. The second conference was a continuation of the first.

Its purpose was to finalize the instructions in light of certain "rewording and reordering" that the trial court had done since the first conference. (31RT 11057.) The only mention of CALJIC No. 2.50 at the second conference was when the court stated that the instruction had already been discussed. (31RT 11061.) Since nothing concerning CALJIC No. 2.50 had changed between the two conferences, renewal of the objection was unnecessary. (Cf. *People v. Holloway* (2004) 33 Cal.4th 96, 133 [pretrial objection to evidence, made before trial court aware of precisely what evidence will show, must be renewed after evidence is actually presented to give court a change to intelligently rule].) Moreover, at the end of the second conference, the trial court stated that objections to instructions "previously articulated" remained recognized. (31RT 11089.) It did not limit this to only those objections made at the second conference. Consequently, appellant's objection to CALJIC No. 2.50 preserved for review appellant's challenge to the instruction.

Assuming *arguendo,* defense counsel's statements did not amount to a sufficient objection, appellant's challenge is nevertheless preserved for two reasons. One, although the forfeiture rule applies to unobjected to instructions that are correct in law and responsive to the evidence (*People v. Hudson, supra,* 38 Cal.4th 1002, 1012), multiple aspects of CALJIC No. 2.50 were legally incorrect and not responsive to the evidence, i.e., they stated that appellant's other crimes were relevant for purposes for which they were not relevant.

Two, the forfeiture rule does not apply if the unobjected-to instruction was erroneous and the error undermined the defendant's substantial rights.

(Pen. Code § 1259.) As developed below, CALJIC No. 2.50 violated appellant's right to due process by lightening the prosecution's burden of proof. It is necessary, therefore, for this Court to review appellant's claim of error to determine if this is so. (*People v. Dunkle* (2005) 36 Cal.4th 861, 924, overruled on other grounds in *People v. Dulin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Prieto* (2003) 30 Cal.4th 226, 247 & 268.)

Therefore, appellant's challenge to CALJIC No. 2.50 has been preserved for review.

C. Argument

CALJIC No. 2.50 is designed to address the permissible uses of evidence of a defendant's uncharged misconduct offered under Evidence Code section 1101. (California Jury Instructions, Criminal (Spring 2010 ed.), Use Note to CALJIC No. 2.50 [citing to *People v. Ewoldt, supra,* 7 Cal.4th 380].) Evidence Code section 1101(a) prohibits admission of uncharged wrongdoing whose sole relevance is to prove criminal propensity. Section 1101(b) creates an exception to this rule for "'evidence that a defendant has committed a crime, civil wrong or some other act ... to prove certain facts, such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident....'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 280.)

As this Court has consistently recognized, propensity evidence, in the form of uncharged misconduct by a defendant, is "inherently prejudicial." (*People v. Williams* (1988) 44 Cal.3d 883, 904.) It creates a danger that the

jury will convict a defendant based on his prior bad acts rather than sufficient proof of the charged offense. (*People v. Schader* (1969) 71 Cal.2d 761, 772.) Consequently, it may be introduced for a non-propensity purpose under Evidence Code section 1101(b) only after it has been "'scrutinized with great care'" and subjected to "'a closely reasoned analysis.'" (*People v. Williams, supra,* at p. 905.)

The admissibility of other-crimes evidence depends on: "'(1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence, e.g., Evidence Code section 352.'" (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1395, citations omitted.) "Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" (*People v. Daniels, supra,* 52 Cal.3d 815, 856.)

A trial court has no *sua sponte* duty to instruct pursuant to CALJIC No. 2.50 but, if requested, it "must give an instruction limiting the evidence to its proper scope." (*People v. Grant* (2003) 113 Cal.App.4th 579, 591.) As demonstrated below, CALJIC No. 2.50 failed to correctly limit the evidence that appellant carried concealed firearms because it allowed jurors to draw irrational inferences about this evidence.

The instruction violated due process (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15) in two respects. One, it erroneously informed the jury

it could draw irrational inferences. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 165; *People v. Mendoza, supra,* 24 Cal.4th 130, 180.) Two, it lightened the state's burden of proving the existence of each element essential to conviction beyond a reasonable doubt. (*In re Winship, supra,* 397 U.S. 358, 364-365; *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-524.) It did so by wrongly relating inherently prejudicial other crimes evidence to elements of the charged crimes. (*Spencer v. Texas* (1967) 385 U.S. 554, 575-576 (Warren, C.J., conc. & dis.) [it violates due process for jury to convict defendant due to his bad character rather than actual guilt for charged offense]; *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Garceau* (1993) 6 Cal.4th 140, 186, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [recognizing that erroneous other crimes instruction, authorizing consideration of other crimes for impermissible propensity purposes, may have lightened the state's burden of proof]; *People v. Harris* (1998) 60 Cal.App.4th 727, 737 [admission of inherently prejudicial other crimes evidence may violate due process by diverting jury's attention away from evidence of the charged crime and towards impermissible propensity reasoning].)

By skewing the jury's determination of guilt, the error also violated appellant's right to a reliable guilt and, hence, penalty phase determination. (U.S. Const., amend. VIII; Cal. Const., art. I, § 17; *California v. Ramos* (1983) 463 U.S. 992, 998-999 & fn. 9.)

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1. Intent

When evidence of a defendant's uncharged wrongdoing is presented to prove the element of intent for a charged crime, "'the [charged] act is conceded or assumed; what is sought is the state of mind that accompanied it.'" (*People v. Ewoldt, supra,* 7 Cal.4th 380, 394, fn. 2, italics in *Ewoldt,* quoting 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 300, p. 238.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar [to the charged crime] to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ewoldt, supra,* at p. 402, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879, disapproved on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387 fn. 13.) There must be a "direct relationship" between the prior offense and the mental state element of the charged offense. (*People v. Daniels, supra,* 52 Cal.3d 815, 857.)

The trial court's version of CALJIC No. 2.50 did not specify to which of the charged crimes, murder, robbery or theft, appellant's possession of concealed firearms related. Assuming that appellant committed the criminal acts comprising these offenses, the dissimilarity between the charged and uncharged misconduct was too stark for jurors to rationally infer that appellant harbored the same criminal intent during both.

When appellant committed the uncharged offenses of carrying a concealed firearm (Pen. Code, § 12025), he kept his firearm concealed in clothing or a vehicle and momentarily displayed it in a non-threatening

manner. There was no evidence his gun was loaded for the Halloween incident. It was questionable whether it was loaded during the park incident (compare 17RT 6918-6919 with 23 RT 8846), and, in any event, appellant threw away his bullets at a park trashcan. Appellant did not use these guns for any specific purpose but just carried them passively. (*People v. Arzate* (2003) 114 Cal.App.4th 390, 400-401 [contrasting "passive" crime of carrying a concealed firearm with crimes like robbery and felony murder which involve "affirmative actions"].) There are two mental state components to the crime: (1) general intent to commit the act of carrying the concealed weapon plus (2) knowledge of its presence. (*People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030-1031; CALJIC No. 12.41.1; CALCRIM No. 2520; see also *People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332 [in context of statute prohibiting carrying concealed dirk or dagger].) Thus, appellant carried the concealed firearms intentionally and with knowledge of their presence.

Assuming appellant committed the acts in the charged crimes, their circumstances are markedly dissimilar from the uncharged crimes. There is no evidence a firearm was involved in the thefts. The firearm involved in the robbery and murder was actively used against McDade to take his property by force or fear and to kill him. Appellant's prior passive conduct in the carrying a concealed firearm offenses is nothing like the active conduct involved in the charged crimes. (*People v. Arzate, supra,* 114 Cal.App.4th 390, 400-401.) Also, the results of the prior and charged crimes are dissimilar. Because it is the recurrence of a *similar result* from uncharged and charged conduct that tends to negate the possibility of innocent intent and tends to prove the existence of criminal intent (*People v. Ewoldt, supra,* 7 Cal.4th 380, 402), one

cannot logically infer that appellant committed both the uncharged and charged crimes with the same culpable mental state. Thus, the prior offenses were not logically relevant to prove appellant's criminal intent during the charged crimes.

In cases where an uncharged crime was properly admitted to prove intent, there is far greater similarity between the uncharged and charged crimes than there is here. (E.g., *People v. Yeoman, supra,* 31 Cal.4th 93, 104-105, 121-122 [in both, defendant used "good Samaritan" ploy of helping victim fix her vehicle before taking her property at gunpoint]; *People v. Hayes* (1990) 52 Cal.3d 577, 617 [in both, defendant assaulted and bound with coat hangers a male victim in a hotel room and then searched it for property]; *People v. Nible* (1988) 200 Cal.App.3d 838, 849-850 [in prior crimes, defendant entered female victims' rooms at night through window and touched victims before being scared away; in current crime, defendant attempted to enter female victim's room at night through window before being scared away].)

Appellant's prior incidents of carrying a concealed gun were irrelevant and hence inadmissible to prove intent for the current offenses. The prosecutor's claim that they tended to show appellant's intent to rob (32RT 11359) was based on speculation, not evidence. Such an irrational inference is not a proper basis for an instruction. (*Ulster County Court v. Allen, supra,* 442 U.S. 140, 157, 165; *People v. Hannon* (1977) 19 Cal.3d 588, 600 [if evidence is inadmissible for a given purpose, court errs in instructing jurors they may consider the improperly admitted evidence for this purpose].) Moreover, there are reasons why appellant may have carried a concealed gun which, while not

legalizing this conduct, are not themselves connected to illegal activity and are much more plausible -- including a believed need for self-defense or adolescent showing off.

2. Knowledge

The trial court's version of CALJIC No. 2.50, addressing "knowledge ... useful or necessary for the commission of the crime charged" (31RT 11110), could have been construed by jurors to relate to an element of knowledge in any of the charged offenses. Carrying a concealed firearm requires proof of the defendant's knowledge of weapon's presence. Knowledge, however, is not an element of any of the charged offenses. Thus, there was no "direct relationship" between the prior and charged crimes concerning the element of knowledge. (*People v. Daniels, supra,* 52 Cal.3d 815, 857.)

3. Identity / Possession of the Means Useful or Necessary

Generally, to warrant an inference that the charged and uncharged offenses were committed by the same person, an even greater degree of similarity between the charged and uncharged crimes is required than to prove intent. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 403.) Both must share common features that are "so unusual and distinctive as to be like a signature.'" (*Id.* at p. 402, quoting 1 McCormick (4th ed. 1992) § 190, pp. 801-803.) Here, the uncharged and charged crimes do not share this extremely high level of similarity. (See *People v. Barnwell, supra,* 41 Cal.4th 1038, 1055-1057

[defendant's possession of firearm one year before charged crimes was "not so distinctive ... as to serve as a signature or fingerprint" supporting that because he had committed the earlier offense he must have also committed the charged offenses].)

Identity may also tend to be shown by evidence that the defendant possessed a weapon that could have been used to commit the charged offense. (*People v. Hamilton, supra,* 41 Cal.3d 408, 430; *People v. Riser* (1956) 47 Cal.2d 566, 577.) Because the gun appellant displayed around Halloween was different from that used in the charged offenses (see Argument VII. §§ A.2 & C.1, *ante*), it was not logically relevant to prove identity. It showed only appellant's propensity to carry concealed firearms. CALJIC No. 2.50, in conjunction with the prosecutor's closing argument (31RT 11162-11163), wrongly permitted the jury to use the Halloween incident to infer appellant's identity as the perpetrator based on impermissible propensity reasoning.

On the other hand, evidence of appellant's carrying the concealed firearm during the park visit and return trip from Los Angeles was arguably relevant to identity. Sherry Brogdon testified that the gun she saw at the park could "possibly" have been the gun identified as People's Exhibit No. T-18A. (17RT 6850, 6853, 6861.) The autopsy slug, People's Exhibit No. T-56, which was too damaged for specific identification, was consistent with, *inter alia,* a .38 caliber bullet, and People's Exhibit No. T-18A, the gun recovered through Littlejohn, fired .38 short bullets. (27RT 9983, 9989-9990, 10147-10148, 10150.) At best, therefore, CALJIC No. 2.50 should have authorized only one permissible use for evidence of appellant's uncharged crimes. Because the

instruction permitted consideration of appellant's other crimes for numerous impermissible purposes, it was erroneous.

D. The Prejudice

CALJIC No. 2.50's informing the jury that it could consider appellant's uncharged crimes for multiple impermissible purposes rendered appellant's trial fundamentally unfair in violation of due process. (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15.) Accordingly, prejudice must be assessed under the stringent *Chapman* standard for prejudice from federal constitutional error. (*Chapman v. California, supra,* 386 U.S. 18, 24; see *People v. Garceau, supra,* 6 Cal.4th 140, 186 [assuming, without deciding, that *Chapman* applies to erroneous instruction on other crimes evidence].)

The key disputed issue in the case was appellant's intent for both the robbery and murder. (31RT 11247, 11249-11251, 11327, 11331, 11337-11338 [defense counsel's closing argument].) CALJIC No. 2.50 wrongly told the jury it could consider appellant's inherently prejudicial gun crimes on this critical issue. (31RT 11110.) The harmful effect of an error is exacerbated when the error goes to the heart of a crucial, contested issue. (See *People v. Rucker* (1980) 26 Cal.3d 368, 391 [finding prejudice from erroneous introduction of evidence that "went directly" to defense presented and intimated it was fabricated]; *People v. Vargas, supra,* 9 Cal.3d 470, 481 [*Griffin* error is prejudicial where it touches a "'live nerve'" in the defense].)

The instruction did not say how the jurors were to consider appellant's

other crimes for intent. Although it cautioned jurors not to consider them as demonstrating appellant's bad character (31RT 11110), because there was no legitimate way to view the evidence for intent, "the limiting instruction was likely to be of little value." (*People v. Felix* (1993) 14 Cal.App.4th 997, 1009 [limiting instruction is of no assistance where other crimes evidence was erroneously admitted to show identity and there was no proper way to view this evidence].) There was a danger the jurors would view the other crimes evidence for the impermissible propensity purposes outlined by the prosecutor: appellant carried a concealed firearm "because he's headed down the criminal path," had criminal objectives in mind and, thus, acted on them in committing the charged crimes. (31RT 11341-11342.)

Further, the prejudicial nature of the erroneous instruction was augmented for two reasons. The prosecutor drew the jurors' attention to it in his closing argument. (31RT 11162-11163; *People v. Woodard* (1979) 23 Cal.3d 329, 341.) Additionally, jurors may have been motivated to punish appellant for his other crimes because they did not result in convictions. (*People v. Ewoldt, supra,* 7 Cal.4th 380, 405.)

Appellant has previously discussed why the evidence furnishes plausible reasons for a verdict more favorable to him. (See Argument I, § C.5.a, *ante.*)

XIII.

THE JUDGMENT CANNOT STAND BECAUSE THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN INSTRUCTING THE JURY IT COULD CONSIDER APPELLANT'S EFFORTS TO SUPPRESS EVIDENCE PURSUANT TO CALJIC NO. 2.06.

The prosecution requested that the trial court instruct the jury with CALJIC No. 2.06, which permits an inference of consciousness of guilt from an accused's suppression of evidence. (30RT 10898; 2CT 565.) The court and parties discussed whether Littlejohn's testimony about disposing of appellant's gun warranted the instruction. (30RT 10897-10899, 10937-10939.)

Littlejohn testified that she came to rescue her son, Coleman, and his companions, appellant and two other young men, after their car broke down on their way back from Los Angeles. (28RT 10389-92.) She demanded that appellant get rid of his gun in order to ride with her. (31CCT 9263, 9266; 28RT 10399.) She pressured appellant to hand it over, and appellant complied because he was weak. (31CCT 9263-9264, 9288; 28RT 10402-403.) After they returned to Sacramento, appellant and his friend, "Doc," called her repeatedly asking for the gun back. (31CCT 9264, 9273. 9276, 9285; 28RT 10408-10409.) She did not want the gun to be used in a future crime (31CCT 9254-9255, 9266, 9285) and was tired of the young men's repeated requests for its return, so she threw it into a dumpster. (31CCT 9275-9276; 28 RT 10403.) Later, she led the police to it. (19RT 7540, 7543-7545; 31CT 9276, 9285-9286; 28RT 10403-10405.)

Appellant objected to CALJIC No. 2.06 because it lacked evidentiary

support. (30RT 10897, 10899, 10938.) Counsel maintained that the evidence showed appellant wanted to keep his gun and did not want Littlejohn to have it or do anything with it. (*Ibid.*) The trial court agreed. (30RT 10938.) The prosecutor conceded that this was the only reasonable way to view Littlejohn's testimony. (*Ibid.*) He argued, nevertheless, that the jury could disregard these aspects of her testimony and instead focus on evidence that "the murder weapon ... was given to" Littlejohn, who was the "mother of a friend of [appellant's], and it wound up in a dumpster...." (30RT 10938-10939.)

Persuaded by the prosecutor's position, the trial court decided to give CALJIC No. 2.06. (30RT 10939.) It instructed (31RT 11104; see also 2CT 565):

> If you find that a defendant attempted to suppress evidence against himself in any manner such as by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. [¶] However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

A trial court may give a consciousness of guilt instruction upon request. (*People v. Najera* (2008) 43 Cal.4th 1132, 1139.) Before it may do so, the record must contain substantial evidence that the defendant sought to suppress evidence. (*People v. Hannon* (1977) 19 Cal.3d 588, 597; see also *People v. Hart* (1999) 20 Cal.4th 546, 620.) "Substantial evidence" is evidence of reasonable and credible value, such as might persuade a rational trier of fact. (*People v. Crew* (2003) 31 Cal.4th 822, 835.)

The trial court erred in giving the instruction because substantial evidence was lacking that appellant sought to suppress the gun. The evidence

showed that appellant did not want Littlejohn to have his gun. Littlejohn was a parental figure with a forceful personality[94] and was the only available ride home after appellant and his friends became stranded. Appellant surrendered his gun to her reluctantly. There was no evidence that he and Littlejohn discussed her disposing of the gun for him or that he acquiesced in her doing so. Notably, after the group returned to Sacramento, appellant kept asking her for the gun back, but she refused to return it. (See Argument IX, *ante.*) If appellant had wanted Littlejohn to discard it, he would not have repeatedly tried get it back.

In *People v. Hannon, supra,* 19 Cal.3d 588, this Court addressed when evidence of a third party's evidence suppression adversely reflects on a defendant's consciousness of guilt and warrants an instruction such as CALJIC No. 2.06. There, the evidence showed that the district attorney's investigator asked the defendant's alibi witness to speak about the defendant's case, but the witness refused, citing the advice of an unspecified attorney. (*Id.* at pp. 595-596.) This Court ruled, *inter alia,* that the record lacked evidentiary support for CALJIC No. 2.06. Even if it was the defendant's attorney (as opposed to another attorney) who directed the witness to remain silent, this did not amount to an attempt to suppress evidence *by the defendant.* (*Id.* at pp. 598-602.) The record "fail[ed] to supply the necessary nexus between defendant and the alleged suppression of evidence" because it failed to show that the defendant authorized the effort at suppression. (*Id.* at pp. 599-600.) "Generally, evidence of the attempt of third persons to suppress testimony is inadmissible

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[94] In closing argument, defense counsel characterized Littlejohn as a "pretty severe woman" who reminded him of the song, "pork salad and a mean razor-toting woman." (31RT 11293.)

against a defendant when the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." (*Id.* at p. 599, internal citations and quotations omitted; see also *People v. Williams* (1997) 16 Cal.4th 153, 200; *People v. Weiss* (1958) 50 Cal.2d 535, 554.)

Although the prosecutor correctly observed that the jury could disregard that part of Littlejohn's testimony indicating that appellant objected to her taking his gun (30RT 10898-899, 10938; *People v. Williams* (1992) 4 Cal.4th 354, 364), the remaining evidence failed to show that appellant actually authorized Littlejohn to dispose of it. The prosecutor emphasized that Littlejohn was the mother of appellant's friend as reason to infer appellant's authorization. (30RT 10939.) Even in light of their relationship,[95] an inference that appellant authorized Littlejohn depended on speculation, which does not amount to "substantial evidence." (*People v. Perez* (1992) 2 Cal.4th 1117, 1133 [a reasonable inference is based on evidence, not speculation].)

Two decisions by this Court addressing when witness intimidation efforts by third parties with a relationship to the defendant permit an inference that the defendant authorized them are instructive. In *People v. Terry* (1962) 57 Cal.2d 538, the defendant's brother-in-law's wife sent a telegram to a witness which implicitly threatened him if he testified against the defendant. The telegram was introduced into evidence over the defendant's objection that

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[95] Although Littlejohn was the mother of appellant's friend (30RT 10939), she was hostile to appellant. Littlejohn stated she had never met appellant before (28 RT 10385, 10435-436), did not care about him (31CCT 9280) and was angry at him for creating the circumstances leading to her involvement.

the evidence failed to show the defendant authorized it. (*Id.* at p. 565.) *Terry* held that admission of the telegram was error. "The relationship of the sender to and her personal interest in appellant are no proof of authorization. Relationship to the defendant does not prove authorization [citations]...." (*Ibid.*) At best, this Court concluded, the evidence showed that the defendant had an opportunity to authorize the telegram, but one could not logically infer that he actually did so absent "conjecture, surmise or suspicion." (*Id.* at p. 567.)

In contrast, *People v. Williams, supra,* 16 Cal.4th 153 found the evidence had sufficiently connected defendant Barry Williams with conduct by Mark Williams and others in shooting at the house of a witness, Patricia Lewis, who lived on 87th Street. (*Id.* at pp. 179, 198, 200-201.) The evidence showed that defendant and Mark Williams were members of the same subset of the Blood gang. (*Id.* at pp. 177-178, 198.) Mark visited Barry in jail prior to the shooting; Barry stated that he was going to get another person to shoot a witness so he could beat charges against him; and Mark stated that he and others had gone "'to take care of some business' that 'Barry' wanted done" involving "'a witness,' a lady who lived on 87th Street." (*Id.* at pp. 200-201.)

Appellant's case more closely resembles *Terry* than *Williams.* There was no evidence that appellant said he wanted the gun suppressed or had talked to anyone about suppressing it. Nor was there any evidence that Littlejohn attributed her suppression of the gun to appellant. She testified that she dumped the gun because she was afraid of what appellant and his friends might

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(31CCT 9272; 28RT 10409, 10424-10427, 10427-10428).

do with it and was tired of their repeated requests to get it back. Appellant's relationship to Littlejohn and his mere opportunity to ask her to suppress the gun do not logically warrant an inference that appellant authorized Littlejohn to dispose of the weapon. One can only find appellant's authorization by resort to speculation and by drawing inferences completely contrary to the only direct evidence of Littlejohn's motivation.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Where there is no rational — as opposed to speculative or conjectural -- connection between the underlying facts and the sought-after inference, instructing the jury that it may draw the desired inference from the underlying facts is a violation of due process. (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15; *People v. Mendoza, supra,* 24 Cal.4th 130, 180.) In *Ulster County Court v. Allen, supra,* 442 U.S. 140, 157, 165 the United States Supreme Court held that a permissive inference (or permissive presumption) violates a defendant's federal constitutional right to due process unless there is a rational connection between the underlying fact and the desired inference, and it can be said "with substantial assurance" that the latter is "more likely than not to flow from" the former. (See also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1243 [accord].) Substantial assurance that Littlejohn acted as appellant's agent in discarding the gun was lacking. The trial court erred in giving CALJIC No. 2.06.

The instructional error prejudiced appellant. Because the error implicates the federal constitutional guarantee of due process of law, its

prejudicial effect must be analyzed under the *Chapman* standard for federal constitutional error, i.e., reversal is required unless the government proves beyond a reasonable doubt that the error had no effect on the verdict. (*Chapman* v. *California, supra,* 386 U.S. 18, 24.) Reversal is also required even under the less stringent *Watson* standard for state-law error, i.e., reversal is necessary if there is a reasonable probability of an outcome more favorable to the accused in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d 818, 836.)

In *People v. Hannon, supra,* 19 Cal.3d 588, this Court reversed because the trial court gave CALJIC No. 2.06 without evidentiary support. (*Id.* at pp. 602-603.) *Hannon* observed that the inference authorized by the instruction threatened to "utterly emasculate whatever doubt the defendant has been able to establish on the question of guilt." (*Id.* at p. 603.) Since the question of the defendant's guilt was close, the error was prejudicial. (*Ibid.*)

People v. *Gloria* (1975) 47 Cal.App.3d 1 also reversed due to the giving of an unsupported consciousness of guilt instruction. It found the error prejudiced the defendant by suggesting that there was some factual basis for finding that he had engaged in the suppression of evidence, which is unquestionably highly improper conduct. (*Id.* at pp. 5-7.) The harm was not cured by the trial court's having informed the jury that not all instructions necessarily applied. "This latter instruction but highlights the implication the jury must make a factual determination concerning the bribery or intimidation of witnesses and the destruction of evidence. At the least the [irrelevant] instruction is confusing. At worst it suggests serious wrongdoing on the part of

[the defendant]." (*Id.* at p. 7.)

Appellant has demonstrated previously why the case against him was not an open and shut one concerning his mental state during the charged robbery and murder. (See Argument I, § C.5, *ante.*) Although CALJIC No. 2.06 went to a general consciousness of wrongdoing and did not specifically address appellant's precise mental state during the charged crimes (*People v. Crandell* (1988) 46 Cal.3d 833, 871), there was a real danger that the jurors would have misused the instruction for this very purpose. A general guilty state of mind and the precise guilty mental state required for an offense would appear closely related to the average lay juror. Further, whether appellant specifically intended to rob McDade as necessary for robbery or felony-murder based on the underlying felony of robbery, or whether appellant deliberated and premeditated the shooting, were the only real issues for the jurors to decide during the guilt phase. (2RT 1019-1020 [trial counsel's description of issues at pretrial conference], 31RT 11249-11250, 11327, 11337-338 [trial counsel's closing argument].) It would have therefore been natural for the jurors to apply the erroneous instruction to them. Even if they did not, the inference that appellant sought to suppress evidence certainly blackened his character and thus made it unlikely the jurors would view the evidence helpful to him in a favorable light. (*People v. Hannon, supra,* 19 Cal.3d 588, 603; *People* v. *Gloria, supra,* 47 Cal.App.3d 1, 7.)

Accordingly, the judgment must be reversed.

XIV.

THE INSTRUCTION ON FLIGHT, CALJIC NO. 2.52, AUTHORIZED AN IRRATIONAL PERMISSIVE INFERENCE.

The evidence showed that, after the crimes against McDade, appellant went to Stockton (30CCT 8984-8986) and Los Angeles (30CCT 8987) before returning to Sacramento, where police arrested him. (19RT 7528-7529, 7534-7535). The prosecution requested that the trial court instruct the jury with CALJIC No. 2.52 on the significance of a defendant's "flight." (2CT 585.) The instruction authorizes the jury to infer the defendant's consciousness of guilt from evidence establishing the predicate fact of the defendant's "flight." (*People v. Crandell* (1988) 46 Cal.3d 833, 869, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; see also *People v. Hill* (1967) 67 Cal.2d 105, 120 [a defendant's "flight" after commission of a crime is "relevant because it may demonstrate consciousness of guilt and has no other probative value"].)

The trial court instructed the jury with CALJIC No. 2.52 as follows (31RT 11111-11112; 2CT 585):

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but it is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. [¶] The weight to which such circumstance is entitled is a matter for the jury to determine.

There are many types of "flight." Not all warrant an inference of the defendant's consciousness of guilt. For example, flight is defined as "swift

movement, transition or progression" which is synonymous with "rush, dash, fleetingness."[96] It is also defined as "[t]he motion of an object in or through a medium," particularly "through the ... atmosphere or ... space."[97] A defendant's mere movement though space, however, does not warrant an inference of his consciousness of guilt. (*People v. Clem* (1980) 104 Cal.App.3d 337, 344 [defendant's arrest away from crime scene, in and of itself, does not warrant inference of consciousness of guilt]; *People v. Watson* (1977) 75 Cal.App.3d 384, 403 [same].)

For the inference to be warranted, the defendant must move with the intent to avoid answering for his criminal conduct. As this Court has recognized, "flight" warranting an inference of consciousness of guilt "manifestly does require ... a purpose to avoid being observed or arrested." (*People v. Crandell, supra,* 46 Cal.3d 833, 869.) Stated differently, the inference is logical when the defendant's movement was "motivated by guilty knowledge." (*People v. Turner* (1990) 50 Cal.3d 668, 694.)

The inference of consciousness of guilt authorized by CALJIC No. 2.52, however, is not limited to only that type of "flight" which logically warrants it. The instruction permits the jury to infer the defendant's consciousness of guilt from *any type of "flight,"* including his mere movement through space. This is misleading and should have been corrected by the trial court. Included in a trial court's sua sponte duty to instruct on "'general principles of law that are ... necessary to the jury's understanding of the case'" is the obligation to define any ambiguous instructional term which has a specialized meaning.

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96 http://dictionary.reference.com/browse/flight.

(*People v. Roberge* (2003) 29 Cal.4th 979, 988.) The trial court should have modified CALJIC No. 2.52 to provide that the defendant's flight must be for "the purpose to avoid being observed or arrested" if it is to warrant an inference of consciousness of guilt. (*People v. Crandell, supra,* 46 Cal.3d 833, 869.)

Because it lacked such language, CALJIC No. 2.52 authorized an irrational inference: it allowed the jury to infer the defendant's consciousness of guilt simply from the his post-offense movement, regardless of its motivation. A permissive inference is irrational where it cannot be said with "substantial assurance" that it is "more likely than not to flow" from a predicate fact on which it depends. (*Ulster County Court v. Allen, supra,* 442 U.S. 140, 157, 165-166; *People v. Mendoza, supra,* 24 Cal.4th 130, 179-180.) An instruction that authorizes an irrational inference violates due process and the jury trial guarantee. (*Ibid.*; U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 7, 15 & 16.)

At the same time, CALJIC No. 2.52 did not preclude jurors from properly considering the purpose of the defendant's movement in determining if he engaged in "flight" indicating consciousness of guilt. The instruction was ambiguous in this respect. Whether an ambiguous instruction is erroneous depends on whether there exits a "reasonable likelihood" that that the jurors applied it in an impermissible manner. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California* (1990) 494 U.S. 370, 380.) A "reasonable

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97 http://www.thefreedictionary.com/flight.

likelihood" in this context is something more than a mere "possibility" but can be satisfied by something less than "more likely than not." (*Ibid.*)

There is a "reasonable likelihood" that the jurors applied CALJIC No. 2.52 erroneously to infer appellant's consciousness of guilt simply from evidence of appellant's post-offense journey, without regard to the purpose for which he undertook it. The trial court and counsel simply assumed that evidence of appellant's leaving Sacramento constituted the type of "flight" warranting an inference of his consciousness of guilt. (30RT 10903, 31RT 11061 [court simply noted at instructional conferences that it will give CALJIC No. 2.52]; 31RT 11296-11298 [defense counsel concedes prosecutor's point that appellant's Los Angeles trip was in flight]) In a knee-jerk fashion, they equated a defendant's post-offense movement with guilty flight regardless of the defendant's purpose for the movement. A number of trial courts have used the same superficial approach in wrongly choosing to give CALJIC No. 2.52 based simply on evidence of the defendant's post-offense movement. (*People v. Crandell, supra,* 46 Cal.3d 833, 869-870; *People v. Clem, supra,* 104 Cal.App.3d 337, 344; *People v. Watson, supra,* 75 Cal.App.3d 384, 403.) There is a "reasonable likelihood" that appellant's jurors would have taken the same approach. Thus, CALJIC No. 2.52 was erroneous.

This Court has rejected claims similar to appellant's in *People v. Mendoza, supra,* 24 Cal.4th 130 and *People v. Abilez* (2007) 41 Cal.4th 472. *Mendoza* found that CALJIC No. 2.52 does not authorize an irrational permissive inference without indicating why the defendant claimed it did. (*Mendoza, supra,* at pp. 179-180.) We cannot assume, therefore, that *Mendoza*

rejected the same claim now made by appellant: that because "flight" has different meanings, not all of which justify a rational inference of consciousness of guilt, it must be further defined. In *Abilez,* the defendant argued that the trial court should have modified CALJIC No. 2.52 to require, *inter alia,* that the jury make a preliminary finding that the defendant "fled to avoid arrest" before it could infer consciousness of guilt from the defendant's flight. (*Abilez, supra,* at p. 522.) The opinion found that this was unnecessary because "'the instruction did not assume that flight was established, leaving that factual determination and its significance to the jury.' [Citation.]" (*Ibid.*) But this analysis only begs the question, what sort of flight may a jury find which is logically relevant to the question of the defendant's guilt? *Abilez* does not grapple with this question. Accordingly, neither *Mendoza* nor *Abilez* govern appellant's claim of error.

The error prejudiced appellant. Since it is of federal constitutional dimension, reversal is required unless the state proves it harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) The state cannot discharge this onerous burden.

The jurors were free to draw their own conclusions about the evidence, regardless of the position advanced by either party. (*People v. Barton* (1995) 12 Cal.4th 186, 203.) The evidence afforded a plausible basis to conclude that appellant went on the trip to Stockton and Los Angeles for reasons other than avoiding observation or arrest, i.e., (1) for recreation and (2) to visit his mother.

After the offenses, appellant and the Hodges spent the night in a Stockton motel with some females before parting ways. (30CCT 8984-8987.) Appellant went to Los Angeles to visit his mother; he arranged for a friend, Coleman, to drive him and two other friends. (30CCT 8987-8989; CCT 9021-9022.) Appellant stayed for only a few hours at his mother's house before heading back to Sacramento. (30CCT 8987-8989.) His mother said that the police were watching her house and asked appellant to go and turn himself in rather than risk staying there and getting shot by the police. (*Ibid.*) On the way back, Coleman's car broke down, and Littlejohn came to bail out the teenagers. (31CCT 9009-9010, 9023-9025.) According to Littlejohn, appellant had already spent all of his money on food, drink and, as Littlejohn put it, "having a big time" (31CCT 9262, 9267), and he just "spilled his guts" about the KFC offenses. (31CCT 9261, 9268.) She thought appellant acted "stupid," "mental," and like he was "a special kid" deserving of S.S.I. because he was mentally slow. (31CCT 9263, 9269; 28RT 10412, 10431). When the California Highway Patrol stopped Littlejohn for driving improperly, appellant did not try to hide or run away. (31CCT 9257, 9291.) Eventually, Littlejohn dropped him off in Sacramento. (30CCT 8987; 31CCT 9029.)

Rational jurors could have viewed the foregoing evidence as establishing that appellant, a mentally slow and unsophisticated youth, did not undertake his journey to avoid observation or arrest. He went to his mother's house, where police might expect him, and left for Sacramento when his mother told him to turn himself in. On the way, he splurged on "having a big time" with females and buddies. He did not undertake any special efforts to maintain a low profile.

CALJIC No. 2.52's allowing jurors to irrationally infer appellant's consciousness of guilt from mere flight, not just flight for the purpose of avoiding criminal responsibility, harmed appellant. Since an inference of the defendant's consciousness of guilt lends itself to an inference of the defendant's actual guilt for the charged offense (*United States v. Harris* (9th Cir. 1986) 792 F.2d 866, 869), the instruction made it easier for the prosecution to convict appellant. Elsewhere, appellant has demonstrated why the evidence presented a plausible basis for a verdict more favorable to him (see Argument I, § C.5, *ante*), and respectfully directs this Court to that portion of his brief.

XV.

THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY INSTRUCTING JURORS UNDER CALJIC NO. 2.71.7 TO VIEW APPELLANT'S EXONERATING UNRECORDED ORAL STATEMENTS WITH CAUTION.

When evidence shows the defendant made an unrecorded, oral admission or damaging pre-offense statement, the trial court has a sua sponte duty to instruct the jury to view it with caution. (*People v. Wilson* (2008) 43 Cal.4th 1, 19; *People v. Lopez* (1975) 47 Cal.App.3d 8, 12.) It is well-recognized that even witnesses "with the best motives are generally unable to state the exact language of an admission" and are thus "liable ... to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury...." (*People v. Bemis* (1949) 33 Cal.2d 395, 399.) Cautionary instructions are necessary "to assist jurors in deciding if the statement was in fact made" and to guard against the risk of an unjust conviction based on a statement falsely attributed to the accused. (*People v. Beagle* (1972) 6 Cal.3d 441, 455-456 & fn. 5, superseded by statute on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301, 307-308.) "For purposes of requiring ... cautionary instructions," this Court has "not distinguished between actual admissions (Evid. Code, § 1220) and pre-offense statements of intent (Evid. Code, § 1250)." (*People v. Beagle, supra,* at p. 455, fn. 5.)

Here, the trial court gave CALJIC No. 2.70, which defined confessions and admissions, informed jurors that they were the exclusive judges of whether the defendant made one and directed them to view evidence of an unrecorded

oral admission or confession with caution. (31RT 11112-11113 & 2CT 589.) The instruction defined an admission as "a statement made by a defendant other than at his trial which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence." (*Ibid.*)

The court also gave CALJIC No. 2.71.7, "Pre-Offense Statement by Defendant," as follows (31RT 11113 & CT 590):

> Evidence has been received from which you may find that a[n] oral statement of intent, plan, motive or design was made by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide whether such a statement was made by the defendant. [¶] Evidence of such oral statement ought to be viewed with caution.

A trial court is obligated to give instructions that are legally correct. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Even a technically correct instruction will be deemed erroneous if it is likely to mislead jurors in violation of the defendant's rights. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1160.)

CALJIC No. 2.71.7 was erroneous because it told jurors to view with caution pre-offense statements by appellant regardless of whether they were harmful or helpful to the defense. The overriding purpose of directing jurors to view with caution an accused's unrecorded, pre-offense statements is to guard against the risk of wrongful conviction due to juror reliance on a fabricated or mistakenly recounted statement. CALJIC No. 2.71.7, like its close cousins CALJIC Nos. 2.70 and 2.71, is designed to protect an accused. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 782-784 [because the cautionary instruction is

meant to protect the defendant and it is often difficult to decide if a statement is in mitigation or aggravation of punishment, at the penalty phase the trial court shall give the cautionary instruction only upon defense request].) Its cautionary directive properly applies only to an accused's *incriminating* unrecorded pre-offense statements.

This Court has so recognized. As noted, *People v. Beagle, supra,* 6 Cal.3d 441, 455, fn. 5, provides that pre-offense statements and admissions are treated similarly for purposes of cautionary instruction. *People v. Slaughter* (2003) 27 Cal.4th 1187, addressing CALJIC No. 2.71's directive to view evidence of a defendant's oral admission with caution, states "'[t]he cautionary language instructs the jury to view evidence of an *admission* with caution. By its terms, the language applies only to statements which tend to prove guilt and not to statements which do not.' [Citation.]" (*Id.* at p. 1200, italics in *Slaughter,* underline added.) Thus, a cautionary instruction on pre-offense statements is meant to address only incriminating pre-offense statements. (See also CALCRIM No. 358 & accompanying Bench Notes [optional language, to be omitted if jury heard only defendant's exculpatory statements, provides: "Consider with caution any statement made by (the/a) defendant *tending to show (his/her) guilt* unless the statement was written or otherwise recorded"], emphasis added.)

The trial court decided to give CALJIC No. 2.71.7 based on evidence of appellant's statements regarding planning the crimes with John Hodges at G-Parkway and appellant's remarks to Scott. (30RT 10904, 10945-10946 [jury instruction conference].) Not all these statements were incriminating. In the

conversation at G-Parkway, appellant conveyed that he did not want to kill McDade. (25RT 9425; 31CCT 9146, 9151 [Banks relates John Hodges's account of G-Parkway conversation].)[98] It was error, therefore, to instruct that any and all of appellant's pre-offense statements of plan, intent, motive and design should be viewed with caution. The instruction was facially flawed. Its cautionary directive should have applied only to incriminating statements.

Even if CALJIC No. 2.71.7 were considered as ambiguous, there was a "reasonable likelihood" the jurors interpreted it erroneously to apply to both incriminating and exculpatory pre-offense statements. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) To assess if such a reasonable likelihood exists, the reviewing court shall consider the instruction's language, meaning in the context of other instructions, and the arguments of counsel. (*Id.* at pp. 525-526.) The plain language of CALJIC No. 2.71.7 did not differentiate between incriminating and exonerating statements. Further, a separate instruction, CALJIC No. 2.70, addressed appellant's admissions, which are incriminating by definition. Since CALJIC Nos. 2.70 and 2.71.7 differentiated between "admissions" and "pre-offense statements," jurors would not have read the latter as equivalent to the former. Further, CALJIC Nos. 2.70 and 3.16, concerning accomplice testimony, both specifically directed jurors to view with caution certain evidence to the extent it tended to incriminate appellant. (See 3CT 604 & 31RT 11119 [CALJIC No. 3.16].) Jurors would have attributed meaning to the omission of similar language in CALJIC No. 2.71.1. Additionally, the parties' arguments did not address the cautionary instruction or shed light on the difference between appellant's admissions and statements.

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[98] Appellant's jury was instructed that it could consider Banks's statements

Typically, error in a cautionary instruction concerning a defendant's incriminating extra-judicial statements is assessed for prejudice under the *Watson* standard for state law error: reversal is required if there is a "reasonable probability" of an outcome more favorable to the accused in the absence of the error. (*Watson, supra,* 46 Cal.2d 818, 836: e.g., *People v. Slaughter, supra,* 27 Cal.4th 1187, 1201; *People v. Ford* (1964) 60 Cal.2d 772, 800, overruled in part on other grounds in *People v. Satchell* (1971) 6 Cal.3d 28.) In this context, a reasonable probability is simply a "*reasonable chance*, more than an *abstract possibility.*" (*College Hospitals, Inc. v. Superior Court* (1994) 8 Cal.4th 707, 715, emphasis in original.)

Because the erroneous instruction violated appellant's federal constitutional rights, however, prejudice should be assessed under the *Chapman* standard for federal constitutional error: reversal is required unless the state can prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) That appellant did not want to kill McDade was a crucial to his defense that he shot him only due to fear and pressure from the Hodges. Counsel argued that the fear and pressure was so extreme that it kept appellant from forming the requisite mental state for either robbery or murder. (See Argument I, § C.5.) CALJIC No. 2.71.7's instructing the jury to view appellant's favorable statements with "caution" undercut his defense and lightened the state's burden of proving his guilt in violation of the due process clause of the Fourteenth Amendment. (*Montana v. Egelhoff, supra,* 518 U.S. 37, 64 (O'Connor, J., dissenting); *Martin v. Ohio, supra,* 480

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for any purpose. (23RT 8747-8748.)

U.S. 228, 233-234; *Crane v. Kentucky, supra,* 476 U.S. 683, 690; *In re Winship, supra,* 397 U.S. 358, 364.) It also invaded the jury's exclusive role as fact-finder as guaranteed by the Sixth Amendment right to jury trial (*United States v. Gaudin* (1995) 515 U.S. 506, 513-515; *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573) and appellant's Eighth Amendment right to a fair and reliable penalty determination. (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 328-330; *Beck v. Alabama, supra,* 447 U.S. 625, 637-638, 642-643).

Regardless of which standard is used, appellant is entitled to relief. The evidence that he committed the charged crimes was subject to doubt, and the defense theory that appellant lacked the requisite mental state was plausible. (See Argument I, § C.5, *ante.*) Appellant's statements about the crime were the most important evidence connecting him to it. (31RT 11246 [defense counsel's closing argument].) Whether appellant intended to kill bore on his mental state as either the direct perpetrator or an aider and abettor. In his closing argument, defense counsel specifically relied on appellant's pre-offense statement that he did not want to kill McDade. (31RT 11332.) The instructional error, however, encouraged the jury to give little weight to this "vitally important" evidence by suggesting that there was something amiss with appellant's statement. (*People v. Ford, supra,* 60 Cal.2d 772, 800 [finding prejudice from error in cautionary instruction concerning key admissions and statements by defendant]; *People v. Lopez, supra,* 47 Cal.App.3d 8, 14 [where defendant's words are "vitally important evidence," it is likewise "vitally important" that the jury be properly guided about how to evaluate them].) At the same time, the error strengthened the prosecutor's

argument that appellant intended to kill McDade "from the get go" to successfully commit the robbery, and appellant's statements to the contrary were "baloney." (31RT 11173, 11219, 11235-11237.) Because the instructional error skewed the jurors in favor of the prosecutor's theory and away from the defense's, it made it easier for the prosecution to meet its burden of proof. (See *People v. Bemis, supra,* 33 Cal.2d 395, 401.)

Although appellant also told Detective Lee post-arrest that he did not want McDade killed (30CCT 8983-8984, 31CCT 9002-9003, 9015-9016), this did not render the error in CALJIC No. 2.71.7 harmless. The statement to Lee and G-Parkway conversation were not equivalent. Appellant had more incentive to lie to Lee than to John Hodges. In conclusion, there is a reasonable chance that, in the error's absence, jurors would have returned a verdict more favorable to appellant.

XVI.

THE INSTRUCTIONS THAT THE HODGES WERE "ACCOMPLICES AS A MATTER OF LAW" BECAUSE THEY WERE AIDERS AND ABETTORS WRONGLY DIRECTED THE JURORS TO FIND THAT APPELLANT WAS THE DIRECT PERPETRATOR OF THE ROBBERY AND MURDER AND REQUIRE REVERSAL OF THESE CONVICTIONS AND ATTACHED ENHANCEMENT AND SPECIAL CIRCUMSTANCE FINDINGS.

Although the prosecutor and defense counsel both theorized that appellant was the shooter, rational jurors, in their exclusive role as fact-finders, could have viewed the evidence differently. They could have concluded that the Hodges were the direct perpetrators of the robbery and murder and appellant (1) was guilty after the fact of only receiving stolen property or (2) aided and abetted only the robbery (which would also make him guilty of the murder under a felony-murder theory but not necessarily liable for the felony-murder special circumstance.) Instructions permitted jurors to return verdicts on either of these theories. Nevertheless, the court's accomplice instructions wrongly undermined the jurors' ability to credit them by providing that the Hodges were aiders and abettors "as a matter of law." This forced jurors to see appellant as the direct perpetrator and skewed them towards more severe verdict options than otherwise. Accordingly, appellant's convictions for robbery and murder and attached enhancement and special circumstance findings must be vacated.

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A. Factual Background

1. The Instructions

The court gave CALJIC No. 3.00 explaining that all "principals" were equally guilty of an offense and a "principal" is either a direct perpetrator or an aider and abettor. (2CT 598 & 31RT 11117.) It also gave CALJIC No. 3.01 on aiding and abetting as a theory of liability. (2CT 598 & 31RT 11117.)

Further, the court instructed that accomplice testimony incriminating appellant must be corroborated by other evidence, the Hodges were "accomplices as a matter of law" and an accomplice is an aider and abettor. It gave CALJIC No. 3.10 which stated (3CT 600 & 31RT 11118):

> An accomplice is a person who is subject to prosecution for the identical offense charged in Counts 1 and 2 and the special circumstance allegation against the defendant on trial by reason of aiding and abetting.

It also gave CALJIC No. 3.16 as follows (3CT 604 & 31RT 11119):

> If the crimes of robbery or murder or the special circumstance allegation were committed by anyone, Terry and John Hodges were accomplices as a matter of law and the statements of each to the extent they incriminate Carl Powell are subject to the rule requiring corroboration.

Additionally, the court instructed pursuant to CALJIC Nos. 14.65 and 17.10 on receiving stolen property (Pen. Code, § 496) as a lesser offense to the robbery charge. (3CT 634-636 & 32RT 11365-11367.)

2. Instructional Conference

At the initial jury instruction conference held on August 23, 1994, the court announced it would give all instructions concerning accomplice corroboration in light of the Hodges' out-of-court statements to Banks and Leisey. (30RT 10952-10954.) Counsel questioned whether accomplice instructions were necessary since the statements were already reliable as statements against penal interest. (30RT 10952-10953.) The court maintained its position. (30RT 10952-10954.)

The court asked if appellant preferred instruction that the Hodges were accomplices "as a matter of law" under CALJIC No. 3.16 or leaving the Hodges's accomplice status up to the jury to decide under CALJIC No. 3.19. (30RT 10954-10955.) It stated its belief that they were accomplices "as a matter of law." (*Ibid.*) Counsel agreed, stating "[t]hat's my opinion, your Honor ... . CALJIC No. 3.16 is more appropriate, given the context of our trial." (*Ibid.*; see also 30RT 10908 [Castro willing to stipulate to matter].)

The court and parties sought to finalize instructions on August 24, 1994. The court announced it would give CALJIC No. 3.10. (31RT 11062-11063.) Next, it stated it would not give CALJIC No. 3.14 (Criminal Intent Necessary to Make One an Accomplice) "[s]ince all of you folks, both sides, are conceding that, as a matter of law, Terry and John Hodges are accomplices...." (31RT 11063.) Both parties agreed. The court read its draft of CALJIC No. 3.16. Neither side voiced any comment concerning CALJIC Nos. 3.10 and 3.16. (*Ibid.*)

CALJIC Nos. 3.00, 3.01, 3.10 and 3.16 were requested by the

prosecution. (31RT 11087; 2CT 598-599, 3CT 600, 604.)

B. The Accomplice Instructions Invaded the Jurors' Exclusive Fact-Finding Role By Wrongly Directing that the Hodges Were Aiders and Abettors "As a Matter of Law."

1. Accomplice Corroboration

Penal Code section 1111 provides that the testimony of an accomplice must be corroborated to support a conviction. The rule applies to both testimony and out-of-court statements incriminating the defendant. (*People v. Williams, supra,* 16 Cal.4th 153, 245.) Corroboration is required because an accomplice has a clear motive "of promoting his or her own self interest by inculpating the defendant" and shifting focus away from himself or herself. (*People v. Guiuan* (1998) 18 Cal.4th 558, 568; see also *id.* at pp. 566-567 & 574-575 (Kennard, J., conc.).)

Section 1111 defines an accomplice as a person "liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." An accomplice is a "principal" in the offense (Pen. Code, § 31) rather than an accessory after the fact (Pen. Code, §§ 32, 33). A "principal" is an aider and abettor, coconspirator or perpetrator who acts in association with the defendant to commit the crime. (*People v. Ward* (2005) 36 Cal.4th 186, 212; *People v. Belton* (1979) 23 Cal.3d 516, 523; *People v. Felton* (2004) 122 Cal.App.4th 260, 268; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1158.) An alternate suspect who acts independently of the defendant is not an accomplice needing

corroboration. (*Ward, supra,* at p. 212.)

Whenever the incriminating statement of an accomplice is introduced against a defendant, the trial court must instruct sua sponte on the definition of an accomplice (*People v. Bevins* (1960) 54 Cal.2d 71, 76), the need for accomplice corroboration (*People v. Gordon* (1973) 10 Cal.3d 460, 466, disapproved on another point in *People v. Ward, supra,* 36 Cal.4th 186, 212) and accomplice status. (*People v. Verlinde, supra,* 100 Cal.App.4th 1146, 1158-1159). Only if there is no legitimate dispute as to either the facts or the inferences to be drawn from them shall the court instruct that a person is an accomplice "as a matter of law." (*People v. Williams, supra,* 16 Cal.4th 635, 679; *People v. Rodriguez* (1986) 42 Cal.3d 730, 759; see also *People v. Riggs* (2008) 44 Cal.4th 248, 311-313 [trial court properly refused to instruct witness was accomplice as a matter of law, although she had pled guilty to same crime, where defendant asserted at trial she was part of his alibi].)

2. The Hodges Were Not Necessarily Accomplices or Aiders and Abettors.

The evidence did not permit only the single inference that the Hodges were accomplices "as a matter of law" to the robbery and murder. Jurors may credit only select portions of witness testimony, statements or other evidence. (*People v. Wickersham* (1982) 32 Cal.3d 307, 328, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Here, they could have determined that the Hodges were direct perpetrators who committed the offenses *without* appellant's participation or encouragement. (30CCT 8976 [appellant tells Lee he just sat in the car]; 31RT 11256, 11287-11291, 11324-

11327 [counsel argues in closing that appellant lacked specific intent to rob or motive to kill because appellant liked and respected McDade and wanted his job back and an armed confrontation was not in his character].) This approach was consistent with the trial court's instruction on receiving stolen property as a lesser crime to robbery. (See 30CCT 8986 [appellant tells Lee he received a share of the loot], 18RT 7138-7140, 19RT 7496-7498, 7500, 21RT 8067-8078 [appellant's prints found on discarded KFC items found on Golf View Drive].) Jurors could have concluded that, after committing the crimes by themselves, the Hodges gave appellant a share of the proceeds to either keep him quiet or reward him for providing information about KFC on which they capitalized, or both. (31RT 11309 [counsel argues that appellant "talked when he shouldn't have and other people picked up on it and ran with it and said here, Carl, you're going with us"] see also *id.* at 11275, 11327, 11331.) As independent, direct perpetrators, the Hodges were not accomplices. (*People v. Ward, supra,* 36 Cal.4th 186, 212.)

Certainly, the evidence also warranted the contrary inference that the Hodges were appellant's accomplices. The jurors could have relied on appellant's first statement to Lee to find that the Hodges were the direct perpetrators of the robbery and murder and appellant aided and abetted them in at least the robbery (thereby making him liable for felony-murder), and possibly in the killing as well. (30CCT 8976-8977, 8983-8984.) Or the jurors could have determined that appellant was the direct perpetrator and the Hodges aided and abetted him by planning and encouraging the crimes and providing transportation and the weapon. (31CCT 9011, 9014-9016, 9018-9021, 31CCT 9155, 32CCT 9303.)

Because rational jurors could have disagreed about whether the Hodges were accomplices, the trial court erred in directing under CALJIC No. 3.16 that they were accomplices "as a matter of law." It should have left for the jurors to decide if the Hodges were accomplices. (See CALJIC No. 3.19.)

The court also erred by defining an accomplice solely as an aider and abettor. CALJIC No. 3.10 stated: "[a]n accomplice is a person who is subject to prosecution for the identical offense charged ... against the defendant on trial *by reason of aiding and abetting*." (3CT 600 & 31RT 11118, emphasis added.) CALJIC No. 3.00 clearly differentiated between a direct perpetrator and an aider and abettor and stated that both were equally guilty. (2CT 598 & 31RT 11117.) Taken together, CALJIC Nos. 3.10 and 3.16 directed that the Hodges were aiders and abettors "as a matter of law." As shown, however, the jurors could have reasonably determined that the Hodges were accomplices because they were direct perpetrators who committed the crimes with appellant's assistance. (See *People v. Belton, supra,* 23 Cal.3d 516, 523 [shooter in drive-by shooting was an accomplice to defendant, the driver].)

Therefore, the trial court erred in instructing under CALJIC Nos. 3.10 and 3.16 that the Hodges were accomplices "as a matter of law" because they were aiders and abettors.

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3. There Is a Reasonable Likelihood the Jurors Interpreted the Accomplice Instructions in an Erroneous Manner.

CALJIC Nos. 3.10 and 3.16 usurped the jurors' fact-finding ability by forcing them to view appellant as the direct perpetrator of the robbery and murder. Together, they directed that the Hodges were aiders and abettors "as a matter of law ... [i]f the crimes ... were committed by anyone...." The crimes were obviously committed by someone. McDade was found fatally shot with $1,707 of KFC proceeds missing from his immediate presence. Under the evidence, appellant was the only choice for the direct perpetrator whom the Hodges aided and abetted. CALJIC No. 3.00, defining principals, reinforced that an aider and abettor is different from a direct perpetrator.

A criminal defendant has a constitutional right to have jurors act as the exclusive finders of fact. This is part of their role in deciding if the prosecution has proven beyond a reasonable doubt each essential element of the crime and the ultimate issue of guilt. (U.S. Const., amends. VI & XIV; Cal. Const., art. I, §§ 7, 15 & 16; *United States v. Gaudin* (1995) 515 U.S. 506, 513-515; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Consistent with the jury trial guarantee, "[t]he trial court may not ... withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power. [Citations.]" (*People v. Rodriguez, supra,* 42 Cal.3d 730, 766; see *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573 [trial court cannot "override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused"].) "The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a

guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.'" (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.) In a capital case, error skewing the jury's guilt determination also violates the Eighth Amendment right to a fair and reliable penalty determination. (U.S. Const., amend. VIII; *Caldwell v. Mississippi, supra,* 472 U.S. 320, 328-330; *Beck v. Alabama, supra,* 447 U.S. 625, 637-638, 642-643.)

Although CALJIC Nos. 3.10 and 3.16 did not explicitly require jurors to view appellant as the direct perpetrator of the robbery and murder, there is a "reasonable likelihood" that the jury interpreted them in this fashion. (*Boyde v. California* (1990) 494 U.S. 370, 380; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; see *Calderon v. Coleman* (1998) 525 U.S. 141, 147 [a "reasonable likelihood" is equivalent to a reasonable possibility]; *Boyde, supra,* at p. 380 ["reasonable likelihood" means more than speculative chance but can be less than a preponderance].) Appellant's reading of the instructions flows naturally from their plain language. Jurors would have likely adopted it because they view the instructions in a straightforward rather than "technical hairsplitting manner. (*Id.* at pp. 380-381.)

In *People v. Hill* (1967) 66 Cal.2d 536, this Court acknowledged that an instruction that a codefendant is an accomplice "as a matter of law" may constrain juror fact-finding. There, Madorid, one of three defendants charged with robbery and murder, confessed on the stand and incriminated his codefendants. (*Id.* at p. 544, 547.) Without question, he aided and abetted them. (*Id.* at p. 555.) Although the trial court instructed the jurors on the need

for corroboration of accomplice testimony, it left it up to them to decide if Madorid was as accomplice. (*Ibid.*) This Court rejected the codefendants' arguments that the trial court should have instructed that Madorid was an accomplice "as a matter of law." Such an instruction, explained the Court, would have created a danger that the jurors would be compelled to impute the codefendants' guilt from Madorid's confession. (*Id.* at pp. 555-556; see also *People v. Riggs, supra,* 44 Cal.4th 248, 311-313 [trial court properly refused to give CALJIC No. 3.16 to avoid directing factual finding undermining defendant's alibi defense]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1100 [quoting *Hill* with approval].)

The other instructions given in appellant's case are consistent with jurors viewing the accomplice instructions as a directive that appellant was the direct perpetrator. Although jurors were instructed on aiding and abetting and receiving stolen property as legitimate theories of appellant's guilt (2CT 598 & 31RT 11117 and 3CT 634-636 & 32RT 11365-11367), they were also instructed that some instructions may not apply depending on the jurors' factual findings. (2CT 638, 32RT 11367 [CALJIC No. 17.31]; see also 31RT 11246 [counsel so notes in closing argument].) Having been told to find that appellant was the direct perpetrator, jurors could have simply concluded that the instructions on aiding and abetting and receiving stolen property were inapplicable. Thus, the complete instructions are harmonious with appellant's position.

The same applies to how the evidence was presented. The evidence supporting that appellant was an aider and abettor to robbery or was guilty of

no more than receiving stolen property, although substantial enough to warrant instruction and support a verdict, did not take center stage at appellant's trial. The main evidentiary basis for these theories was appellant's initial version of events in his statement to detective Lee, in which appellant claimed he just sat in the car while the Hodges perpetrated the crimes. (30CCT 8975-8988.) The bulk of the trial evidence pertained to his acting as the direct perpetrator. (See 30CCT 8990-31CCT 9004 [appellant claims he shot McDade accidentally]; 31CCT 9004-9020, 9263 [appellant claims he shot McDade deliberately out of fear and pressure].) The Hodges's statements to this effect, related through the lengthy testimony and prior statements of Banks and Leisey, were heavily emphasized and hotly contested.

Appellant's case stands in sharp contrast to those where jurors must have concluded that a significant portion of the proceedings had been a "virtual charade" in order to view the challenged instructions in the manner advanced by the defendant. (See *Ayers v. Belmontes* (2006) 549 U.S. 7, 13, 16-17 [jurors would not interpret instruction as precluding consideration of future conduct mitigation evidence because this would mandate ignoring multiple defense penalty phase witnesses]; *Brown v. Payton* (2005) 544 U.S. 133, 144 [jurors would not interpret instruction to render meaningless defendant's eight penalty phase witnesses who testified without objection].) No such evidentiary impediment prevents viewing the accomplice instructions as a directive that appellant was the direct perpetrator.

Counsels' arguments are also consistent with jurors interpreting the instructions to restrain their fact-finding abilities. Defense counsel did not

reference the accomplice instructions. The prosecutor mentioned them once to briefly state that the Hodges were accomplices and their statements to Banks and Leisey were corroborated by other evidence. (31RT 11168-11169.) Because the parties' arguments ignored the instructions' erroneous directive that appellant was the direct perpetrator, they do not detract from appellant's position.

Further, consistent with how the evidence was presented, both sides emphasized that appellant was the direct perpetrator and minimized evidence of other theories. The prosecutor devoted the bulk of his remarks to arguing that appellant was the actual robber and shooter. (31RT 11192-11197, 11203-11205, 11208, 11216, 11225-11238, 32RT 11353-11356.) Defense counsel conceded appellant's role as the direct perpetrator and challenged the evidence of his mental state. (31RT 11249-11250.) Both acknowledged that jurors might view appellant as an aider and abettor or guilty of no more than receiving stolen property, but they downplayed these alternatives. (31RT 11159, 11181, 11337-11338.) The prosecutor argued that appellant's first story to Lee was a complete lie. (31RT 11167, 11175, 11217-11222.) He also contended that there was no practical difference between appellant's aiding and abetting and being a direct perpetrator. Either way, appellant was guilty of robbery and felony-murder, and, because felony-murder and the felony-murder special circumstance are equivalent, for the special circumstance as well. (31RT 11164, 11175, 11216-11218.) In contrast, defense counsel maintained there was some truth to appellant's first story. (31RT 11271.) In acknowledgement of the jurors' fact-finding powers, counsel argued that, since appellant's versions of what happened were inconsistent and incomplete, jurors

had to pick out what facts rang true in each to piece together what happened. (31RT 11252, 11284-11285, 11287, 11334.) In sum, the parties' arguments were consistent with jurors interpreting the accomplice instructions as directing them to view appellant as the direct perpetrator.

Accordingly, in light of the instructions as a whole, evidence presented and counsels' arguments, there is a reasonable likelihood that the jurors viewed interpreted the accomplice instructions to usurp their fact-finding abilities.

People v. Heishman (1988) 45 Cal.3d 147 does not undermine appellant's position although it rejected a similar claim. There, the defendant argued that CALJIC Nos. 3.00, 3.10 and 3.16 erroneously directed jurors to find that a witness, Gentry, was an accomplice because she was an aider and abettor to the murder with which the defendant was charged; consequently, the defendant contended, the instructions precluded jurors from crediting the defense theory that Gentry killed the victim acting on her own. (*Id.* at pp. 162-163.) *Heishman* reasoned that CALJIC No. 3.16 left jurors free to determine that Gentry was the actual killer because "Gentry was legally an accomplice 'if the crime of murder was committed by anyone' including Gentry herself." (*Id.* at p. 162.) Also, seeing the accomplice instructions as "practically a direction of conviction" was inconsistent with instructions given on the defendant's presumption of innocence and the prosecution's burden of proof. (*Id.* at p. 163.)

After *Heishman,* this Court has ruled that an accomplice cannot be a direct perpetrator who commits the crime without the defendant's participation.

(*People v. Ward, supra,* 36 Cal.4th 186, 212.) It has also continued to adhere the validity of *People v. Hill, supra,* 66 Cal.2d 536, 555. (E.g., *People v. Riggs, supra,* 44 Cal.4th 248, 311-313; *People v. Bittaker, supra,* 48 Cal.3d 1046, 1100.) Presumably, the jurors in *Hill* were also instructed on the defendant's presumption of innocence and prosecution's burden of proof. Yet *Hill* recognized that an instruction that a codefendant is an accomplice as a matter of law threatens to direct jurors to find facts adverse to the defendant. (*Id.* at p. 555.) It is well-recognized that the effect of a directed verdict is to overcome the defendant's presumption of innocence and government's burden of proof. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 277-278; *People v. Figueroa, supra,* 41 Cal.3d 714, 725.) Thus, decisions following *Heishman* have overruled it *sub silentio.*

C. The Error Was Not Invited

Under the doctrine of invited error, "[i]f defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.' [Citation.]" (*People v. Marshall* (1990) 50 Cal.3d 907, 931.) When counsel "accedes to [an] erroneous instruction because of neglect or mistake we do not find 'invited error.' Only if counsel *expresses a deliberate tactical purpose* in acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause.'" (*People v. Barraza* (1979) 23 Cal.3d 675, 683-684, quoting *People v. Graham* (1969) 71 Cal.2d 303, 319, italics added in *Barraza.*)

Appellant did not invite the errors in CALJIC Nos. 3.10 and 3.16.

Because these are sua sponte instructions for which the trial is ultimately responsible (*People v. Wickersham, supra,* 32 Cal.3d 307, 335), invited error cannot be found unless counsel expressly articulated a tactical purpose for causing the trial court to err. (*People v. Marshall, supra,* 50 Cal.3d 907, 932). Counsel did not address CALJIC No. 3.10. As for CALJIC No. 3.16, counsel merely agreed with the trial court about the Hodges's accomplice status. He did not articulate a tactical purpose for acceding to the instruction. Indeed, counsel questioned if any accomplice instructions should be given at all. Consequently, appellant's claims of error have been preserved for review.

D. <u>The Erroneous Accomplice Instructions Require Reversal</u>.

The error in the accomplice instructions was tantamount to a directed verdict against appellant for robbery and murder. The instructions told jurors that if these offenses were committed by anyone, the Hodges were aiders and abettors as a "matter of law" and aiders and abettors were as "equally guilty" as the direct perpetrator. (See 2CT 599 & 31RT 11117 [CALJIC No. 3.00 provides all principals are "equally guilty"].) Obviously, the offenses were committed by someone. Under the evidence, appellant was the only possible choice for the "equally guilty" direct perpetrator. Instructional error which directs a verdict against an accused is reversible per se. (*Rose v. Clark* (1986) 478 U.S. 570, 578.)

Relief is also required if the error is assessed for prejudice. The jurors found that appellant was the direct perpetrator as demonstrated by their finding that he personally used a gun during the robbery and murder. (3CT 673-675

[verdicts].) This finding eliminated three legitimate interpretations of the evidence more favorable to appellant, i.e., that appellant (1) did not participate at all in the robbery and murder, either as an aider and abettor or direct perpetrator, and just sat in the car; (2) did not participate at all in the offenses but was guilty of the lesser crime of receiving stolen property; and (3) did not perpetrate the offenses but aided and abetted the robbery but not the murder. Under (3), appellant would be guilty of not only the robbery but also of the murder under a felony-murder theory. Since he did not intend McDade's death, however, he would not be liable for the felony-murder special circumstance. (See 3CT 617 & 31RT 11125 [CALJIC No. 8.80.1].) The question is whether the erroneous accomplice instructions surely had no effect on the jurors' determination that appellant was the direct perpetrator.

Because the error violates the federal constitution, reversal is required unless the government proves it harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) Consistent with the jury trial guarantee, the reviewing court cannot itself hypothesize what a reasonable jury would have done in the error's absence. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279.) Rather, in applying *Chapman,* it must "look[] ... to the basis on which 'the jury *actually rested* its verdict'" and determine if "the verdict actually rendered in *this* trial was surely unattributable to the error." (*Ibid.*) "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*People v. Harris* (1994) 9 Cal.4th 407, 426, citation and italics omitted.)

As discussed above (§ B.3, *ante*), the instructions as a whole, manner in which the evidence was presented and arguments of counsel were all consistent with the instructions' erroneous directive to view appellant as the direct perpetrator. If the jurors wanted to stray from this view, the erroneous instructions directed them back to it. Because the evidence and parties' main theories complemented each other, it is reasonable to assume that they worked with these instructions to influence the verdict.

Nevertheless, the evidence gave jurors cause to doubt whether appellant was the direct perpetrator. No physical evidence or disinterested eyewitness supported this theory. Schuyler's testimony that he saw appellant passing through the alley by KFC with an object resembling a book or a bank bag (17RT 6958-6963, 6966, 6973) was thoroughly impeached by Schuyler's criminal record (17RT 6974-6975, 7026-7027, 7034-7039) efforts to sell his testimony in exchange for leniency in his own on-going case (17RT 7028-7029, 7112-7113, 7117) and coming forward only after media accounts portrayed appellant as a suspect. (17RT 6983, 7056, 18RT 7107-7108, 7224-7225). Although the Hodges made statements that the "boy" or "youngster" was the shooter, they were related by Leisey and Banks, whose credibility was highly questionable. (25RT 9495, 9498, 27RT 9869, 10032 & 32CCT 9302-9306 [Leisey]; 24RT 8962, 9017-9018, 31CCT 9150, 9154-9155 [Banks].) Leisey and Banks were convicted felons with histories of mental illness, substance abuse and ingratiating themselves with law enforcement. (25RT 9500-9501, 9520-9526, 9542, 9545, 26RT 9694, 9721, 9772-9773 [Leisey]; 23RT 8714-8715, 8753-8754, 8761-8766, 8770, 8797-8800 [Banks].) Moreover, the Hodges had an incentive to minimize their own culpability at

appellant's expense. Also, appellant himself gave multiple, inconsistent accounts of his conduct. (See § B.3, *ante.*) His deep fear of the Hodges gave him a compelling motive to cast the blame on himself and away from them. (31CCT 9011-9012 9031 [appellant expresses fear of Hodges].)

At the same time, the evidence permitted the conclusion that the Hodges, not appellant, were the direct perpetrators. Recognizing this, the trial court instructed on aiding and abetting as a theory for appellant's liability. (30RT 10950-10952; 2CT 598 & 31RT 11117.) That the Hodges appeared to be "bad dudes," (30RT 11005, 31RT 11054, 11257 [counsel's remarks]; see also 25RT 9394-9395, 26RT 9647, 27RT 10093-10094 [Juror No. 11 reports fear of defendants after getting better view of the Hodges]), were linked to prison, drugs, violence, drive-by shootings and weapons (31CCT 9155, 32CCT 9303, 93110-9311, 25RT 9471, 9474) and instilled fear in appellant (31CCT 9012, 9031) was consistent with their acting as direct perpetrators. In contrast, Littlejohn described appellant as "weak" and a "follower." (31CCT 9270.) The defense argued that appellant was a "sneak thief" and it was not in his character to confront McDade at gunpoint. (31RT 11276, 11326-11327.)

Nor did jurors resolve the appellant's role in the robbery and murder adversely to him under other, properly given instructions. Jurors found true the personal gun use allegation; also, by finding the robbery felony-murder special circumstance true, they rejected the theory that appellant only aided and abetted the robbery but did not intend the killing. (3CT 673-675 [verdicts for counts one and two]; 3CT 617 & 31RT 11125 [CALJIC No. 8.80.1].) The instructions for both these allegations told jurors to consider them only *after*

finding appellant guilty of the charged crimes. (*Ibid.*; 2CT 626 & 31RT 11129 [CALJIC No. 17.19].) By then, the accomplice instructions' directive to consider appellant the direct perpetrator would have already affected the jurors' view of the facts. The verdicts on the special allegations were the logical consequence of the instructional error.

Therefore, appellant is entitled to a new trial on the robbery and murder charges and their associated enhancement and special circumstance findings.

XVII.

BECAUSE THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE TO ROBBERY, IT IS NECESSARY TO REVERSE THE ROBBERY, FIRST DEGREE MURDER, FIREARM USE AND SPECIAL CIRCUMSTANCE VERDICTS AND THE ENSUING JUDGMENT OF DEATH.

The jurors were instructed that they could convict appellant of first degree murder in count one based on felony-murder with robbery as the underlying felony. (3CT 610 & 31RT 11122 [CALJIC No. 8.21].) They were also was instructed on the robbery felony-murder special circumstance (3CT 617 & 31RT 11124-11125 [CALJIC No. 8.80.1]) and, in count two, the substantive crime of robbery. (3CT 623 & 31RT 11127-11128 [CALJIC No. 9.40]). The court did not instruct, however, on theft as a lesser included offense to robbery. This was error. The evidence permitted jurors to find after-acquired-intent to steal, i.e., that appellant was undecided about stealing from McDade until after shooting him for reasons not motivated by theft, and it was only after the shooting that appellant actually formed the specific intent to steal.

The omission of instruction on theft deprived appellant of his federal constitutional rights to due process, trial by jury and reliable guilt, special circumstance and penalty verdicts (U.S. Const., amends. V, VI, VIII & XIV), as well as his state constitutional rights to due process and trial by jury (Cal. Const., art. I, §§ 7 & 15). It requires reversal of appellant's convictions for robbery and first degree murder, the attached firearm use enhancements, the felony-murder special circumstance and the ensuing judgment of death.

A. The Trial Court Must Instruct Sua Sponte on All Lesser Included Offenses Supported by Substantial Evidence.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) This duty includes giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense have been proven and there is substantial evidence of the lesser included offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

This *sua sponte* obligation is not limited "to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, ... the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the full range of possible verdicts' included in the charge, regardless of the parties' wishes or tactics." (*People v. Breverman, supra,* 19 Cal.4th 142, 155, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 324, disapproved on other grounds in *People v. Barton, supra,* 12 Cal.4th 186, 200-201.) The trial court must "instruct on lesser included offenses supported by the evidence even when they are 'inconsistent with the defense selected by the defendant.'" (*Barton, supra,* at p. 198, fn. 7, quoting

People v. Sedeno (1974) 10 Cal.3d 703, 717, fn. 7, overruled in part in *Breverman, supra,* at p. 176.) In short, "*every* lesser included offense, or theory thereof, which is supported by the evidence, must be presented to the jury." (*Id.* at p. 155, emphasis in original.)

In determining if the record contains substantial evidence to support an instruction, a court cannot weigh the evidence or make credibility determinations because these are tasks exclusively reserved for the jury. (*People v. Breverman, supra,* 19 Cal.4th 142, 162; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, disapproved on another point in *In re Christian S.* (1994) 7 Cal.4th 768.) A defendant's testimony, even if "less than convincing" to the court, is still sufficient to require *sua sponte* instruction upon a lesser included offense. (*People v. Turner* (1990) 50 Cal.3d 668, 690.) An instruction is warranted "even though the factual premise underlying the instruction is contrary to the defendant's own testimony, so long as there is substantial evidence in the entire record to support that premise." (*People v. Elize* (1999) 71 Cal.App.4th 605, 615; see *id.* at p. 614 [gleaning principle from this Court's opinions in *Breverman, Barton* and *Sedeno*]; see *Breverman, supra,* at p. 164.) Further, "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Wilson* (1967) 66 Cal.2d 749, 763.)

B. Because Jurors Could Have Found that Appellant's Intent to Steal Did Not Arise until After Application of Force or Fear, the Trial Court Erred in Failing to Instruct on Theft as a Lesser Included Offense to Robbery.

Theft by larceny (Pen. Code, § 487) is a lesser included offense to

robbery, which includes the additional element that the defendant use force or fear to take the property (*People v. Ortega* (1998) 19 Cal.4th 686, 694, disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055) or carry it away. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8; *People v. Pham* (1993) 15 Cal.App.4th 61, 65-67). If the defendant's intent to steal arises only after the application of force of fear, the robbery element of using force or fear is absent and the offense committed is theft, not robbery.[99] (*Bradford, supra,* at pp. 1055-1056; *People v. Kelly* (1992) 1 Cal.4th 495, 528-529; *People v. Turner, supra,* 50 Cal.3d 668, 690; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351; *People v. Green* (1980) 27 Cal.3d 1, 54.)

Appellant gave multiple accounts of what happened to detective Lee and to Angela Littlejohn. Both sides agreed that no single version rang true in all respects; consequently, jurors had to sort through them to pick out what was true and piece together what happened. (31RT 11167, 11252 [attorneys argue jurors must credit statements selectively]; see *People v. Jeter* (1964) 60 Cal.2d 671 [court should have instructed on lesser included offense even where defendant denies any guilt, because jury could have believed parts, but not all of defendant's testimony].)

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[99] CALCRIM No. 1600 (Fall 2009 ed.) makes clear when the intent to steal must arise for robbery. It lists as an essential element: "When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently / [or] to remove it from the owner's possession that the owner would be deprived of a major portion of the value or enjoyment of the property)."

Jurors could have selectively viewed the evidence to find that appellant was undecided about stealing from McDade until after he shot him. The mental state of being undecided about whether or not to do something is inconsistent with actually forming the specific intent to do it.

As explained in more detail below, the jurors could have found that appellant acquired the KFC bank bag without use of force or fear. While holding it, he shot McDade not to steal it but as a response to intense pressures emanating from a number of factors: McDade started to threaten appellant, and they had a lengthy argument; the Hodges were pressuring him to victimize McDade; appellant's brother was pressuring him to find work; appellant desperately wanted to be rehired at KFC, but McDade refused; and appellant had to make the hard choice between either siding with the Hodges or McDade and his brother. Only after shooting McDade, and thereby siding with the Hodges, did appellant actually form the specific intent to steal the KFC proceeds.

Jurors could have seen appellant as straddling two worlds when he approached McDade. One was the criminal lifestyle represented by the Hodges brothers, a couple of "bad dudes," who were actively encouraging appellant to rob and kill McDade. (30RT 11005, 31RT 11054, 11257 [defense counsel argues Hodges are "bad dudes"]; 25RT 9471, 9474, 31CCT 9155, 32CCT 9303, 9311 [Hodges are linked to guns, drugs, drive-by shootings and prison]; 31CCT 9154-9155 [John Hodges manipulates appellant to do his will and gives the order to kill], 25RT 9494 & 32CCT 9305-9306 [Terry Hodges tells appellant, "just whack the motherfucker"].) The other was the straight

and narrow path, represented by the hard-working McDade (16RT 6505-6505, 6509) and appellant's brother, who was pressuring appellant to find work. (30CCT 8999).

The evidence warranted the inference that when appellant encountered McDade, he was undecided about whether he would carry out the Hodges' directives. Appellant did not act decisively to rob McDade and eliminate him as a witness; instead, he stalled for time. (16RT 6521, 6558-6559, 6562-6563, 6578 [McDade leaves KFC around 10:20 to 10:30 p.m.], 19RT 7583-7586 [Senner hears shot at 10:45 or 10:50 p.m.]; 32CCT 9315 [Terry Hodges tells Leisey the shooter "didn't have no heart"]; 31RT 11280 [counsel argues that if appellant confronted McDade simply to rob and kill him, he could have accomplished this in mere moments].) Appellant still desperately wanted his old job back at KFC, which appellant said was "the only job ... that I'm really good at." (30CCT 8999.) If appellant robbed McDade, he would destroy any chance of regaining it. (See 31RT 11287-11289, 11324-11325 [defense counsel characterizes appellant's job as his "lifeline" and chance at life as a law-abiding citizen].)

In his second version of events to detective Lee, appellant related that when he went up to McDade, he asked McDade to rehire him (30CCT 8999), just as he had many times before. (16RT 6514, 6517, 6549). McDade replied that he was full, told appellant to return later and the two engaged in small talk (30CCT 8999-31CCT 9000) as appellant tried to figure out what, if anything, if he was going to do. According to appellant, McDade passed him the bank bag. (*Ibid.*) Appellant had not taken out his gun and, arguably, had not done

anything to inspire fear in McDade. (*Ibid.*) Appellant stated (30CCT 8999, emphasis added):

> I was talking to him about getting my job back and he was like, come back tomorrow. And I, he didn't say nothing. *You know, he just gave me the money.* And then he just started talking, just you know, cause there was a lot of stress on my mind, my brother, he was killing me, it's like my brother don't want me around no more. [¶s] ... You know, and that hurt me. That's why I kept going to Keith cause that's the only job, you know, that I'm really good at....

Lee prompted appellant to continue, and the following exchange occurred (30CCT 8999 - 31CCT 9000, emphasis added):

> LEE: When you walked [up] to him, just tell me, say like I'm Keith, what did you say to me?
>
> POWELL: I said, I don't, I said uhm, when you gonna let me get my job back. He said uhm, you know, we're kinda full right now. And uhm, let me see, and I was like, oh, and he, he said uh, he was like, yeah, what'd he say, he said, he offered me some chicken. I was like, no, I don't want no chicken man, you know.
>
> LEE: So when you asked him for his job, what, what'd he say, come back and see me tomorrow?
>
> POWELL: Yeah, come back and see me tomorrow.
>
> LEE: And then what'd you say?
>
> POWELL: *I said, okay. And then I was like, what you got in the bag.*
>
> LEE: Uh huh.
>
> POWELL: (INAUDIBLE) *money. And then I said, hand it*

over.

LEE: Uh hmm.

POWELL: *And then he was like, then like he wanted to get out the car and hurt me. But I was like, I pulled my gun out and he's like kinda just sat back down.* And then he started talking on off the wall stuff like, you know, (INAUDIBLE) he just started talking off the wall, you know. It's bad enough my brother was killing me and then he was saying stuff he said and then ...

Under this version of events, jurors could rationally conclude that appellant did not use force or fear to obtain the bank bag. Appellant said McDade "just gave me the money" (30CCT 8999), before appellant took out his gun (31CCT 9000).

Further, the evidence could be interpreted to show that as appellant stood there with the bank bag, weighing his options, McDade realized he had made a serious mistake in handing it to him. McDade started to threaten appellant. (31CCT 9000.) According to appellant, McDade was neither trying to talk appellant into returning the money (31CCT 9002) nor threatening to turn him in. (31CCT 9003). Rather, McDade was "talking crazy" and threatening to have appellant and his family killed. (31CCT 9001.) At this point, appellant pulled out his gun in response to McDade's threats, not because he had actually formulated the specific intent to steal. Appellant stated, McDade "wanted to get out the car and hurt me. But I ... pulled my gun out and he[...] sat back down." (*Ibid.*) Appellant was only 18 years old, immature for his age, and mentally slow. (23RT 8850, 28RT 10412, 10431; see also 31RT 11255-11256 [counsel's argument].) He candidly admitted that he did not know what to do. (31CCT 9001.)

Appellant related to Lee that he did not want to kill McDade, but he shot him for reasons which jurors could conclude were unrelated to robbery, i.e., because he felt scared and pressured and feared that McDade was going to harm him. (31CCT 9001-9002, 9004.) Appellant said "there was a lot of stress on my mind...." (30CCT 8999.) "It was bad enough my brother was killing me and then he [McDade] was saying stuff...." (31CCT 9000.) He wanted McDade to stop talking. Appellant said, "I was like man, don't do it. You know, leave me, let me go. Don't don't play nothing," but McDade continued. (31CCT 9001.)

As appellant has demonstrated elsewhere, the evidence also supported that appellant had animus against McDade because McDade refused to rehire him. (See Argument XVIII, *post*.) Rational jurors could have factored these hard feelings, unrelated to theft, into the strong emotions and pressures that influenced appellant to shoot. Appellant told Littlejohn that he shot McDade because McDade "had it coming." (31CCT 9263.) Although appellant "just spill[ed] his gut" to Littlejohn, he never said anything about wanting to rob McDade. (31CCT 9268, 9277-9278.) Instead, he told her that he approached McDade to ask for his job back, and an argument ensued which "went on and on" and culminated in the killing. (31CCT 9277-9278.)

Therefore, rational jurors could have interpreted the evidence to show that appellant did not form the specific intent to steal from McDade until after shooting him for reasons unrelated to theft. "Since there was evidence that defendant was guilty only of theft rather than robbery, the court had a *sua*

sponte duty to instruct on theft as a lesser included offense." (*People v. Kelly, supra,* 1 Cal.4th 495, 529-530.) Its failure to do so was error.

C. The Instructional Error Violated Appellant's Constitutional Rights

The court's failure to instruct on theft as a lesser included offense to robbery violated appellant's state constitutional due process right to have the jury instructed on every lesser included offense supported by the evidence when it raises a question as to whether all of the elements of the charged offense were present. (Cal. Const., art. I, §§ 7 & & 15; *People v. Breverman, supra,* 19 Cal.4th 142, 155, 162.)

The instructional omission also violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the federal constitution to due process, jury trial and a reliable guilt determination in a capital case. Due process requires that a lesser included offense instruction be given when warranted by the evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 633-637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.) As the United States Supreme Court explained in *Beck v. Alabama, supra,* 447 U.S. 625, giving the jury the opportunity to convict on a lesser offense ensures that it will give the defendant the benefit of the reasonable-doubt standard. (*Id.* at p. 634.) When the evidence establishes that the defendant is guilty of a serious, violent offense but leaves some doubt as to an element justifying a conviction of a capital offense, the failure to give the jury an appropriate "third option" between conviction for capital murder or acquittal impermissibly enhances the risk of an unwarranted conviction. (*Id.* at pp. 639-640.) This violates the Eighth

Amendment because "[s]uch a risk cannot be tolerated in a case where a defendant's life is at stake." (*Id.* at pp. 637-638.) It also violates the jury trial guarantee by encouraging jurors to violate their oaths. (*Id.* at pp. 639-640; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [due process right to hold state to proof beyond a reasonable doubt intertwined with 6th Amend. guarantee that it is the jury that will appropriately do so].)

A defendant is not entitled under the federal constitution to instruction on every lesser included non-capital offense supported by the evidence. (*Schad v. Arizona* (1991) 501 U.S. 624, 645-648.) But the jury must be given a factually supported "third option" for conviction that *realistically* offsets the danger it will convict the defendant of capital murder, although not convinced of his guilt for it, rather than set him free. (*Id.* at pp. 647-648; *Spaziano v. Florida* (1984) 468 U.S. 447, 455-456.) In *Schad v. Arizona, supra,* the United States Supreme Court rejected the defendant's challenge to lack of instructions on theft in a prosecution for first degree murder based on theories of deliberate and premeditated murder and robbery felony-murder. It reasoned that if jurors believed the defendant simply stole the victim's belongings but did not kill the victim, it was irrational to expect that they would convict him of capital murder rather than second degree murder, a lesser non-capital crime on which they were instructed. (*Schad, supra,* at pp. 647-648.)

The record in appellant's case lacks a similar assurance that jurors would not render an unreliable verdict despite lack of instruction on theft. In *Schad,* the defendant admitted taking the victim's property but denied killing him. (*Schad v. Arizona, supra,* 501 U.S. 624, 647.) This gave jurors who

believed he was guilty of only theft such a strikingly stark choice between conviction for capital murder and acquittal that it was unrealistic to assume they would resolve it in favor of choosing the more severe crime of capital murder, especially since the lesser option of second degree murder was also available. (*Id.* at pp. 647-648.) In contrast, here appellant admitted shooting the victim and taking his property. (30CCT 8999, 31CCT 9002.) There was far less distinction between the non-capital crimes jurors may have believed appellant committed -- murder and theft -- versus the capital crime of robbery felony-murder for which appellant was prosecuted. The key distinction was just *when* appellant formed the mental state of *specific intent to steal.* (See 31RT 11150 [prosecutor laments that timing of intent to steal is a "nebulous" concept that may confuse jurors].) It is feasible that jurors who believed appellant guilty of only murder plus theft skewed their fact-finding towards the capital crime of robbery felony-murder (and hence the virtually identical robbery felony-murder special circumstance (see 31RT 11178, 11216, 11239 [prosecutor's argument])) because this imperfect option resembled far more closely the defendant's relative culpability than conviction for the lesser offenses on which the jurors were also instructed, second degree murder (3CT 613 & 31RT 11123) and receiving stolen property (3CT 635-636 & 31RT 11366-11367.)

Second degree murder was presented as a lesser crime not to first degree robbery felony-murder but to first degree deliberate and premeditated murder. (3CT 608-609 & 31RT 11121-11122 [CALJIC No. 8.20 provides that first degree deliberate and premeditated murder is an intentional killing with express malice plus the heightened state of deliberation and premeditation];

3CT 613 & 31RT 11123 [CALJIC No. 8.30 provides that a second degree murder is an intentional killing with malice but without deliberation and premeditation]; 3CT 610 & 31RT 11122 [under CALJIC No. 8.21, first degree felony-murder does not require malice or an intentional killing but only the specific intent involved in robbery]; see *Schad v. Arizona, supra,* 501 U.S. 624, 660-662 (White, J., dissenting)). Receiving stolen property was presented as a lesser crime to robbery only under the factual scenario that appellant did not personally take the victim's property or kill him. (30CCT 8976-8977 [in his first statement to Lee, appellant stated he sat in the car while accomplices perpetrated the crimes, and he later received some of the loot]; 31RT 11180-11181 [prosecutor argued against jurors convicting of only receiving stolen property by crediting appellant's first statement to Lee].) Jurors rejected this scenario, as evidenced by their verdicts finding that appellant personally used a firearm during the robbery and murder. (3CT 673, 675.) Therefore, *Schad* does not take this case out of *Beck's* ambit.

Additionally, the erroneous failure to instruct on theft as a lesser included offense of robbery violated appellant's right to federal due process (U.S. Const., amend. XIV) by arbitrarily depriving appellant of a liberty interest created by state law – i.e., the right to instruction on every lesser included offense supported by the evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488-489.)

D. <u>The Lack of Instruction on Theft Prejudiced Appellant</u>.

Because the lack of theft instruction violated appellant's federal

constitutional rights, the error is reviewable for prejudice under *Chapman v. California, supra,* 386 U.S. 18, 24. Under *Chapman,* relief is required because the state cannot prove the error harmless beyond a reasonable doubt. (*Ibid.*)

Even if the error were assessed for prejudice under the standard for state law error set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, reversal is still warranted. Under *Watson,* the reviewing court considers the "entire record" to determine if, in the error's absence, there is a "reasonable probability" of a verdict more favorable to the defendant. (*Ibid.*) Such a "reasonable probability" "does not mean more likely than not, but merely "a *reasonable chance,* more than an *abstract possibility.*" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original.)

In light of the general verdict convicting appellant of first degree murder plus the robbery felony-murder special circumstance finding, this Court should assume that the jurors convicted appellant of first degree murder based on the theory of robbery felony-murder. (3CT 673-674; *People v. Ramkeesoon, supra,* 39 Cal.3d 346, 352, fn. 2.) Although the prosecution's evidence of robbery felony-murder was certainly substantial, it was not so overwhelming that it renders the lack of theft instruction harmless. (*People v. Breverman, supra,* 19 Cal.4th 142, 177 [prejudice analysis may properly consider the relative strength of the evidence supporting the judgment versus that supporting the omitted instruction].)

As demonstrated above (§ B, *ante*), jurors had cause to doubt appellant's specific intent to rob McDade. The evidence showed that appellant

desperately wanted his job back, approached McDade to discuss getting rehired and did not shoot him until about 30 minutes into their encounter. Appellant told Littlejohn he approached McDade to ask about his job, they became embroiled in a lengthy argument and appellant shot him because McDade "had it coming." If, as the prosecution maintained, appellant approached McDade rob and kill him pursuant to a plan formed with the Hodges, appellant could have accomplished this in mere moments. The foregoing supports that appellant was undecided about victimizing McDade, and the encounter did not proceed as planned. Instruction on theft would have addressed this significant shortcoming in the state's evidence. It would have given jurors an option for finding that appellant's specific intent to steal from McDade did not solidify until after appellant and McDade argued and appellant shot him for reasons other than theft.

Such a theory would have appealed to the jurors' knowledge of human nature. Everyone has at some point felt undecided about alternate courses of conduct which each pose unique attractions (e.g., choosing between competing schools, job offers or marriage proposals). We all understand that an undecided person has not mentally committed to pursing whatever objective the alternatives he or she must choose between present. Although jurors may not have related to the particular choices appellant faced, they would have easily identified with appellant's inability to decide between them and hence to formulate the specific intent to act upon them, including the specific intent to steal necessary for robbery.

Concededly, appellant admitted to Lee that he robbed and killed

McDade. (31CCT 9031.) But appellant gave Lee several accounts of what happened. They all differed from each other and from what appellant told Littlejohn. (Compare 30CCT 8975-8977 [appellant sat in car while Hodges committed crimes], with 30CCT 8999-9001 [appellant shot McDade accidentally], 31CCT 9003 [appellant shot McDade because he was pressured and scared] and 31CCT 9263, 9277-9278 [appellant shot McDade after they argued and because McDade "had it coming"].) Appellant lacked a strong motive to lie to Littlejohn, who was the mother of appellant's friend and who had herself experienced trouble with the law. (31CCT 9289, 28RT 10389-10390, 31RT 11212 [prosecutor claimed Littlejohn favored appellant].) In contrast, when he spoke with Lee, appellant had a motive to take the blame upon himself and shift it away from the Hodges in order to protect himself and his family from them. (See 31CCT 9012 [appellant told Lee that if Lee knew more about the Hodges' involvement, "ya'll would go swipe them, they got locked up and probably be out and bam, there go my family..."], 9016 [appellant said the Hodges "wanted everything to be on me..."]; 31CCT 9142 [John Hodges ~~told~~ Banks he can beat the charges because the youngster had taken the blame]; 31RT 11254 [defense counsel argued appellant sought to exculpate the Hodges].)

Significantly, the defense disputed appellant's formation of the mental state necessary for robbery. (31RT 11249 [counsel omitted intent for robbery from list of undisputed matters in argument], 11250 [counsel challenged proof of appellant's mental state], 11327 & 11338 [counsel questioned proof of appellant's specific intent to rob].)

Further, jurors did not resolve the question of when appellant formed the intent to steal posed by the omitted theft instruction under any of the other, properly given instructions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 96; *People v. Sedeno, supra,* 10 Cal.3d 703, 721.) Although the court gave CALJIC No. 14.65 on receiving stolen property as a lesser included offense to robbery (3CT 635-636 & 31RT 11366-11367), the instruction did not address the timing of a defendant's specific intent to steal in regards to application of force or fear. Rather, CALJIC No. 14.65 posited a defendant who receives property already stolen by another. Also, it required the mental state of knowledge, not specific intent to steal. (*Ibid.*) Moreover, conviction for receiving stolen property was presented as an option if jurors believed that appellant's first account to Lee that the Hodges were the direct perpetrators and appellant remained in the car. (31RT 11180-11181 [prosecutor argued against receiving stolen property]; 30CCT 8975-8977 [appellant's first story].) Because this scenario was completely at odds with that supporting the omitted theft instruction, the jurors' rejection of the former is not tantamount of rejection of the latter.

Otherwise, the jurors were instructed on the greater offense of robbery as a substantive offense and also in the context of robbery felony-murder and the robbery felony-murder special circumstance. (3CT 623 & 31RT 11127-11128 [robbery]; 3CT 610 & 31RT 11122 [felony-murder]; 3CT 619 & 31RT 11125-11126 [special circumstance].) Correct instructions on a greater including offense do not render harmless the failure to instruct on a lesser included offense because they do not give jurors a choice between the two. (*People v. Breverman, supra,* 19 Cal.4th 142, 178, fn. 25.) Although the

standard instructions "adequately cover[ed] the issue of the time of the formation of the intent to steal" (*People v. Hendricks* (1988) 44 Cal.3d 635, 643), none of them highlighted it. (*People v. Kelly, supra,* 1 Cal.4th 495, 530 [presence or absence of special after-formed-intent instructions bears on prejudice from lack of lesser-included theft instruction]; see also Argument XVII, *post* [CALJIC No. 8.81.17 defective for using "or" between paras. 1 and 2]). Thus, they did not tend to lessen the harm resulting from the instructional omission. (*Kelly, supra,* at p. 530.) "Since the jury was deprived of the 'theft option' which was clearly supported by some evidence, it cannot be said that a verdict finding defendant guilty of robbery necessarily resolved the issue posed by the lesser offense instruction adversely to defendant. [Citation.]" (*People v. Ramkeesoon,* 39 Cal.3d 346, 352; see also *Kelly, supra,* at pp. 529-530 [standard instructions on robbery and the robbery felony-murder special circumstance do not render harmless the failure to instruct on theft]; *Ramkeesoon, supra,* at pp. 352-353 [same in regards to instructions on robbery and robbery felony-murder].)

Therefore, the trial court erred to appellant's prejudice in failing to instruct on theft as a lesser included offense to robbery. As a result, appellant's convictions for robbery and first degree murder, attached gun enhancements and the special circumstance finding must be reversed.

XVIII.

THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN USING THE DISJUNCTIVE BETWEEN PARAGRAPHS ONE AND TWO OF CALJIC NO. 8.81.17.

The jury found true the robbery felony-murder special circumstance against appellant thereby making him eligible for the death penalty. (3CT 674; Pen. Code, § 190.3.) The felony-murder special circumstance applies upon conviction for first degree murder when "[t]he murder was committed while the defendant was engaged in ... the commission of ... [r]obbery...." (Pen. Code, § 190.2, subd. (a)(17)(A).)

The trial court instructed on the robbery felony-murder special circumstance under CALJIC No. 8.81.17. It stated in pertinent part that the special circumstance requires proof that

> 1. The murder was committed while the defendant was engaged in the commission of a Robbery, or
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of Robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the Robbery was merely incidental to the commission of the murder.

(3CT 619; see also 31RT 11125-11126.) The instructions defined robbery elsewhere. (3CT 623-625 & 31RT 11127-11128.)

By using the disjunctive between paragraphs one and two, CALJIC No. 8.81.17 allowed the jurors to find the special circumstance true if the murder

was committed *either* (1) while the defendant was engaged in the commission of robbery *or* (2) to carry out or advance commission of robbery or facilitate escape therefrom – i.e., the robbery was not merely incidental to the murder.[100] This was error. (*People v. Friend* (2009) 47 Cal.4th 1, 79; *People v. Prieto* (2003) 30 Cal.4th 226, 256-257.)

The trial court was required to give the second paragraph of CALJIC No. 8.81.17 because jurors could have rationally inferred that the robbery was "merely incidental" to the murder and so that the felony-murder special circumstance would narrow out from the class of convicted murderers those deserving of death eligibility.

The second paragraph of CALJIC No. 8.81.17 was added to the instruction to reflect the holding of *People v. Green* (1980) 27 Cal.3d 1 (*Green*).[101] (*People v. Horning* (2004) 34 Cal.4th 871, 907.) There, the defendant sought to kill his wife due to jealousy and belief she had been "snitching." In the process of killing her, he took her clothes and rings to prevent identification of her body. (*Green, supra,* at p. 55.) *Green* reversed the robbery felony-murder special circumstance because the evidence showed a robbery during commission of a murder, not, as the special circumstance

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100 CALJIC No. 8.81.17 was revised in 1991 to use "and" between paragraphs one and two. (*People v. Friend, supra,* 47 Cal.4th 1, 79, fn. 42.) It is unknown why the trial court did not use the revision at appellant's 1994 trial. (2CT 550, 3CT 670.)

101 *Green w*as overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239 and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and was disapproved on other grounds in *People v. Beamon* (1973) 8 Cal.3d 625 and *Evans v. Superior Court* (1974) 11 Cal.3d 617.

required, a "murder ... committed during the commission of a robbery." (*Id.* at pp. 50, 59-62.) It held that the felony-murder special circumstance requires proof that the defendant killed "in order to advance an independent felonious purpose." (*Id.* at p. 61.) Such proof is lacking if the felony simply serves to advance the murder or, put another way, if the felony is "merely incidental" to the murder. (*Ibid.*)

Green explained that the Legislature enacted California's special circumstance statute in response to *Furman v. Georgia* (1972) 408 U.S. 238 and *Gregg v. Georgia* (1976) 428 U.S. 153. (*Green, supra,* 27 Cal.3d 1, 49.) Under these decisions, a death penalty scheme violates the Eighth Amendment unless it narrows out from the greater class of convicted murderers those deserving of death eligibility and also suitably channels the sentencer's discretion in choosing between life and death. (*Id.* at p. 48.) To comply with *Furman* and *Gregg,* the Legislature intended that "each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (*Id.* at p. 61, fn. omitted.) The felony-murder special circumstance does so by "expos[ing] to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose...." (*Ibid.*)

Subsequent decisions have retreated from the requirement that the murder advance an independent felonious purpose for the felony-murder special circumstance to apply. *People v. Clark* (1990) 50 Cal.3d 583, 608-609 provides that it is enough for the killing to occur while the defendant harbors independent concurrent intents -- to both kill and commit a felony. As explained in *People v. Horning, supra,* 34 Cal.4th 871, *Green's* point is that the

felony cannot be "merely incidental to the murder." This concept can be expressed in different ways, including that the felony cannot simply advance the murder or that the felony must have an "independent felonious purpose." (*Id.* at pp. 907-908, & accompanying fn. 8.)

This Court has taken conflicting positions on whether the "independent felonious purpose" concept is a "clarification of the scope of the felony-murder special circumstance" or an essential element. (Compare *People v. Valdez* (2004) 32 Cal.4th 73, 113 & *People v. Kimble* (1988) 44 Cal.3d 480, 501 with *People v. Prieto, supra,* 30 Cal.4th 226, 256-257 & *People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25.) Appellant submits that it is an element. It "requires proof of the intent of the accused" (*id.* at p. 322) which "is perhaps as close as one might hope to come to a 'core' criminal offense element." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 493). The legally sufficiency of the evidence of the felony-murder special circumstance depends on the adequacy of such proof. (*Green, supra,* 27 Cal.3d 1, 61-62; *Thompson, supra,* at pp. 322-323 & accompanying fn. 25.) Legally sufficient proof of each essential element is necessary for a defendant to be subjected to criminal liability for prohibited conduct. (*In re Winship, supra,* 397 U.S. 358, 364.) When, as here, proof of a fact exposes an accused to an increased statutory penalty, the fact is the functional equivalent of an element. (*Apprendi, supra,* at p. 494, fn. 19; *Prieto, supra,* at pp. 262-263.)

Proof of the defendant's independent felonious purpose is also necessary for the felony-murder special circumstance to perform its narrowing function under the Eighth Amendment. "[A]s the California Supreme Court explained in *Green,* it added this element out of constitutional necessity, not

mere state law nicety...." (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476; see also *Maynard v. Cartwright* (1988) 486 U.S. 356, 363 & *Zant v. Stephens* (1983) 462 U.S. 862, 878.) Without the second paragraph of CALJIC No. 8.81.17, there would be no difference between first degree felony-murder (Pen. Code, § 189) and the felony-murder special circumstance (Pen. Code, § 190.2, subd. (a)(17)).

A trial court's failure to instruct on an essential element violates a defendant's Fourteenth Amendment right to due process and Sixth Amendment right to jury trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *In re Winship, supra,* 397 U.S. 358, 364.) Additionally, for the reasons discussed above, where the omitted element is necessary for a special circumstance to perform its narrowing function, failure to instruct on it violates the Eighth Amendment.

Regardless of precisely how *Green's* principles are labeled, they are general principles of law on which a trial court must instruct sua sponte when raised by the evidence. "The second paragraph of CALJIC No. 8.81.17 is appropriate where the evidence suggests the defendant may have intended to murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation." (*People v. Navarette* (2003) 30 Cal.4th 458, 505.)

Here, the court was required to instruct on the second paragraph of CALJIC No. 8.81.17. The jurors were not bound by the prosecutor's murder-for-robbery theory that appellant robbed McDade and then killed him to eliminate him as a witness to the robbery. (31RT 11164, 11175, 11236-11239

[prosecutor's argument]; *People v. Rayley* (1992) 2 Cal.4th 870, 902 [jurors not bound by advocates' theories].) Rather, they could have rationally found that appellant's primary objective was to kill McDade out of personal animus and that appellant committed the robbery merely as a ruse to occupy the victim until he could shoot him. (See 31RT 11200 [prosecutor argued appellant waited until McDade turned away to fire the close-range shot to McDade's temple without McDade assuming a defensive posture].) Or jurors could have seen the robbery as a means of creating a false impression about the actual motive for the killing in order to throw off authorities. (See 28RT 10271, 10282-10283 [in calls from jail, appellant encourages friends to fabricate evidence].)

According to Littlejohn, appellant said he killed McDade because McDade had threatened him and "had it coming." (31CCT 9263; see also 9266.) Further, appellant told her that "nobody really know the truth about why I killed him, the papers got it all wrong." (31CCT 9263; see also 9277.) Although appellant "just spill[ed] his guts" to Littlejohn, he never said anything about wanting to rob McDade. (31CCT 9268, 9277-9278; see *People v. Ledesma* (2006) 39 Cal.4th 641, 715 [defendant's failure to mention robbery motive when making admissions supports that different motive was behind the killing].) Appellant told her he approached McDade to discuss getting his job back and an argument ensued, which "went on and on" and culminated in the killing. (31CCT 9277-9278.)

Other evidence also supported that appellant killed McDade due to frustration over not getting rehired. (See *People v. Ledesma, supra,* 39 Cal.4th

641, 715 [evidence supports that defendant killed for revenge, not to rob].) Appellant was really proud of his work at KFC. (31CCT 8996, 8999.) After he was fired, he repeatedly returned to KFC to ask McDade to rehire him, but McDade always put him off. (16RT 6514-6515, 6517-6518, 6549; 31CCT 8992, 8994.) Appellant wanted to stay off the streets and his brother was pressuring him to find work. (31CCT 8992, 8999.) Once, appellant went with an older relative to ask McDade about being rehired; the men had such a heated verbal confrontation that McDade threatened to call the police. (16RT 6516, 6547, 6552.) Additionally, appellant told Kim Scott that he intended "to get y'all" in reference to the people at KFC. (18RT 7286, 7350.) He told Detective Lee that he shot McDade because McDade had provoked him. (32CCT 9001-9002.) Also, appellant did not act terribly interested in McDade's valuables. There was no evidence that he rummaged through McDade's pockets or vehicle. He left within it a bank bag containing KFC proceeds from the day before the shooting. (16RT 6518-6519, 6536, 20RT 7845; see *People v. Thompson, supra,* 27 Cal.3d 303, 323-324 [defendant's failure to take victim's valuables indicates lack of robbery motive].)

The prosecutor believed there was a substantial danger that jurors would find that appellant's objective was to kill and his commission of the robbery was merely incidental to it. Consequently, he repeatedly argued against such an interpretation of the evidence in his closing remarks. (31RT 11164 [prosecutor argues appellant's motive was not revenge], 11170 [although appellant was bothered by not getting his job back, appellant killed McDade out of greed, not hatred], 11174-11175 [appellant did not kill and then decide to take money as afterthought], 11179-11180 [appellant's primary purpose was

not murder with robbery incidental to it], 11185 [purpose of killing was not to get back at McDade but to commit robbery], 11190-11191 [appellant was not bitter about being fired, and he did not kill in revenge], 11195-11196 [according to Banks, John Hodges never said appellant had a beef with McDade], 11227 [nothing shows appellant shot McDade for revenge].) Although the evidence speaks for itself, that the prosecutor was so concerned that jurors would find appellant killed for revenge underscores the reasonableness of appellant's claim.

Clearly, the evidence supported that appellant had a motive to kill McDade because he was a disgruntled ex-employee. This motive had nothing to do with robbery. Because jurors could have viewed the robbery as "merely incidental" to the murder, the trial court erred in presenting the second paragraph of CALJIC No. 8.81.17 as an optional, not mandatory, requirement of the felony-murder special circumstance. (See *People v. Navarette, supra,* 30 Cal.4th 458, 505 [no need for *Green* language if there is no significant evidence of motive to kill other than to facilitate commission of burglary and/or robbery]; *People v. Kimble, supra,* 44 Cal.3d 480, 503 & accompanying fn. 18 [omission of second paragraph of 8.81.17 acceptable because only speculation, not evidence, supports that defendant killed due to "burning hatred" of victims].)

The failure to instruct on the second paragraph of CALJIC No. 8.81.17 is assessed under the stringent *Chapman* test for prejudice from federal constitutional error: reversal is required unless the state proves the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24: *People v. Prieto, supra,* 30 Cal.4th 226, 256-257.) The state

cannot meet its burden here.

In assessing prejudice, the reviewing court looks to whether there was evidence "'that reasonably or rationally suggests that defendant committed the [felony] ... in order to carry out or advance the murder.' [Citation.]" (*People v. Prieto, supra,* 30 Cal.4th 226, 257.) If the record contains evidence that "could rationally lead to a contrary finding" i.e., one favorable to the defendant, the error will be deemed prejudicial. (*Neder v. United States* (1999) 527 U.S. 1, 19 [explaining harmless error analysis in context of omission of an element].) As demonstrated, the evidence here furnished a plausible basis for jurors to have found that the robbery was merely incidental to the murder.

Although the evidence undoubtedly warranted a finding of independent felonious intent, the prosecution's murder-for-robbery theory had its problems. The prosecution relied on extra-judicial statements by appellant and the Hodges that their goal was to rob McDade and kill him to eliminate him as a witness to the robbery. (31RT 11163-11164, 11226-11239 [prosecutor discussed appellant's statement in closing remarks], 11194-11199 [prosecutor discussed Hodges' statements].) The Hodges' statements, were relayed to jurors through Leisey and Banks, witnesses with serious credibility problems. (31CCT 9132-9166, 31CCT 9293-32CCT 9322; see Argument XVII, § D, *ante*.) Further, appellant gave detective Lee three different versions of what happened (30CCT 8974-31CCT 9032) and candidly admitted he was holding back. (31CCT 9012). He gave a fourth version to Littlejohn, which, as noted, said nothing about approaching McDade to rob him and instead emphasized

that McDade "had it coming." (31CCT 9263, 9277-9278.) Given these weaknesses with the murder-for-robbery theory, jurors could have instead concluded that the murder was motivated by the age-old motive of revenge.

Nothing in CALJIC No. 8.81.17 required the jury to find that the robbery was not merely incidental to the murder in order to find the special circumstance true. (*Williams v. Calderon, supra,* 52 F.3d 1465, 1476, emphasis added.) The jury's verdict was consistent with either a finding of felony-murder or deliberate and premeditated murder. (3CT 673-675 [verdicts].) The trial court instructed on both theories of first degree murder (2CT 608-609 [CALJIC No. 8.20], 623 [CALJIC No. 9.40] and 2CT 610 [CALJIC No. 8.21]) and that jurors need not unanimously agree on either (2CT 612). It cannot be said that the jury resolved *Green's* principles adversely to appellant under other, properly given instructions. (*People v. Flood* (1998) 18 Cal.4th 470, 484.)

Therefore, the felony-murder special circumstance finding must be vacated due to the trial court's failure to instruct that, to find the special circumstance true, jurors must find appellant acted pursuant to an independent felonious purpose.

XIX.

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

Appellant's jury was instructed that appellant could be convicted of first degree murder if he either committed a deliberate and premeditated murder (2CT 608-609 & 31RT 11121-11122 [CALJIC No. 8.20]), or killed during the commission of robbery (2CT 610& 31RT 11122 [CALJIC No. 8.21]). It was also instructed on second degree murder. (3CT 613 & 31RT 11123 [CALJIC No. 8.30].) The jury convicted appellant of first degree murder. (3CT 673.) The trial court erred in instructing the jury on first degree murder. The information supported instruction only on second degree murder. It did not charge appellant with first degree murder and did not allege the facts necessary to establish it.

The information charged appellant and the Hodges with "violation of Section 187 of the Penal Code, of the State of California, a felony, committed as follows: That on or about the 19th day of January, 1992, at and in the County of Sacramento, State of California, the defendants ... did willfully, unlawfully, and with malice aforethought murder KEITH MCDADE, a human being." (1CCT 47.)

Penal Code section 187, cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the

additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307, overruled on other grounds by *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1198-1199.) "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.) Both the statutory reference ("Section 187 of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Because the information charged only second degree malice murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. A court has no jurisdiction to proceed with trial for an offense without a valid indictment or information charging that specific offense. (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; *People v. Granice* (1875) 50 Cal. 447, 448-449.)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the information or indictment charges only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) The rationale for this position is that all forms of murder

are defined by section 187, and, therefore, an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary. Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> ... [I]t must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto* [(1883)] 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree. It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *Witt* and similar cases has been undermined by *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has reaffirmed *Witt* following *Dillon* (*People v. Hughes*, *supra*, 27 Cal.4th 287, 369), it has never explained how *Witt* and *Dillon* can be reconciled.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. 104, 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, *Dillon* concluded that "[w]e are therefore required to construe [Penal Code] section 189 as a statutory enactment of the first degree felony murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d 441, 472, fn. omitted.)

In rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, abrogated by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212, disapproved on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute defining that offense is section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a), referring to "willful, deliberate, and premeditated murder, as defined by Section 189") or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d 441, 472, expressly held that the first degree felony murder rule was codified in section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by section 189. The information did not charge first degree murder in the language of "the statute defining" that crime.

Consequently, it is immaterial whether this Court was correct in concluding that "Felony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct

crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [second degree murder is a lesser offense included within first degree murder]; *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.) [different degrees of a crime are different offenses requiring proof of different elements].)

The greatest difference is the one between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice. (*People v. Watson*, *supra*, 30 Cal.3d 290, 295; *People v. Dillon*, *supra*, 34 Cal.3d 441, 475.) But malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th 1153, 1212; *Dillon*, *supra*, at pp. 475, 476, fn. 23.) In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in relevant respects to sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases*

the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.) Premeditation and the facts necessary to bring a killing within the first degree felony murder rule (commission or attempted commission of a felony listed in section 189 together with the specific intent to commit that crime) are facts which increase the maximum penalty for the crime of murder. If they are absent, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

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

The erroneous instruction on first degree murder prejudiced appellant.

In its absence, jurors could have convicted appellant at most of second degree murder, a noncapital crime. Thus, first degree murder conviction must be reversed.

XX.

MULTIPLE INSTNCES OF PROSECUTORIAL MISCONDUCT REQUIRE REVERSAL OF THE JUDGMENT.

Both state and federal authority hold a prosecutor to a high standard of professionalism and objectivity as a representative of the people, whose "twofold aim ... is that guilt shall not escape or innocence suffer." (*People v. Lyons* (1956) 47 Cal.2d 311, 318 quoting *Viereck v. United States* (1943) 318 U.S. 236, 248.) A district attorney "may strike hard blows" but not "foul ones." (*Lyons, supra,* at 318.) "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Ibid.*; see also *People v. Hill, supra,* 17 Cal.4th 800, 845, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841 [prosecutor cannot stoop to use of "'deceptive or reprehensible methods' ... to persuade the jury"].)

"A prosecutor's ... intemperate behavior violates the federal constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process'" as guaranteed under the Fourteenth Amendment. (*People* v. *Goines* (1995) 9 Cal.4th 1196, 1214; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 180-181.) The danger of this occurring is especially great when the prosecutor acts as his or her own, unsworn witness. (*Id.* at p. 182.) Prosecutorial conduct that does not rise to this level may still constitute error under state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820.)

Where the challenged conduct consists of statements before the jury, the question is whether there is a reasonable likelihood that the jury construed the statements in an objectionable manner. (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

A. Denigrating Role of the Defense

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel...." (*People v. Hill, supra,* 17 Cal.4th 800, 832; see also *People v. Turner* (2004) 34 Cal.4th 406, 429-430.) A "defendant's conviction should rest on evidence, not on derelictions of his counsel." (*People v. Thompson* (1988) 45 Cal.3d 86, 112.) "[I]t is improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. (*Ibid.*; see also *People v. Wash* (1993) 6 Cal.4th 215, 265 [misconduct to suggest that trial counsel coached defendant to feign memory loss]; *People v. Bain* (1971) 5 Cal.3d 839, 847 [misconduct to allege defendant and counsel fabricated defense].) Likewise, it is misconduct for a prosecutor to allege that defense counsel has acted in bad faith. (*People v. Perry* (1972) 7 Cal.3d 756, 790.)

Here, the prosecutor repeatedly committed misconduct by attacking the integrity of defense counsel. In his opening argument, the prosecutor stated that, unlike the prosecution, the defense was permitted to asking witnesses leading questions, i.e., questions which suggested an answer. (31RT 11191) Further, "a lot of times the witnesses were able to be manipulated by the defense attorneys with these leading type questions." (*Ibid.*) The prosecutor's

remark constituted misconduct. It accused the defense of stooping to an underhanded tactic to procure witness testimony. Manipulation relies on cunning to force another person to do or say something that he or she would not freely do or say. (See generally, http://wordnet.princeton.edu/perl/webwn?s=manipulate [defining manipulate as tampering with for purpose of deception and as controlling another to one's advantage].) The challenged remark portrayed defense counsel as using coercion to elicit suspect testimony. Contrary to the prosecutor's insinuation, use of leading questions is permissible because it furthers the truth-finding goal of cross examination integral to proper functioning of our adversarial system. (*Crawford v. United States* (2004) 541 U.S. 36, 61-62 [the crucible of cross examination serves to ensure the reliability of evidence]; Evid. Code, § 767, subd. (a)(2).)

The remarks also unfairly implied that the prosecution was above the lowly tactic of asking leading questions. This is wrong. For example, the prosecution was allowed to ask leading questions of even its own witness, Eric Banks (e.g., 23RT 8721-8724, 8744), and of defense witnesses. (See 29RT 10703 et seq. [presentation of defense case]).

Consistent with the manipulation theme, the prosecutor wrongly vilified defense counsel's role. He started his rebuttal argument by stating, "[l]adies and gentlemen, I call that the Svengali defense. Mr. Castro has reinvented the facts of this case." (31RT 11339-11340; see also 31RT 11341 & 11344.) "The word 'Svengali' has entered the language meaning a person who, with evil intent, manipulates another into doing what is desired." (http://en.wikipedia.org/wiki/Svengali.) Because Svengali refers to an evil-minded manipulator,

the prosecutor's remarks implied that defense counsel relied on deception to present appellant's defense.

Subsequently, the prosecutor demeaned the role of defense counsel in general and personally attacked appellant's counsel. The prosecutor asserted, "[h]e's trying to defend his client. ... *He doesn't care about a just verdict.* He cares about the defense of his client, which he's supposed to. That's his professional duty. But *don't buy that for a second that he just wants a just verdict.*" (31RT 11341, emphasis added.) The argument implied that, by fulfilling his obligation to defend appellant, defense counsel sought a potentially unjust verdict. Although the prosecutor did not explain what an unjust verdict would be, his implied that defense counsel was permitted to present an dishonest defense. (See also 32RT 11345 [prosecutor argues that a defense attorney faced with a case like this will figure way to "lay it off on the other two guys"].) The prosecutor's comments also portraryed defense counsel as personally lacking a moral compass.

The prosecutor's argument is similar to that condemned in *People v. Perry, supra,* 7 Cal.3d 756, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 28-34. There, the prosecutor read from a United States Supreme Court opinion of Justice White[102] stating that, unlike the prosecutor, whose only function is to expose the truth, defense attorneys will often cross-examine and seek to impeach a witness even if the witness is telling the truth. (*Id.* at p. 790.) *Perry* found that the prosecutor committed misconduct by suggesting that defense attorneys are free to obscure the truth and confuse the

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[102] The reference was presumably to Justice White's dissenting opinion in

jury. (*Id.* at pp. 789-790.) *People v. Hawthorne* (1992) 4 Cal.4th 43 condemned similar reliance on Justice White's opinion because it "paints with too broad a brush" and "interject[s] an extraneous generalization, potentially diverting the jury's attention" away from the law and facts. (*Id.* at p. 60; see generally, *id.* at pp. 59-61.)

The prosecutor's attacks on the defense in general and defense counsel personally were improper. "Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People v. Thompson, supra,* 45 Cal.3d 86, 112.)

B. Statements of Personal Opinion and References to Matters Beyond the Evidence

Having portrayed defense counsel as stooping to reprehensible means to defend appellant, the prosecutor then distanced himself from his opponent by expressing his personal opinion and emotion. In response to defense counsel's argument that appellant and the prosecution shared a common view of much of the evidence (see, e.g., 31RT 11246, 11252), the prosecutor stated, "[a]nd *I resent him* continuing to say that he and I agree." (31RT 11340, emphasis added).

The prosecutor then continued to express his personal opinions about appellant's guilt and personal desire to convict appellant (3RT 11340, emphasis added.):

United States v. Wade (1967) 388 U.S. 218, 256-258.)

> Carl Powell is a cold-blooded murder. That's what Carl Powell is, and *that's what I think he is.*
>
> And then [appellant's counsel is] telling me that *I* agree with him on these various facts; that's baloney. ...
>
> Make no mistake about it. *I* am not aligned with Mr. Castro in any way, shape or form. *I* have been cordial to him on a professional basis, because *I think* that's the way attorneys should act.
>
> *My* purpose from the very beginning in this case was the convict Carl Powell, John Hodges and Terry Hodges of first-degree murder, with the special circumstances.

A prosecutor's reference to his own personal feelings is inappropriate. (*People v. Mendoza* (2007) 42 Cal.4th 686, 703-704.) For example, in *People v. Fiero* (1991) 1 Cal.4th 173, 212-213, this Court found misconduct due to the prosecutor's comment, "I am certainly offended at the duplicity of the argument" presented by defense counsel. Additionally, a prosecutor "may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion." (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

In response to defense counsel's argument that the testimony of various witnesses suggested that appellant was in the parking lot talking to McDade for about 30 minutes before the shooting (see 31RT 11276-11281), the prosecutor argued, "in a case like this, everything never fits." (32RT 11351). In essence, the prosecutor relied on the existence of evidentiary incongruities in *other* cases to shore up the prosecution's evidence in *this* one. This was misconduct. Since there was no evidence before the jury concerning other cases, the remark

implied that the prosecutor was privy to information, beyond the evidence presented at trial, tending to prove appellant's guilt.

Because the prosecutor did not state that his personal feelings and opinions were based on the evidence, there is a reasonable likelihood jurors would have interpreted them as based, at least in part, on extra-judicial information. (*People v. Bain, supra,* 5 Cal.3d 839, 848.) This is particularly so in light of the last remark. It is misconduct for a prosecutor to assert "'that he believed in the guilt of the defendant at the very inception of the prosecution,'" prior to the presentation of evidence, since "'such belief must have been founded upon the result of the district attorney's original and independent investigation....'" (*Ibid.*, quoting *People v. Kirkes* (1952) 39 Cal.2d 719, 723-724.)

C. Emotional Appeal

It is wrong for a prosecutor to inject emotional matters, having no bearing on the legitimate issue, into argument as means of persuasion. (*People v. Mayfield* (1997) 14 Cal.4th 668, 803; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) A prosecutor may not "divert the jury's attention for its proper role or invite an irrational response." (*People v. Sanders* (1995) 11 Cal.4th 475, 550.)

The prosecutor committed misconduct in his rebuttal argument by contending that appellant's family did not support him. (32RT 11353.) He argued, "[t]hen this thing about Carl's family – not that that's a defense once again. But where is the family? ... He may love his family dearly, but *they*

don't seem real supportive of him. He goes down to L.A.; his mother tells him to come back to Sacramento because he's turning himself in. His brother is kicking him out on the street. Where is his family that he's trying to protect so much?" (*Ibid.,* emphasis added.) Whether appellant's family was "supportive of him" has no legitimate bearing on the issues presented at the guilt phase. By characterizing appellant as someone for whom his own family did not even care, the remark invited jurors to dismiss appellant as unworthy of their concern as well.

D. References to Lack of Remorse

In the guilt phase of a capital trial, a defendant's lack of remorse is irrelevant unless the defense opens the door to it during its case-in-chief. (*People v. Riggs* (2008) 44 Cal.4th 248, 301; *People v. Jones* (1998) 17 Cal.4th 279, 307.) A prosecutor may not urge guilt based on irrelevant considerations because doing so diverts the jurors' attention from their proper tasks. (*People v. Mayfield, supra,* 14 Cal.4th 668, 803; *People v. Pensinger, supra,* 52 Cal.3d 1210, 1250.)

Here, the prosecutor repeatedly relied in his guilt phase arguments on appellant's lack of remorse for the killing. (31RT 11194.) Twice in his opening argument the prosecutor referenced John Hodges's statement to Banks that appellant was "without no remorse, you know, because he's young, and he ain't never been, been into nothing." (31RT 11193-11194 & 11195.) Then he emphasized, "[k]eep in mind the no remorse part of this. He's young, and according to John Hodges there, he showed no remorse whatsoever. And if you look at the killing, it could not be more cold-blooded." (31RT 11194.)

Subsequently, the prosecutor referenced Angela Littlejohn's account to police concerning appellant's post-shooting conduct, i.e., that appellant "'was stupid. He didn't act like he killed anybody.'" (31RT 11207.) The prosecutor contended that the Littlejohn evidence dovetailed with appellant's demeanor at trial and John Hodges's statement that appellant showed no remorse (31RT 11207-11208):

> And that's consistent with what John Hodges says; he doesn't have any remorse. And he's sitting there ... you might think that he's younger than the Hodges brothers, and he looks kind of down.
>
> You know, the most remorseful criminal in the world is the guy who's been caught. You know, but this shows he didn't care; he didn't have any remorse.
>
> Now, that's ... two statements that he just didn't care. And then there were other statements he was laughing about it. [Littlejohn] says he was walking around with a gun in his pocket. 'To me, he was stupid.'
>
> That's how she interprets it, because it's so outrageous. He shoots a guy in the head, and then he walks around bragging to the girls, thinking it's a joke and having no remorse. So she interprets it ... as stupid.
>
> [¶s]
>
> Now, you notice how bad Carl Powell feels about what he did to Keith McDade? ... He wants his gun back so he can get more money."

The prosecutor also related Littlejohn's statements that appellant acted like taking a life was "nothing big" and "no big thing." (31RT 11213.) He

further relied on Littlejohn's exchange with detective Thurston to argue lack of remorse: "[d]etective Thurston says so he didn't show any remorse at all. Angela Littlejohn says he – don't really care. ... [¶] And then Angela Littlejohn repeats that. You know, he don't care." (31RT 11213; see also 31 RT 11224 [prosecutor contends appellant's second statement to detective Lee in which appellant said he was in tears over the killing is inconsistent with Littlejohn's account that appellant lacked remorse]; 31RT 11237 [prosecutor argues appellant was laughing about the killing later].)

In his rebuttal remarks, the prosecutor harkened back to his lack-of-remorse theme by stressing that, after the killing, appellant bragged and joked about it and partied with girls. (32 RT 11355-11356.)

Appellant did not open the door in his guilt phase case-in-chief to evidence that he lacked remorse. The prosecutor's references to appellant's lack of remorse constituted misconduct.

E. The Misconduct Claims Have Been Preserved for Review

Generally, "'a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citations.]" (*People v. Hill, supra,* 17 Cal.4th 800, 820.) A request for admonition shall be excused if the court's promptly overruling the objection leaves no time to make the request. (*Ibid.*) Further, both objection and request for admonition shall be excused if they would be futile or the harm caused cannot be cured. (*Ibid.*)

Defense counsel promptly object to the first challenged instance of prosecutorial misconduct characterizing legitimate cross examination by counsel as "manipulation" that coerced suspect testimony. (31RT 11191) When the trial court overruled this first objection, it explained "since this is argument[,] you can respond to it in your argument." (*Ibid.*) By refusing to sustain appellant's initial meritorious objection and indicating that counsel's remedy was to respond in his own argument, the trial court rendered subsequent objections futile. (See *People v. Bain, supra,* 5 Cal.3d 839, 849, fn. 1 ["[a]nother objection, right after the trial judge overruled the previous one, would have been futile and would possibly have involved a risk of antagonizing the jurors. Defendant is not required to bear such a risk"]; see also *People v. Hill, supra,* 17 Cal.4th 800, 821 [excusing further objections as futile where prosecutorial misconduct was interspersed during proceedings and trial court failed to curb it when counsel objected].)

Additional objections were also excused as futile because admonition could not "unring the bell" of the prosecutor's misconduct. The prosecutor repeatedly characterized defense counsel's legitimate role as manipulative and evil in a manner that undermined the adversarial process. At the same time, he contended that he was personally offended by defense counsel's tactics and implied that he had extra-record information condemning appellant. As in *People v. Kirkes, supra,* 39 Cal.2d 719, the prosecutor's flagrant misconduct was "interspersed throughout the closing argument in such manner that [its] ... cumulative effect was devastating. Repeated objections might well have served to impress upon the jury the damaging force of the challenged

assertions." Under these circumstances, "[a] series of admonitions ... could not have cured the harmful effect of such misconduct." (*Id.* at p. 726.)

Accordingly, appellant's claims of misconduct have been preserved for review.

F. The Prejudice

Typically, claims of prosecutorial misconduct are assessed for prejudice under the *Watson* standard for state law error: reversal is required if there exists a reasonable probability that, in the absence of the error, the jury would have returned a verdict more favorable to the accused. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Watson, supra,* 46 Cal.2d 818, 836.)

Misconduct implying that the prosecutor has knowledge of facts, beyond the evidence, incriminating the defendant violates the Sixth Amendment right of confrontation and cross-examination by permitting the prosecutor to act as his own, unsworn witness. (*People v. Bolton, supra,* 23 Cal.3d 208, 215, fn. 4.) Further, misconduct that is sufficiently pervasive and damaging raises due process concerns about the fundamental fairness of the proceedings as guaranteed by the due process clause of the Fourteenth Amendment. (U.S. Const., amends. V & XIV; *Darden v. Wainwright, supra,* 477 U.S. 168, 180-181.) Since this is a capital case, the errors ultimately affect the right to a reliable penalty determination under the Eighth Amendment. Because the misconduct at issue implicated these federal constitutional guarantees, it is appropriate to use the *Chapman* standard for federal constitutional error, i.e., reversal is required unless the state can prove the error

harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

The harmful effect of the misconduct in the present case was strong for several reasons. The closing argument of a prosecutor "carr[ies] great weight" (*People v. Talle* (1952) 111 Cal.App.2d 650, 677) and constitutes an "especially critical period" during which misconduct may prejudice the jury. (*People v. Alverson* (1964) 60 Cal.2d 803, 805). Most of the misconduct occurred during the prosecutor's rebuttal argument, right before the jury began its guilt phase deliberations. This was when its impact was sure to be the greatest. (Cf., *People v. Williams* (1976) 16 Cal.3d 663, 669 [that jury convicted soon after hearing read back of wrongly admitted evidence tends to show that the evidence affected the verdict].)

Further, even if each individual instance of misconduct does not alone constitute reversible error, the cumulative effect of the prosecutor's multiple acts of misconduct prejudiced appellant in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.) The remarks attacking the role of defense counsel and defense counsel personally and those implying the prosecutor was privy to information beyond the evidence tending to prove appellant's guilt clearly complemented each other in how each undermined the adversarial process. Neither's effect would have been as harmful without the other's supporting role.

Additionally, the prejudicial effect of the prosecutor's improper remarks

was augmented because they occurred on multiple occasions and were interspersed throughout the argument. (*People v. Kirkes, supra,* 39 Cal.2d 719, 726.)

Further, the prosecutor's implication that defense counsel had fabricated an avenue of defense went to the heart of the defense case – appellant's mental state. (See, e.g., 31RT 11249-11250 [defense counsel argues in closing that the key issue is appellant's mental state].)

When defense counsel voiced an objection to the prosecutor's improper argument, the trial court overruled it. Consequently, the trial court did nothing to minimize the resulting prejudice. (*People v. Hill, supra,* 17 Cal.4th 800, 845.)

Appellant has already previously discussed why the prosecution's case against him was troubled, and he respectfully directs this Court to that portion of his brief. (See Argument I, § C.5.a, *ante.*)

XXI.

REVERSAL OF THE JUDGMENT IS REQUIRED DUE TO GUILT PHASE JUROR MISCONDUCT IN REVIEWING NEWSPAPER ARTICLES CONCERNING THE MISTRIAL GRANTED TO THE HODGES AND THE DISMISSAL OF THE CHARGES AGAINST THEM AND ALSO DUE TO THE TRIAL COURT'S INADEQUATE INQUIRY INTO THE MATTER.

A. Factual Background

On August 23, 1994, at the conclusion of the evidentiary portion of the guilt phase, the trial court granted a mistrial to the Hodges brothers. (30RT 10829-10831, 10838-10842; 29CCT 8605.) John and Terry Hodges, their four attorneys, their investigators and the Hodges jurors and alternates all disappeared from the courtroom. The court simply informed appellant's jurors that the Hodges would no longer be present, and it was not going to provide any further information about the status of their case. (30RT 10867.) It also instructed the jurors not to speculate about what had happened in the Hodges case and to continue avoiding news reports "about any of the cases." (30RT 10868.) Appellant's defense case continued. (2CT 520, 550, 3CT 672.)

On August 24, 1994, the Sacramento Bee, a local newspaper, ran an article captioned "mistrial delivered in slaying of K.F.C. manager" which reported that a mistrial was granted in the Hodges' case. (32RT 11390-11391.) It included comments by the Hodges jurors "expressing some of [their] feelings" in a manner that Holmes characterized as "damaging" to appellant. (32RT 11392-11393.)

On August 26, 1994, the superior court granted the prosecution's request to dismiss the charges against the Hodges. (1CCT 30-31.)

On August 27, 1994, the Sacramento Bee ran another article captioned "charges dropped in K.F.C. murder case" reporting that the charges against the Hodges had been dismissed. (31RT 11153, 32RT 11390-11391.)

The next court day, August 29, 1994, Castro called the court's attention to the August 27, 1994, article. (31RT 11153.) The record does not explain why counsel did not also draw the court's attention to the August 24, 1994, article. In any case, joined by the prosecutor, Castro asked the court to question the jurors about the most recent article and instruct them not to be affected by it. (Ibid.) He expressed concern that if appellant's jurors realized that the Hodges' cases had been dismissed, "they may feel, okay, the Hodges brothers are gone, and now we're going to load up on [appellant].) (31RT 11154.)

The court agreed to make an inquiry. (31RT 11153.) It explained that it would ask the jurors as a group if any of them had read the article, and, if so, if they could "assure us that it will not have any effect on their decision;" additionally, if anyone said it might affect their decision, the court would then question that juror privately. (31RT 11153-11154.) Castro concurred in this approach. (31RT 11154.)

When the jurors arrived, the court asked them to raise their hands if "any of you read the article or the headline of the short article in the

newspaper, Sacramento Bee, this Saturday concerning the charges against the co-defendants, Terry and John Hodges." (31RT 11154.) Six jurors and two alternates responded affirmatively, and an unidentified juror said, "[t]itle." (31RT 11154-11155.) Next, the court asked, "would the content of the article or the headline to the article in any way affect your verdict or decision in this case, in your opinion?" (31RT 11156.) No one responded. (Ibid.) The court continued, "if I were to direct you to disregard what you've read in either the headlines or the article, are there any of you that feel you would have any problem disregarding ... all of that in making your decision in this case?" (Ibid.) Again, no one responded. (Ibid.) The court asked Castro if he thought the inquiry was sufficient or if he desired "to pose any other questions to the jurors?" (Ibid.) Castro replied that the inquiry was appropriate. (31RT 11156-11157.)

Appellant's guilt phase trial continued. On August 29, 1994, and on August 30, 1994, the prosecutor and defense counsel gave closing arguments, and the court instructed the jurors. (2CT 550, 3CT 670.) They started deliberations on August 30, 1994. (3CT 670.)

That day, as appellant's jurors were engaged in deliberations, Holmes, prompted by appellant, brought the court's attention to the earlier article which ran on August 24, 1994. (32RT 11390.) Holmes and Castro were not sure if any inquiry had been made regarding it. (32RT 11393.) Both addressed why they may not have previously requested one. Holmes said that during the inquiry concerning the August 27, 1994, article, he recalled hearing several jurors say they had stopped at the caption, and "I assume maybe they were

doing the same thing with the previous article[]." (32RT 11391.) Castro said he thought the court's August 23, 1994, remarks to appellant's jurors about the Hodges's disappearance from the case "probably took care of the whole thing." (32RT 11392.)

Holmes requested that the court ask jurors about the effect of the August 24, 1994, article. (32RT 11393.) Because the jurors were deliberating, the court decided not to call them into the courtroom but to instead send them a note. (32RT 11393, 11395.) It planned to ask them in writing about their exposure and reaction to the August 24, 1994, article in basically the same terms as the earlier inquiry into the August 27, 1994, article. (32RT 11395.) Counsel agreed with this approach. (32RT 11395-11396.)

The court's note was submitted to the jurors on August 30, 1994. (3CT 669 [reproducing note].) It asked anyone who had been exposed to the August 24, 1994, Sacramento Bee article, or its headline, to so indicate. Two jurors and three alternates indicated that they had read the article or its headline.[103] (*Ibid.*; see 2CT 422-423 [indicating identity of jurors versus alternates].) The note then instructed them to disregard the article in their deliberations and asked if anyone would have difficulty doing so. (32RT 11402.) No one responded affirmatively. (32RT 11402-11403.)

Jurors agreed on the guilt phase verdicts on August 31, 1994, and returned them in open court on September 1, 1994. (32RT 11404.)

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103 The court said the note could be sent to the deliberating jurors and the

B. General Principles

"Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors...." (*In re Willon* (1996) 47 Cal.App.4th 1080, 1092.) The right to trial by an impartial jury is guaranteed by the Sixth Amendment. The Due Process Clause of the Fourteenth Amendment further guarantees that jurors remain "free from outside influences." (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 362; see also *Turner v. Louisiana, supra*, 379 U.S. 466, 471; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Turner, supra*, at p. 472.) The denial of a fair guilt phase trial by impartial jurors also violates the Eighth Amendment's guarantee of a reliable penalty determination. (*Caldwell v. Mississippi, supra*, 472 U.S. 320, 328-330.) State law is in accord. (Cal. Const., art. I, §§ 7, 16 & 17.)

A juror engages in misconduct if he or she considers extrinsic information, including news reports about the trial, beyond the evidence presented at trial. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1111-1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830; *People v. Daniels, supra*, 52 Cal.3d 815, 863-864.) "It is well settled that it is misconduct for a juror to read newspaper accounts of a case on which he is sitting...." (*Holloway, supra*, at p. 1108.) Jurors should refrain from reading anything pertaining to the trial which might influence them in the performance of their duties. (*Ibid.*)

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court attendant could separately inquire of the alternates. (32RT 11395.)

Such misconduct may constitute good cause for discharge of a seated juror. (*People v. Daniels*, *supra*, 52 Cal.3d 815, 863-866; Pen. Code, § 1089; see also Pen. Code, § 1120.) When put on notice of the possibility that a juror has been exposed to improper influences, the trial court must make whatever inquiry is reasonably necessary to properly exercise its discretion, and its failure to do so is error. (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838-840; *People v. Burgener* (1986) 41 Cal.3d 505, 519-520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743.)

Both the adequacy of the court's inquiry into juror misconduct and the court's decision to discharge or retain a juror are reviewed under the abuse of discretion standard. (*People v. Pinholster* (1992) 1 Cal.4th 865, 928 and *People v. Burgener, supra*, 41 Cal.3d 505, 520 [adequacy of inquiry]; *People v. Barnwell, supra*, 41 Cal.4th 1038, 1052 [decision on merits].)

C. Reversal is Required Due to Juror Exposure to Newspaper Articles Concerning the Hodges' Case.

Multiple members of appellant's jury admitted to reading some or all of two newspaper stories concerning appellant's trial with the Hodges which issued at the crucial juncture, at the conclusion of the guilt phase, when the Hodges were granted a mistrial and the charges against them were dismissed. This was misconduct. (*People v. Pinholster, supra,* 1 Cal.4th 865, 927 [to extent an article contains any information about the defendant's case, it is misconduct for a juror to read it]; *People v. Holloway, supra*, 50 Cal.3d 1098, 1108.) It is misconduct for a juror to receive or communicate to another juror any "information from sources outside the evidence in the case." (*Young v.*

Brunicardi (1986) 187 Cal.App.3d 1344, 1349; see also *People v. Andrews* (1983) 149 Cal.App.3d 358, 364-365 [reversing due to juror exposure to news article during deliberations].)

When such juror misconduct occurs, it gives rise to a presumption of prejudice. (*People v. Holloway, supra*, 50 Cal.3d 1098, 1108; *People v. Honneycutt* (1977) 20 Cal.3d 150, 156.) The presumption is rebuttable "only by a strong contrary showing by the Government." (*United States v. Armstrong* (9th Cir. 1981) 654 F.2d 1328, 1332.) The government must show that no actual prejudice resulted. (*Honneycutt, supra*, at p. 156; Holloway, supra, at p. 1108.) When a juror receives extrinsic information which may influence his or her mind, the juror is not allowed to say, "I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the juryroom." (*Id.* at p. 1109.)

The government cannot dispel the presumption of prejudice arising from multiple jurors' exposure to articles reporting that the Hodges' case had mistried, the charges against them had been dismissed and certain Hodges jurors expressed feelings negative to appellant. The articles appeared at the end of the guilt phase, on the eve of deliberations. They coincided with the dramatic disappearance of the two Hodges brothers, the four Hodges attorneys, their investigators and all Hodges jurors and alternates from the small, crowded courtroom. (See Argument III, § C.3, ante.) The absence of the Hodges' entourage would have been palpable to the remaining Powell jurors, who naturally would have been extremely curious about what had happened.

The articles stood to seriously harm appellant as the Powell jurors retired to decide appellant's fate. They contained express statements damaging to appellant by the Hodges jurors, who were the Powell jurors' peers having sat through the same trial. The articles suggested that the Hodges brothers had been victimized by legal error (and thus deserved a mistrial) and were not responsible for the crimes (and thus merited having the charges dismissed against them.) Like the prosecutor's broken promise that appellant would testify that he acted under duress from the Hodges (see Argument I, §§ C.1-3, *ante*), the newspaper articles created a danger that the Powell jurors would see appellant's defense, which sought to blame the Hodges, as a sham. Appellant heavily relied on the testimony of Banks and Leisey, who incriminated the Hodges, to establish the brothers' dominance over him. The dismissal of the charges against the Hodges implied that Banks and Leisey lacked credibility. It also undercut those portions of appellant's statements to Lee and Littlejohn supporting that the Hodges were the truly culpable parties. Unquestionably, the articles contained information and encouraged inferences which were quite prejudicial to appellant's defense. (See generally, Argument I, § C.5, *ante*.) At a minimum, they created the danger that appellant's jurors would lash out against appellant since he was the only remaining defendant that could be held accountable for the tragic crimes against McDade.

The trial court's anemic inquires of the jurors as a group, first in the courtroom concerning the August 27, 1994, article, and next in a note to the deliberating jurors concerning the August 24, 1994, article, were inadequate to dispel the strong prejudice that arose from the articles at this key juncture in the proceedings. This is so even though no juror indicated that he or she would

be influenced by the articles. "[I]n the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient (to test that impartiality).'" (*Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 639, citing *United States ex rel. Bloeth v. Denno* (2d Cir. 1963) 313 F.2d 364, 372; see § D, post.) Also, although one and possibly more jurors indicated that they stopped at the articles' captions (see 31RT 11155, 32RT 11391), the captions were themselves quite damaging: they indicated that the Hodges deserved not only a mistrial but dismissal of the charges. Further, the court's inquiries did not establish that all jurors stopped at the damaging captions. Even if a single juror read more, such as the damaging expression of feelings by the Hodges jurors in the August 24, 1994, article, this would further compromise appellant's right to a fair and impartial jury. (*People v. Pierce* (1979) 24 Cal.3d 199, 208 [corruption of even a single juror violates right to fair trial by impartial jury].)

Reversal is required. Regardless of the strength of the evidence against the defendant (*People v. Pierce*, supra, 24 Cal.3d 199, 206-207), a "conviction cannot stand if even a single juror has been improperly influenced." (Id. at p. 208). The defendant is entitled to a new trial. (*People v. Hogan* (1982) 31 Cal.3d 815, 846, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 835.) This is necessary to safeguard the right to a fair trial, "since a fair trial includes among other things the right to an unbiased jury. [Citations.]" (*People v. Diaz* (1984) 152 Cal.App.3d 926, 935.)

D. Appellant is Entitled to Relief Due to the Trial Court's Inadequate Inquiry into the Effect of the Hodges Articles on Appellant's Jurors.

Appellant also merits relief because the trial court's inquiry into the articles was patently deficient.

Once a trial court has been put on notice that any juror may have been subjected to an improper influence, it is the court's obligation to make whatever inquiry is reasonably necessary to determine if the juror should be discharged. (*People v. Burgener*, supra, 41 Cal.3d 505, 520.) Its inquiry must be sufficient to uncover the key facts pertaining to the misconduct allegation. (*People v. Davis* (1995) 10 Cal.4th 463, 547.) These requirements apply under both state and federal law. (*Ibid.; Remmer v. United States* (1954) 347 U.S. 227 [court must hold hearing to determine if juror had improper communication with third party].)

Case law recognizes that, due to human nature, jurors may be reluctant to admit in open court and in front of their peers that they have engaged in misconduct. Also, they are prone to minimize its effect on their impartiality. (E.g., *Silverthorne v. United States, supra,* 400 F.2d 627, 639-640; *United States v. Accardo* (7th Cir. 1962) 298 F.2d 133, 136; *United States v. Davis* (5th Cir. 1978) 583 F.2d 190, 196-198.) Consequently, a trial court must do more than make a general, group inquiry into whether jurors have been exposed to and affected by publicity. (*Accardo, supra*, at p. 136 [court's general inquiry was insufficient because it was uncertain that all jurors would volunteer information about violating admonitions or admit they had been influenced by

publicity]; *Coppedge v. United States* (D.C. Cir. 1959) 272 F.2d 504, 506-508 [court's inquiry to jurors as a group to raise their hands if any had read certain newspaper articles and if any could not ignore them was inadequate].)

When informed that jurors may have been exposed to publicity about he case, the trial court should question each juror individually in chambers and to determine his or her knowledge of the improper material and if it prejudices the defendant. (*People v. Andrews, supra,* 149 Cal.App.3d 358, 366.) Also, its examination should seek to uncover "an objective basis for the court's evaluation[because] 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient (to test that impartiality)." (*Silverthorne v. United States, supra*, 400 F.2d 627, 639.) For example, in *Marshall v. United States* (1959) 360 U.S. 310, 312, the United States Supreme Court reversed due to juror exposure to prejudicial news accounts. The opinion did not consider dispositive each juror's statement "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." (See also *Irvin v. Dowd, supra*, 366 U.S. 717, 728 [same]; *People v. McNeal, supra*, 90 Cal.App.3d 830, 838 [juror alone should not evaluate facts and render opinion of his or her impartiality].)

In *Silverthorne v. United States, supra*, 400 F.2d 627, the Ninth Circuit found that the trial court erred by conducting an inadequate inquiry into the effect of trial publicity. (Id. at pp. 639-640.) It failed "to ascertain what information the jurors had accumulated and, consequently, had no way of objectively assessing the impact caused by this pretrial knowledge on the

juror's impartiality...." (Id. at p. 639.) It simply asked jurors if they believed they could be fair despite their exposure to publicity. However, "whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness without something more. [Citations.] 'No doubt each juror was sincere when he said that he would be fair and impartial ... but the psychological impact requiring such a declaration before one's fellows is often its father.'" (*Ibid.*, quoting *Irvin v. Dowd, supra*, 366 U.S. 717, 728.)

Similarly, the Fifth Circuit found inadequate general, group questioning of jurors in *United States v. Davis, supra*, 583 F.2d 190, 196-198. The trial court simply asked that any panel member raise his hand if he felt that publicity had impaired his ability to render an impartial decision, and no one responded. Such cursory questioning was "not enough. The court should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed." (*Id.* at p. 196.)

Here, as in *Silverthorne* and *Davis*, the trial court's general inquires to the jurors as a group, designed to elicit the jurors' subjective assessments of impartiality, were insufficient to allow the court to gauge the effect of the articles reporting that the Hodges' case had mistried and the charges against the Hodges had been dismissed. The trial court did not determine what exactly each juror had read. Two jurors and three alternates simply indicated they had read either the article or headline for the August 24, 1994, article. (3CT 669.) Six jurors and two alternates indicated that they had read some or all of the

August 27, 1994, article. (31RT 11155-11156.) Of these, one unidentified individual volunteered "[t]itle." (31RT 11155.) At a later date, Holmes stated that he had heard "several" jurors say they had stopped at the caption. (32RT 11391.) The trial court did not conduct any inquiry to determine who read what. Nor, armed with this knowledge, did it probe each juror individually for information from which it could objectively determine if that juror's impartiality had been compromised. It simply asked the jurors and alternates who had been exposed to the extrinsic information as a group to give a self-assessment about their ability to remain impartial. That the inquiry concerning the August 24, 1994, article was in writing, in the privacy of the deliberation room where no juror had to look the court, counsel or appellant in the eye, made it all the more easy for the jurors to proclaim their fairness. Given the crucial timing of the articles at the end of the guilt phase, their connection to the Hodges's striking disappearance from the courtroom, and their potentially devastating impact on appellant's defense, the trial court's inquiry into the jurors' exposure to the articles and the articles' affect on them was clearly insufficient.

The error requires reversal. When a juror's impartiality comes into question due to exposure to extrinsic information, "the court's failure to make an appropriate inquiry into the facts in order to determine whether they constituted good cause for discharge of the juror constitutes reversible error." (*People v. McNeal, supra*, 90 Cal.App.3d 830, 840.)

PENALTY PHASE

XXII

THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY INTO THE NATURE AND IMPACT OF PREJUDICIAL PUBLICITY COINCIDING WITH PENALTY PHASE DELIBERATIONS REQUIRES REVERSAL OF THE DEATH VERDICT; REVERSAL IS ALSO REQUIRED DUE TO JUROR MISCONDUCT.

A. Factual Background

On September 30, 1994, the court notified counsel that the jurors had reached a penalty verdict. (36RT 12652.) Holmes stated that they must have all read about the shooting and robbery, which occurred during arguments, at the McDonald's on Florin Road, and had considerable similarities to the instant case. (36RT 12653-12655.) According to Holmes, the McDonald's was located close to the KFC, and young gang members were suspected. (36RT 12655.) News of the McDonald's crimes issued during arguments and deliberations. [104] (36RT 12654.)

Holmes asked the court to inquire, in whatever way the court considered appropriate, into whether jurors had read the McDonald's article, and, if so, if it had any effect on their deliberations. (36RT 12654.) When the court asked if it should inquire of the jurors as a panel, Holmes agreed. (*Ibid.*) The prosecution opposed any inquiry because juror exposure to current events is to

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[104] It is unclear how many articles reported the McDonald's crimes. Holmes referred to both an "article" and "articles." (36RT 12654-12655.)

be expected. (36RT 12654-55.) The court decided to make the inquiry of the jurors as a group and, at the prosecutor's request, agreed to wait until after delivery of the verdict.[105] (36RT 12655-56.)

The jurors then rendered the verdict sentencing appellant to death. (36RT 12656-12658.) After the court excused them but before they left the courtroom, Holmes asked if the court would "make that one inquiry?" (36RT 12661-62.) The court asked for a show of hands, "Which, if any of you, were exposed to any of the news reports, newspaper or TV or any other news reports, of the recent McDonalds fast-food robbery/murder case?" Ten jurors raised their hands.[106] (36RT 12662.) The court then inquired, "And those who did receive any information about that, were there any of you that were influenced in your decision by any of the news reports concerning that? If so, raise your hand." The court noted, "there is no response." The jurors then left. (*Ibid.*)

B. Argument

As previously discussed (Argument XXI, *ante*), the constitutional rights of trial by jury and due process guarantee a criminal defendant the right to a fair trial by impartial jurors who base their verdict on evidence presented at trial and not on any extrinsic information. (U.S. Const., amends. VI, XIV; Cal. Const., art. I, §§ 7, 15 & 16.) In a capital case, a defendant is also entitled to a

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105 The prosecutor reasoned that the inquiry might become a moot point after the verdict. Defense counsel did not oppose waiting until after the verdict. (36RT 12655-56.)

106 Juror Nos. 3 and 4 were the only ones who did not indicate exposure to the news accounts. (36RT 12662; 2CT 422.)

reliable penalty determination. (U.S. Const., amend. VIII; Cal. Const., art. I, § 17.) Appellant's fundamental rights were violated because (1) the trial court failed to conduct an adequate inquiry into prejudicial news accounts of strikingly similar crimes coinciding with penalty deliberations; and (2) ten jurors engaged in misconduct by reviewing some or all of the publicity.

1. The Trial Court Engaged in a Patently Inadequate Inquiry.

Defense counsel informed the court about prejudicial publicity that circulated in the community just before and during the jury's penalty phase deliberations. It concerned a robbery-murder at a McDonald's, close to the KFC, which was very similar to the crimes for which appellant's jurors were debating appellant's punishment. The McDonald's crimes, allegedly committed by young gang members, were likely to cause fear and outrage among appellant's jurors and motivate them to impose the sternest sentence possible to send a message to deter future such offenses. Although ten jurors admitted exposure to the McDonald's publicity, the trial court took no meaningful steps to investigate the extent of their exposure or its impact on them.

Under both state and federal law, the trial court was required to conduct an inquiry adequate to determine whether the ten jurors' exposure to the extraneous news of the McDonald's crimes tainted their deliberations and death verdict. (See generally, Argument XXI, *ante*.) "A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'" (*People v. Davis, supra*, 10 Cal.4th 463, 547; *Remmer v. United States,*

supra, 347 U.S. 227.) Its failure to do so constitutes an abuse of discretion. (*People v. Pinholster, supra,* 1 Cal.4th 865, 928.) A sufficient inquiry uncovers the key facts pertaining to the misconduct allegation to allow the trial court to objectively exercise its own judgment about whether prejudicial misconduct has occurred. (*Remmer, supra*; *Davis, supra,* at p. 547; *Silverthorne v. United States, supra,* 400 F.2d 627, 639-400.)

Here, the trial court simply inquired if any juror had been exposed to news of the recent McDonald's robbery-murder case. Although ten jurors replied that they had, the court made no attempt to discern what each juror had seen or heard. The court asked no questions regarding the content of the publicity to which the jurors had been exposed. It did not ask how many times the exposure had occurred. Nor did it ascertain whether the exposure was through newspaper articles, television news reports, radio news reports, other jurors (potentially during deliberations), other sources or any combination thereof. Without determining the nature and extent of each juror's exposure to the prejudicial publicity, the court had no objective basis for deciding if any juror had engaged in prejudicial misconduct. For this reason alone, the court's inquiry was inadequate. (*United States v. Davis, supra,* 583, F.2d 190, 196 ["The court should have determined what in particular each juror had heard or read..."]; *People v. Andrews, supra,* 149 Cal.App.3d 358, 366; *People v. Pierce, supra,* 24 Cal.3d 199, 208 [corruption of even one juror violates right to fair trial by an impartial jury].)

Moreover, the court failed to conduct any meaningful questioning to determine the impact of the publicity on the ten jurors who had been exposed to it. The court merely asked the jurors as a group whether any of them had

been influenced by any of the news reports, again asking for a show of hands. Not surprisingly, considering that the jurors had just rendered their verdict and were told that they were excused, no one raised a hand. Such a general inquiry and request for a show of hands are insufficient to probe juror impartiality. (*United States v. Davis, supra,* 583, F.2d 190, 196 [cursory group questioning and request for show of hands were insufficient]; *United States v. Accardo, supra,* 298 F.2d 133, 136; *Coppedge v. United States, supra,* 272 F.2d 504, 506-508.) A "juror is poorly placed to make a determination as to his own impartiality. Instead the trial court should make this determination." (*Davis, supra,* at p. 197.) The United States Supreme Court has itself refused to credit jurors' self-assessments of their own impartiality after exposure to prejudicial news accounts. (*Marshall v. United States, supra,* 360 U.S. 310, 312; *Irvin v. Dowd, supra,* 366 U.S. 717, 728.)

Two timing-related circumstances also heightened the need for careful examination of the jurors: (1) the jurors were exposed to the prejudicial publicity during an extremely sensitive period – just before and during deliberations; and (2) the court made its inquiry after the jurors had already returned the death verdict and were told they were excused. Because the McDonald's crimes were so similar to appellant's conviction offenses, they were quite likely to evoke fear, concern and outrage in appellant's jurors about unchecked, violent crime in their community. It was imperative for the trial court to obtain sufficient information to ensure that the death verdict was not affected by any juror's emotional response to these recent crimes or a desire to send a message to young, criminally-oriented gang members. Even for publicity occurring well in advance of juror deliberations, "[i]t is too much to expect of human nature that a juror would volunteer, in open court, before his

fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial." (*Coppedge, supra,* 272 F.2d 504, 508; *id.* at pp. 504-506.) This is even more true when, as here, the group inquiry is conducted *after* jurors have just rendered their verdict and are almost out the door. (36RT 12661-62.) It would take quite a courageous juror to volunteer under these circumstances that he or she had been influenced by exposure to news reports. The situation called for "a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles." (*Coppedge, supra,* at p. 508; see also *People v. Andrews, supra,* 149 Cal.App.3d 358, 366.) The examination that the trial court conducted did not rise to this level.

Therefore, the court's terse inquiry to the jurors as a group, which failed to probe the nature and extent of the jurors' exposure to the prejudicial publicity and merely went through the motion of obtaining jurors' assurances of impartiality, was inadequate to protect appellant's rights to a fair trial by impartial jurors and a reliable penalty determination. Because this Court can only speculate as to what the results of a proper inquiry would have been, the error was not harmless beyond a reasonable doubt. (*People v. McNeal, supra,* 90 Cal.App.3d 830, 840.) The penalty verdict must be vacated.

2. Juror Misconduct

It is misconduct for any juror to consult extrinsic information about "'"any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty...."'" (*People v. Pinholster, supra,* 1 Cal.4th 865, 924-925; see generally, Argument XXI, §§ B

& C, *ante.*) Exposure of even a single juror to such extrinsic material constitutes misconduct giving rise to a presumption of prejudice. (*People v. Honeycutt, supra,* 20 Cal.3d 150, 156; *People v. Pierce, supra,* 24 Cal.3d 199, 208.) The presumption may be overcome only by a strong showing that no actual prejudice resulted. (*Honeycutt, supra,* at p. 156.) Otherwise, reversal is required regardless of the strength of the evidence. (*Pierce, supra,* at pp. 206-207.)

In *United States v. Littlefield* (9th Cir. 1985) 752 F.2d 1429, 1430, the defendant was convicted of various tax-related offenses arising from tax shelter activities. The Ninth Circuit remanded for a new trial because a juror carried a magazine article on similarly fraudulent tax shelters into the jury room during deliberations, and it was read and discussed by one or more other jurors. The opinion found that the government had failed to carry its heavy burden of proving beyond a reasonable doubt that the extrinsic material had no influence on the verdict. (*Id.* at pp. 1431-32.) It observed that the jurors would have instantly appreciated the connection between the article and the similar crimes charged, including the article's contention that such crimes were a growing national trend and concern about the lack of meaningful deterrence for them. (*Id.* at p. 1432.)

Likewise, here, ten jurors were exposed at the crucial juncture of penalty phase deliberations to publicity about crimes very similar to appellant's conviction offenses: a shooting and robbery, allegedly committed by young gang-members, at another fast-food establishment in the same general area as the McDade's KFC. The report of yet another tragic crime in the community, committed under similar circumstances, likely influenced appellant's jurors to

sentence him to death over life. This publicity could have only evoked a negative emotional reaction in appellant's jurors and prompted them to send a message to Sacramento's gang community that such crimes would not be tolerated, but would be met with the ultimate punishment. That ten jurors were exposed to this prejudicial publicity at such a crucial time created a least a reasonable doubt about the publicity's influence on the jury's sentencing verdict. The state has failed to carry its heavy burden of rebutting the presumption of prejudice arising from the exposure of so many jurors to this prejudicial publicity at this critical juncture. Reversal is required.

XXIII.

THE TRIAL COURT ERRED IN PLACING SIGNIFICANT RESTRICTIONS ON THE TESTIMONY OF APPELLANT'S MENTAL HEALTH EXPERT, VIOLATING APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction

The heart of appellant's case in mitigation was its argument that John and Terry Hodges used and compelled appellant to shoot McDade, an act which appellant sorely did not want to commit. The defense presented testimony by psychologist Larry Nicholas to support this mitigating circumstance. The trial court allowed Dr. Nicholas to testify that his test results showed the combination of appellant's very low I.Q. and his personality rendered him ripe for manipulation and intimidation by the older, experienced Hodges brothers. The trial court, however, would not permit Dr. Nicholas to testify to appellant's account of his behavior and thoughts at the time of the offense in order to support an opinion that appellant was coerced by the Hodges to shoot McDade. The trial court excluded that proposed testimony on the erroneous belief that case law did not permit a defense expert to testify to any extrajudicial statements in support of his or her opinion unless the statements were admissible under a recognized hearsay exception. As a result, the court never exercised its discretion to admit or exclude Dr. Nicholas' proposed testimony.

The trial court's failure to exercise its discretion constituted an abuse of discretion. The excluded testimony should have been admitted to explain Dr. Nicholas' opinion and permit the jury to evaluate his opinion. Furthermore,

the exclusion of this evidence constituted a violation of the Due Process Clause of the Fourteenth Amendment.

B. Factual Summary

During his penalty phase opening argument, defense counsel detailed the testimony to be provided by the defense mental health expert, psychologist Larry Nicholas. (33RT 11819-11822.) Defense counsel told the jurors that Dr. Nicholas would testify to his opinion that appellant could be manipulated and that in reaching his opinion, Dr. Nicholas reviewed police reports and spoke to appellant about the offense. (*Id.*, at p. 11822.) When defense counsel began to describe appellant's account to Dr. Nicholas of meeting Terry Hodges two weeks before the offense, the prosecutor objected. (*Ibid.*) Defense counsel explained that Dr. Nicholas was prepared to offer his opinion regarding appellant's role in the offense based on the doctor's test results as well as his interview with appellant regarding the crime. (*Id.*, at pp. 11822-23.)

Out of the jury's presence, defense counsel provided an offer of proof of Dr. Nicholas' proposed testimony. (*Id.*, at p. 11824.) Dr. Nicholas, in explaining the basis of his opinion that appellant was manipulated, would testify that when he interviewed appellant about the offense, appellant told him the following. (*Ibid.*) Appellant met Terry Hodges two weeks before the offense. (*Ibid.*) On the day of January 19, 1992, appellant and the two Hodges brothers had been drinking. Appellant was driving around with John and Terry Hodges. They went to the K.F.C. As soon as the K.F.C. closed, appellant exited the car and went over to talk to Keith McDade about getting his job back. The Hodges brothers remained in their car, parked in the alley.

Sometime later, the Hodges came to the car where appellant was speaking to McDade. John Hodges handed appellant a gun. Terry Hodges told McDade, "this is a robbery," then turned to appellant and said, "get rid of the motherfucker." Appellant, believing that McDade was going to die in any event, shot McDade. He felt pressured by the Hodges to shoot McDade. (*Ibid.*)

Defense counsel explained that Dr. Nicholas' proposed testimony was relevant to several of the Penal Code section 190.3 mitigating factors, including factor (g) ["[w]hether or not defendant acted under extreme duress or under the substantial domination of another person"] and factor (h) ["[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, or the affects of intoxications"]. (*Id.*, at p. 11825.) The defense argued that the results of appellant's personality and intelligence testing, which revealed an I.Q. of only 77, established appellant's susceptibility to manipulation. (*Ibid.*) And the proposed testimony by Dr. Nicolas regarding appellant's account was essential to show that appellant, only 18 years old and 5'8", was being manipulated and used by the two older sophisticated gang members, whom appellant respected and admired. (*Ibid.*) Defense counsel explained that if Dr. Nicholas could not testify to what appellant told him about the offense, the doctor would not be able to support his opinions and conclusions regarding the Hodges' manipulation of appellant. (*Id.*, at p. 11826.) In essence, the defense would have "the skids pulled out" of its penalty phase defense. (*Ibid.*)

The defense argued that appellant's statements to Dr. Nicholas were

admissible pursuant to Evidence Code section 1230 as declarations against penal interest: in his statements to the doctor, appellant admitted (1) shooting Keith McDade; (2) committing the thefts charged in Counts 3, 4, and 5; and (3) being present at the taking of Hernandez' bicycle and participating in that assault. (34RT 11975.) The defense also urged the Court to exercise its discretion to admit Dr. Nicholas' testimony concerning appellant's statements to him even should the Court conclude that those statements constituted inadmissible hearsay evidence, given the critical importance of this evidence at the penalty phase where the issue was not appellant's guilt or innocence but rather whether he should live or die. (*Id.*, at pp. 11980-82.) In these circumstances, the defense argued, the jury should be provided all relevant evidence before reaching its sentencing decision. (*Id.*, at pp. 11981-82.) As explained by defense counsel, the defense was not relitigating appellant's guilt or innocence and therefore was offering appellant's statements to Dr. Nicholas not for the purpose of establishing their truth but for the purpose of explaining and supporting Dr. Nicholas' opinions and conclusions. (*Id.*, at p. 11982.)

The trial court initially indicated that it was receptive to allowing Dr. Nicholas to testify to appellant's hearsay statements for the limited purpose of supporting his opinion and curing any possible concern by the prosecution that the jury would consider the evidence for its truth by admonishing the jurors that they could only consider the statements as a basis for the doctor's opinions. (33RT 11831-32.)

Thereafter, after reviewing *People v. Coleman* (1985) 38 Cal.3d 69 and *People v. Price* (1991) 1 Cal.4th 324, the Court changed its mind, stating:

"The cases I have read have stood for the proposition that

> the expert cannot base an opinion upon inadmissible evidence and cannot, through testifying as to his opinion, put before the jury the inadmissible hearsay evidence.
>
> And if you can give me any cases or authority that allows it in the context of this case in a criminal prosecution, a defendant's statement to a psychologist or a psychiatrist, I'll reconsider that. But I have not seen any cases that would permit it, and the cases I've seen have been sufficiently analogous to disallow it."

(*Id.*, at p. 11845.) The Court stated that the doctor could render an opinion on the basis of, and testify to, any evidence "[i]f it came in as an exception to the hearsay rule."

The trial court thus ruled, pursuant to *People v. Coleman*, *supra*, and *People v. Price*, *supra*, that the defense could not elicit appellant's statements to Dr. Nicholas about the capital offense because they were inadmissible hearsay. Dr. Nicholas could support his opinions only with evidence of his test results and evidence properly placed before the jury – either at the guilt phase or penalty phase. (34RT 11989-90.) Dr. Nicholas would be permitted to testify that he considered police reports, his testing results, and his interview of appellant. (*Id.*, at p. 11989.) He would be permitted to testify to his test results because they were "not, per se, hearsay" and base his opinion on any statements by the co-defendants to either Daryl Leisey or Eric Banks that were admitted into evidence at the guilt phase as exceptions to the hearsay rule. (33RT 11846.)

However, the doctor would not be permitted to detail the contents of any hearsay statement that was not properly before the jury. (34RT 11990.) Thus, Dr. Nicholas could not inform the jurors of what appellant told him about the

offense or even characterize appellant's statements about the offense as consistent with any witness' trial testimony. (*Id.*, at p. 11989.) Nor would Dr. Nicholas be permitted to testify to any hearsay statements made to him by appellant's family members unless the content of those statements had already been placed before the jury. (*Id.*, at p. 11990.) Any hypothetical questions to the doctor would have to be based on the versions of the offense already placed before the jurors, including appellant's statements to the police and the statements of Terry and John Hodges which were admitted during the guilt phase through the testimony of other witnesses. (*Id.*, at p. 11990.)

The trial court further ruled that the prosecutor could cross-examine Dr. Nicholas regarding any of appellant's hearsay statements to the doctor, thus permitting the defense to elicit the remainder of appellant's hearsay statements under Evidence Code section 356.[107] (*Id.*, at p. 11991.) However, finding that appellant's statements to Dr. Nicholas included admissions to distinct offenses, the court ruled that any such "opening the door" would be solely limited to the particular offense behavior upon which the prosecutor cross-examined. (*Ibid.*) Thus, for example, if the prosecutor limited his cross-examination of Dr. Nicholas to appellant's admissions regarding the Hernandez bicycle incident or the Rigsby bowling alley incident, the defense, on re-direct, would not be permitted to elicit any of appellant's statements to Dr. Nicholas regarding the capital offense. (*Id.*, at pp. 11991-92.) The court acknowledged that this

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[107] Evidence Code section 356 provides that "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be

ruling allowed the prosecutor to "pick and choose" which of appellant's admissions to Dr. Nicholas would be admitted into evidence. (*Id.*, at p. 11992.)

C. The Trial Court Erred in Excluding Dr. Nicholas' Testimony Regarding Appellant's Statements About the Offense As Part of the Basis for the Doctor's Opinion.

1. The Trial Court Never Exercised Its Discretion to Admit Dr. Nicholas' Testimony Regarding Appellant's Statements As Part of the Basis for the Doctor's Opinion Because of an Erroneous Belief That Case Law Mandated Exclusion of the Evidence; the Evidence Should Have Been Admitted to Explain the Doctor's Opinion and Permit the Jury to Evaluate His Opinion.

It is not uncommon for an expert opinion to be based in whole or in part on inadmissible matter, frequently hearsay. (Simons, California Evidence Manual (2006 ed.), Chapter 4, § 4:31, at p. 286.) Indeed, "[a]n expert may generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably . . . be relied upon' for that purpose." (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918.) On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. (*Ibid.*; see also *People v. Nicolaus* (1991) 54 Cal.3d 551, 583.) These rules apply to mental health experts. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747.) Hearsay relied upon by experts in formulating their opinions is not testimonial because it is not offered for the truth of the facts stated but merely as the basis for the expert's opinion. (*Ibid.*)

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given in evidence."

As noted by this Court in *People v. Carpenter*, "prejudice might arise if, ' "under the guise of reasons," ' the expert's detailed explanation ' " [brings] before the jury incompetent hearsay evidence.' " [Citations omitted.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 403, superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096.) "Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Montiel*, *supra*, at p. 919.) "Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." (*Ibid.*)

Recognizing that "[s]ometimes a limiting instruction may not be enough," this Court notes that "[i]n such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." (*Ibid.*) A trial court has discretion "to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*People v. Coleman*, *supra*, 38 Cal.3d at p. 91.) A trial court also "has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*People v. Price*, *supra*, 1 Cal.4th at p. 416.) However, as cautioned by the United States Supreme Court, the fact that some mitigation evidence may be hearsay

does not necessarily undermine its value or admissibility for penalty phase purposes: the Court has "recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule." (*Sears v. Upton* (2010) ___ U.S. ___, 130 S.Ct. 3259, 3271, 177 L.Ed.2d 1025.)

Normally, evidentiary rulings are reviewed for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933; *People v. Siripongs* (1988) 45 Cal.3d 548, 574.) In this case, however, the trial court never exercised its discretion to admit or exclude Dr. Nicholas' proposed testimony regarding appellant's statements to him about the offense because it thought *People v. Coleman*, *supra*, and *People v. Price*, *supra*, mandated exclusion of any hearsay testimony which was not admissible under an established hearsay exception if the hearsay was at all prejudicial to the prosecution. (34RT 11988-11990.) The following colloquy makes clear that the trial court was under the erroneous belief that an expert witness in a criminal case could not testify to any extrajudicial statements, which were not admissible as exceptions to the hearsay rule (33RT 11845-47):

THE COURT:	--Before he testifies, the opening statement by Mr. Holmes, and the scope of the doctor's testimony cannot detail the defendant's statement to the doctor nor refer to the fact that the doctor even took a statement. And cannot consider that.
MR. HOLMES:	You say he cannot refer to that?
THE COURT:	The cases I have read have stood for the proposition that the expert cannot base an opinion upon inadmissible evidence and cannot, through testifying as to his opinion, put before the jury the

inadmissible hearsay evidence. [¶] And if you can give me any cases or authority that allows it in the context of this case in a criminal prosecution, a defendant's statement to a psychologist or psychiatrist, I'll reconsider that. But I have not seen any cases that would permit it, and the cases I've seen have been sufficiently analogous to disallow it.

MR. HOLMES: Okay. Well, I don't mean this as any indication of conceding a point, but I have an idea the Court is probably right on this. But I had to cover for another court; I didn't have three minutes to even look at that stuff.

THE COURT: Well, when we finish this afternoon, you'll have until tomorrow morning when the doctor's called back to see if you can obtain anything else.

As I indicated before, if the doctor considered . . . other evidence that's already before the jury, he can elaborate on that.

MR. HOLMES: Right.

THE COURT: The test results of the defendant are not, per se, hearsay. They are just the defendant answering questions that are not coming in for the truth of the matter and don't have the unreliability issue.

MR. HOLMES: Okay.

THE COURT: He can testify to the test results.

MR. HOLMES: Okay. Just to make sure: So anything that Mr. Leisey or Mr. Banks may have said in their testimony, I can present that to the doctor in the way of a hypothetical or something?

THE COURT: If it came in as an exception to the hearsay rule.

MR. HOLMES: Right.

THE COURT: And is otherwise reliable and admissible as an exception to the hearsay rule, it can be considered by the doctor.

MR. HOLMES: And also I think it meets 804 Evidence test to, where evidence of other testimony or statements that either were, if he were cross-examined – And I certainly was –

THE COURT: Although I think the declarants, Terry Hodges and John Hodges, were not cross-examined in that sense – The witnesses who testified about those statements, which again were exceptions to the hearsay rule and came in without objection to the People and the defendant Carl Powell, the doctor may consider those.

The trial court was wrong in its belief that *Coleman* and *Price* mandated automatic exclusion of any extrajudicial statements upon which an expert has relied if that evidence is not admissible under a recognized hearsay exception.[108] As made clear by the authorities cited above, generally, an expert is permitted to testify to declarations made to the expert in order to support his opinions. And as made clear by the cases discussed below, California courts have frequently authorized the admission of such out-of-court statements, even

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[108] What the trial court failed to recognize is that hearsay was not the deciding issue here because appellant's statement were not being offered to prove the truth of those statements. (Cf. *People v. Vanegas* (2004) 114 Cal.App4th 592, 597.) When an expert relies on inadmissible matter in forming an opinion and so testifies, such matter is not admitted as proof of the facts stated, but to enable expert to explain and the jury to evaluate the basis of the opinion. Case law admitting such extrajudicial declarations "do not purport to announce an exception to the hearsay rule; that is, they hold that the statements are admissible not as proof of the facts stated but to enable the expert to explain and the jury to appraise the basis of his opinion." (*People v. Brown* (1958) 49 Cal.2d 577, 586.)

when they include statements by a criminal defendant to a mental health expert.

In *People v. Ainsworth* (1988) 45 Cal.3d 894, over the hearsay objections of the prosecutor and counsel for Ainsworth, a defense psychiatrist for the co-defendant Bayles was permitted to testify to the entire contents of Bayles' statement to him regarding his involvement in the crimes in order to support the expert's opinion as to Bayles' capacity to form the requisite mental states.[109] (*Id.*, at pp. 1010-1011.) This Court observed:

> An expert should be allowed to testify to all the facts upon which he bases his opinion, including relevant declarations to him. (Citation omitted.) The statements are admissible not as proof of the facts stated but to enable the expert to explain and the jury to appraise the basis of his opinion."

(*People v. Ainsworth, supra*, 45 Cal.3d at p. 1012.) In affirming the trial court's admission of the doctor's hearsay testimony, *Ainsworth* stated: "Dr. Thompson's testimony was relevant to Bayles' defense of diminished capacity and Bayles' extrajudicial statement was clearly admissible as relevant to the development of Thompson's diagnosis of Bayles' mental state." (*Ibid.*)

Ainsworth is not alone in sanctioning the admission of extrajudicial declarations to mental health experts to support their opinions. In *People v. Mickey* (1991) 54 Cal.3d 612, this Court approved of the admission of hearsay statements by the defendant's ex-wife to a prosecution mental health expert regarding the defendant's use of drugs. At Mickey's penalty phase, the

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109 The psychiatrist, a Dr. Thompson, also based his opinion on discussions with two police officers who described the crimes and Bayles' past history of

prosecution psychiatrist first recounted the contents of her telephonic interview with the ex-wife and then used those statements as one basis for her opinion as to the defendant's mental capacity at the time of the offense. (*Id.*, at p. 687.) Notably, the defendant's ex-wife, who was a Lieutenant in the U.S. Air Force at the time of the interview, minimized the amount of drugs used by her husband during the time they lived together with her two children in military housing at the Yokata Air Force base and the prosecution's expert conceded that "perhaps the drug history [she] got from [the ex-wife was] very incomplete." (*Id.*, at pp. 637, 687.) Nonetheless, this Court found that these hearsay statements were sufficiently reliable for a psychiatrist forming a psychiatric opinion and found no error in their admission to the jury. (*Id.*, at p. 688; see also *People v. Montiel*, *supra*, 5 Cal.4th 877, [no abuse of discretion in permitting expert to recite hearsay details of prior unfavorable psychological reports]; *People v. Carpenter*, *supra*, 15 Cal.4th 312, 410 [no error in allowing expert to testify about "hearsay statements that defendant had referred to himself as ' "Devious Dave," ' and that he 'would frequently discuss committing perfect crimes and bragging about his Mafia connections'" because the trial court carefully exercised its discretion and admonished the jury that the statements were hearsay and not admitted to show the truth "of the thing that is asserted" but to show the information on which the doctor was basing his opinion.]; *Heishman v. Ayers* (9th Cir. 2010) 621 F.3d 1030, 1043 [Trial counsel could have presented expert psychological testimony regarding defendant's diagnosis for post-traumatic stress disorder and had he done so, the expert would have been able to base her opinions on the defendant's out-of-

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arrests. (*People* v. *Ainsworth*, *supra*, 45 Cal.3d at p. 1011.)

court statements regarding sexual abuse and to discuss both those opinions and the underlying hearsay in court pursuant to Evidence code section 801(b).].)

Two other categories of expert opinion testimony also illustrate the frequency in which California courts have approved the admission of an expert's recitation of out-of-court statements in support his or her own opinion: the admission of declarations to physicians to support diagnoses and the admission of hearsay statements to support gang experts' opinions regarding a defendant's gang membership and whether crimes have been committed for the purpose of benefiting the gang.

As illustrated by *People v. Brown* (1958) 49 Cal.2d 577, criticized on other grounds in *People v. Pearson* (1986) 42 Cal.3d 351, and the numerous cases cited therein, it has been accepted practice in this State to permit a physician to testify to hearsay statements upon which the doctor relied to support his or her diagnosis and other opinions. In *Brown,* an abortion prosecution, a physician was permitted to testify, as reasons for his opinion that an abortion was performed, to the victim's account of the manner in which the abortion was performed as well as the victim's statements that she found a person who offered to do an abortion on her and that this person went there to perform the abortion on her. (*Id.*, at p. 587.) In holding that "[s]uch narrative statements are admissible in this state as part of the foundation on which [a] doctor relie[s] where they relate to facts connected with diagnosis and treatment," this Court stated:

> It cannot be doubted that a physician's diagnosis as to an injury will usually be based . . . in part upon the history given by the patient. And the physician should be allowed to testify to all the

> facts upon which he based his opinion, including the case history given him by the patient as well as facts learned by immediate personal observation. Therefore, declarations to a physician concerning physical condition prior to an accident (citation omitted) and declarations as to the history of an accident (citation omitted) have been admitted as a basis for the opinion of a physician to whom the declarations were made.

(*People v. Brown*, *supra*, 49 Cal.2d at pp. 585-587.)

California courts have also routinely approved the admission of extensive hearsay statements by various individuals, such as victims, gang members, and police officers, as well as unidentified informants, when gang experts testify to such hearsay in order to support their opinions. In *People v. Gardeley*, a gang expert opined that the defendants were members of a gang, the Family Crip; that the Family Crip gang met the statutory definition of a criminal street gang; and that the charged offense was committed for the benefit of the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619-620.) The expert based his opinion "on conversations with the defendants and with other Family Crip members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies." (*Id.*, at p. 620.) The trial court, over hearsay objections, permitted the gang expert to relate during direct examination the contents of his interview with a codefendant who entered a plea prior to trial, as well as hearsay concerning other attacks by the same gang. (*Id.*, at pp. 611-613.) In approving the admission of this evidence, this Court explained:

> Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming

> their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.] [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citation.]

(*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618; see also *People v. Valdez* (1997) 58 Cal.App4th 494, 509-511 [Court rejects defendant's argument that trial court violated *People v. Coleman* (1985) 38 Cal.3d 69, by allowing gang expert to testify to extensive hearsay used to formulate various opinions, including allowing expert to read verbatim and explain gang-related portions of letters written by or sent to three participants not tried with the defendant, relate the contents of statements by the participants, and talk about rumors and statements of unidentified informants]; *accord*, *People v. Williams* (2009) 170 Cal.App.4th 587, 621-623; see also *People v Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210 [No error in admission of gang expert's testimony regarding expert's "casual, undocumented" conversations with various gang members in which they identified defendant as a gang member; such admission was proper to support expert's opinion that defendant was a member of a particular gang and did not violate *Crawford v. Washington* (2004) 541 U.S. 36, because the statements were not offered to establish the truth of the matter asserted but merely as one of the bases for the expert witness's opinion".]

It is true that this Court stated in *Coleman*: "While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. " (*People v. Coleman, supra*, 38 Cal.3d at p. 92.) However, as more recently stated by this Court in *People v. Mickey*, "the plurality opinion in *People v. Coleman, supra,* 38 Cal.3d 69, 90-92, does not stand for the proposition that on direct examination an expert may *never* testify to extrajudicial statements when he gives 'the reasons for his opinion and the matter ... upon which it is based' (Citation omitted)." (*People v. Mickey, supra*, 54 Cal.3d at p. 689.) As explained in *Mickey*, the critical issue is whether the hearsay matter on which the expert based his or her opinion is of "a type that reasonably may be relied upon by an expert in forming an opinion upon the subject" of his mental condition. (*Id.*, at pp. 687-88.)

The case law discussed above illustrates that California courts have found a defendant's statements to a mental health expert to be the type of hearsay matter that may reasonably be relied upon by an expert in forming an opinion upon the subject of his mental condition. As observed by this Court in *People v. Stoll*, it is certainly proper for a mental health expert to rely upon statements made by a defendant during a psychological interview in forming an opinion about the defendant's mental condition. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155; see also *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1294 [Experts examining a defendant after a plea of not guilty by reason of insanity "necessarily inquire into the defendant's conduct at the time of the offense because the defendant's account of his actions and thought processes can be critical to the formation of an expert's opinion."].)

In sum, the critical points here are (1) the Evidence Code authorizes an expert to base his opinion on inadmissible hearsay and testify to that hearsay in support of his opinion; (2) the Evidence Code authorizes a trial court to exclude any such hearsay if a limiting instruction is not sufficient to cure any potential prejudice; and (3) a trial court must exercise its discretion before excluding such hearsay. "California law gives the trial court discretion to weigh the probative value of inadmissible evidence relied upon by an expert witness as a partial basis for his opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein. " (*Coleman, supra,* 38 Cal.3d at p. 91.) "[T]he trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit evidence to its proper uses." (*Id.*, at p. 92.)

The trial court abused its discretion in this case by excluding Dr. Nicholas' testimony regarding appellant's statements about the offense. As a result of its erroneous belief that a defendant's out-of-court statements to a defense expert witness are never admissible unless they come within a recognized hearsay exception, the trial court automatically excluded Dr. Nicholas' proffered testimony without exercising its discretion. It failed to consider that appellant's statements were being proffered for the nonhearsay purpose of supporting the doctor's opinion, rather than as proof of the facts stated therein. This ruling, which rests on a demonstrable error of law, constitutes an abuse of discretion. (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49; see also *People v. Cooper, supra,* 148 Cal.App.4th at p. 742.)

Dr. Nicholas' proposed testimony as to appellant's account of the crime

should have been admitted to explain the doctor's opinion regarding the Hodges' manipulation of appellant and to permit the jury to evaluate the doctor's opinion. It was certainly proper for the doctor to rely on these statements made by appellant during a psychological interview in forming an opinion about appellant's mental condition. (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1155.) Appellant's account of his actions and thought processes was not only relevant but critical to the doctor's ability to formulate an opinion whether appellant was manipulated by the Hodges. Just as a patient's case history is necessary to a physician's ability to diagnose a physical ailment, a defendant's account of his behavior and thoughts are necessary to a mental health's expert's ability to formulate an opinion as to mental condition. Moreover, as discussed *post*, in section (C)(2), substantial reasons existed to assume the reliability of appellant's statements to the doctor.

Any potential prejudice to the People could have readily been cured by proper instruction.[110] " ' "[It is] the almost invariable assumption of the law that jurors follow their instructions." [Citation.] "[We] presume that jurors,

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[110] The court could have instructed the jurors, pursuant to CALJIC No. 2.10, which states:

> "There has been admitted in evidence the testimony of a medical expert of statements made by the defendant in the course of an examination of the defendant which were made for the purpose of [diagnosis] [treatment]. These statements may be considered by you only for the limited purpose of showing the information upon which the medical expert based [his] [her] opinion. This testimony is not to be considered by you as evidence of the truth of the facts disclosed by defendant's statements."

conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." [Citations.]' [Citations.]" (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 152-53.) In fact, *Coleman* recognized that a limiting instruction informing the jury that the matters relied on by the expert are admitted only to show the basis for the opinion and not for the truth eliminates any hearsay problem except in an aggravated situation. (*People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

The trial court thus erred in failing to exercise it discretion to admit Dr. Nicholas' proffered testimony regarding appellant's account of the crime. The evidence was critical to explain the doctor's opinion and permit the jury to evaluate his opinion. The probative value of Dr. Nicholas' testimony regarding appellant's statements outweighed any possible prejudice from the hearsay. For these reasons, the testimony was admissible and should have been admitted.

2. The Exclusion of Dr. Nicholas' Testimony Regarding Appellant's Statements About the Offense Constituted A Violation of the Due Process Clause of the Fourteenth Amendment.

Even if this Court disagrees that the trial court abused its discretion in failing to admit Dr. Nicholas' proposed testimony as a basis for his opinions, the exclusion of the testimony constituted a violation of appellant's due process rights because the excluded evidence was highly relevant to critical issues at the penalty phase and there were substantial reasons to assume its reliability. "[A] defendant's due process rights are violated when hearsay

testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of the trial,' and (2) there are substantial reasons to assume the reliability of the evidence." (*People v. Loker* (2008) 44 Cal.4th 691, 729; *Green v. Georgia* (1979) 442 U.S. 95, 97.)

In *Green v. Georgia*, a capital defendant sought to introduce at his sentencing hearing hearsay testimony that his codefendant Moore, tried separately, had confided to another that he, rather than Green, had murdered the victim. The trial court excluded that testimony on the grounds that it constituted inadmissible hearsay under Georgia state law[111] and Green was sentenced to death. (*Green v. Georgia, supra*, 442 U.S. at p. 96.) The United States Supreme Court vacated the judgment, concluding:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio* [citations omitted], and substantial reasons existed to assume its reliability.

(*Id.*, at p. 97.)

Those substantial reasons included the fact that Moore made his statement spontaneously to a close friend, the statement was against interest and the State considered the testimony sufficiently reliable to use it against

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[111] Georgia apparently recognized an exception to the hearsay rule for declarations against pecuniary interest, but not for declarations against penal interest. (*Green v. Georgia, supra*, 442 U.S. at p. 96.

Moore. (*Ibid.*) The Court, noting that "'the hearsay rule may not be applied mechanistically to defeat the ends of justice,'" held that the exclusion of this hearsay testimony denied Green a fair trial on the issue of punishment. (*Ibid.*, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Barnes v. State* (1998) 269 Ga. 345, 359-360 ["[E]videntiary rules may be trumped by a defendant's need to introduce mitigation evidence;" "[N]o unnecessary restrictions should be imposed on the mitigation evidence that a defendant can present in the sentencing phase regarding his individual background and character. All doubt should be resolved in favor of admissibility given the enormity of the penalty. . . ."]; *People v. Thompkins* (1998) 181 Ill.2d 1, 17-18 ["[E]vidence may be admissible at a capital sentencing hearing that would not ordinarily be admissible at the guilt phase of trial;" "[H]earsay evidence, such as affidavits, may be admitted at a capital sentencing hearing without cross-examination where relevant and reliable."].)

Here, as in *Green*, there were substantial reasons to assume the reliability of appellant's statements to Dr. Nicholas. These statements, like the statements at issue in *Green*, were against appellant's interest. In his statements to Dr. Nicholas, appellant admitted shooting Keith McDade; committing the thefts charged in Counts 3, 4, and 5; and assaulting David Hernandez, one of the aggravating circumstances introduced by the prosecution pursuant to Penal Code section 190.3(b). (33RT 11824; 34RT 11975.)

Moreover, similar to the circumstances in *Green*, the prosecutor here wanted to use appellant's testimony against the Hodges brothers at the guilt phase. (See, e.g., 15RT 6266, 6271, 6280-8, 6343-6345.) During his guilt

phase opening statement, the prosecutors told the jurors what he anticipated appellant would testify during the People's case in chief – an account which mirrored appellant's statements to Dr. Nicholas.[112] (*Id.*, at 6344-6345 [Prosecutor described anticipated testimony by appellant that both Hodges were present when appellant shot McDade, that John Hodges handed him the gun used to shoot McDade, and that the Hodges compelled him to shoot McDade.].) Appellant's account to Dr. Nicholas was also corroborated in several respects by the guilt phase testimony of prosecution witnesses Eric Banks and Daryl Leisey.[113]

Additionally, it cannot be doubted that Dr. Nicholas' excluded testimony was "highly relevant to a critical issue in the punishment phase of the trial." (*Green v. Georgia*, *supra*, 442 U.S. at p. 97.) As explained by defense counsel, Dr. Nicholas' proposed testimony was relevant to several of the Penal Code section 190.3 mitigating factors: factor (g), whether appellant acted under extreme duress or under the substantial domination of another, and factor (h), whether appellant's capacity was impaired as a result of mental

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[112] Appellant, however, never testified at the guilt phase. (29RT 10702-30RT 10805; 30RT 10810.) Penalty phase testimony by appellant's family, as well as defense experts, indicated that he could not testify for fear of retribution by the Hodges brothers. (33RT 11889-92, 11896; 34RT 12041-42, 12050; 35RT 12290-91.

[113] Although Eric Banks' preliminary hearing testimony (which was read to the jury) was that John Hodges never explicitly said he was present during the shooting, Hodges' statement to Banks that he told the youngster to kill the "partner" so he "can't I.D. us" indicated to Banks that John Hodges was present at the shooting. (25RT 9449, 9452, 9462-63.) Daryl Leisey also testified to his belief, as well as statements by Terry Hodges which indicated, that Terry Hodges was present when McDade was shot. (25RT 9494-9495; 27RT 10031.)

disease or defect. (33RT 11825.) The proposed testimony was critical to support an opinion that the Hodges manipulated and pressured appellant to kill Keith McDade, an act that appellant did not want to commit. As further explained by counsel, if Dr. Nicholas could not testify to what appellant told him about the offense, the doctor would not be able to support his opinions and conclusions regarding the Hodges' manipulation of appellant. (*Id.*, at p. 11826.) The issue of duress and domination by the Hodges was one of the foundations of appellant's case in mitigation. Without the admission of Dr. Nicholas' proposed testimony, the defense would have "the skids pulled out" of its penalty phase defense. (*Ibid.*) Accordingly, the exclusion of Dr. Nicholas' testimony regarding appellant's statements about the offense constituted a violation of the Due Process Clause of the Fourteenth Amendment

D. The Trial Court's Erroneous Restriction on Dr. Nicholas' Testimony Constituted Prejudicial Error, Requiring Reversal of Appellant's Sentence.

The trial court's erroneous restriction on Dr. Nicholas' testimony deprived appellant of due process of law under the Fifth and Fourteenth Amendments, his Sixth Amendment right to present a defense, and his Eighth Amendment right to a reliable penalty trial, including presentation of "any relevant mitigating evidence." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.) Because this error violated appellant's federal constitutional rights, prejudice is assessed under the *Chapman* "harmless beyond a reasonable doubt" standard of prejudice. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) However, even if this misconduct is assessed under California's "miscarriage of justice" standard,

reversal is required, for there is a reasonable probability that, in the absence of the prosecutor's misconduct, the jury would have returned a different sentence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

The centerpiece of appellant's case in mitigation was its argument that the Hodges used and compelled appellant to kill McDade, an act he sorely did not want to commit. (See, e .g. 35RT 12435-36, 12440 [Prosecutor will talk at length during closing argument about this argument because "that's what (the defense is) going to hang their hat on."].) The trial court's erroneous restriction on Dr. Nicholas' testimony gutted this crucial factor in mitigation. Had the doctor's testimony not been so curtailed, it is reasonably probable that at least one of the jurors would have concluded that appellant was forced by the Hodges to commit an act he did not want to commit. Dr. Nicholas' test results showed that the combination of appellant's very low I.Q. and personality rendered him ripe for intimidation by the older, wiser, more experienced and manipulative Hodges brothers. (34RT 12040-41.) The excluded testimony, however, was critical to support an opinion by Dr. Nicholas that the Hodges manipulated and compelled appellant to kill Keith McDade.

Such testimony and opinion could have made a world of difference at appellant's penalty case. During his opening penalty phase argument, the prosecutor noted that the defense was going to stake its penalty phase case on the claim that the Hodges compelled appellant to shoot McDade. The prosecutor was able to effectively destroy that claim by arguing that appellant had choices: "He had the gun. He had control of the situation." (*Id.*, at p. 12437.) The prosecutor then urged the jury to hold appellant responsible for

his choices – for his exercise of "free will." (*Id.*, at pp. 12437-12438.) The prosecutor also argued that appellant's claim of duress was nothing more than a well-known defense tactic to "[t]ry someone else." (*Id.*, at pp. 12440-41.) The exclusion of Dr. Nicholas' proposed testimony would have provided doubt that appellant's act in shooting McDade was a product of free will and shown that rather, it was a desperate act committed under duress.

The prosecutor also argued at length that the reason why this particular felony-murder was so aggravating was because of the relationship between appellant and McDade – that in choosing to rob and kill McDade, appellant broke "a relationship of trust." (*Id.*, at pp. 12443-12444.) As argued by the prosecutor: "[W]hen you stop and think of the enormity, of the outrage of the situation like this with what – with what he then does he does not deserve your mercy or sympathy in any way, shape, or form." (*Id.*, at p. 12444.) Dr. Nicholas' excluded testimony would have shown that this was not an act that appellant freely chose to commit and that appellant did not want to commit the act, but only did so because he felt he had no choice.

Accordingly, Dr. Nicholas' proposed testimony would not only have provided the support for the mainstay of the defense case in mitigation but would also have effectively destroyed the State's strongest argument why this particular murder was so aggravating. The excluded testimony would thus have changed the entire tenor of appellant's penalty phase. Under such changed circumstances, death would not have been an inevitable result. This was a robbery-murder of a single victim and appellant was a very young man (just 18 years of age at the time of the crime) with no prior felony convictions. The State cannot demonstrate beyond a reasonable doubt the harmlessness of

this error. The erroneous restriction on appellant's presentation of evidence in mitigation therefore requires that the judgment and sentence of death be set aside.

XXIV.

REVERSAL IS REQUIRED DUE TO PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE CLOSING ARGUMENT.

A. Introduction

During his penalty phase arguments, the prosecutor committed flagrant, egregious and incurably prejudicial misconduct by urging the jury to put appellant to death on the basis of improper (1) appeals to passion and prejudice, including a thinly-veiled racist allusion; (2) arguments regarding future dangerousness and lack of remorse; (3) misrepresentations of the evidence designed to both denigrate the case in mitigation and aggravate the circumstances of the crime and evidence offered under Penal Code section 190.3 (b) (violent criminal activity); (4) denigration of the defense; and (5) invocation of biblical authority to justify imposition of a sentence of death in this case. The prosecutor made unacceptable arguments designed to ensure that the jury would not consider mercy as a mitigating factor, urged the jurors to make a sentencing decision on the basis of their fears of gang violence and speculation that appellant could have killed others, and used emotionally charged arguments to dehumanize appellant and inflame the jury's fears and emotions. Moreover, the prosecution based the central tenet of its case in aggravation, an argument that appellant acted alone in committing the crime, on deliberate misstatements of the record.

The prosecutor's deliberate and inexcusable misconduct violated appellant's fundamental rights under the Federal Constitution, including his Eighth Amendment right to a reliable determination that death is the

appropriate punishment, his Sixth Amendment right to confront and cross-examine witnesses against him, his Fifth Amendment rights to notice, to be heard and respond, and to due process, and his Fourteenth Amendment right not to be arbitrarily deprived of life or liberty interest under state law. The prosecutor's violations were deeply prejudicial and require that the death sentence be set aside.

B. General Law and Legal Standards

The same standards applicable to prosecutorial misconduct at the guilt phase are applicable at the penalty phase. (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1153; *People v. Valdez* (2004) 32 Cal. 4th 73, 132.) A defendant's due process rights are violated when prosecution misconduct at closing argument renders his trial fundamentally unfair. (*Darden v. Wainwright, supra*, 477 U.S. at pp. 180-181.) "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Id.*, at p. 181.)

Under *Darden*, the first issue is whether the prosecution's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. (*Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1112.) In particular, a due process violation arises when the prosecution misstates or manipulates the evidence. "[I]t is decidedly improper for the prosecution to propound inferences that it knows to be false, or has very strong reason to doubt. . . ." (*United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.) "Evidence matters; closing argument matters; statements from the prosecution

matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.)

Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. (*Darden v. Wainwright*, *supra*, 477 U.S. at pp. 178-179.)

Conduct that falls short of *Darden* "may still constitute misconduct under state law when it "involves the use of deceptive or reprehensible methods to persuade the jury." (*People v. Panah* (2005) 35 Cal. 4th 395, 462.) When misconduct has been established, in determining prejudice, the Court must decide "whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner." (*People v. Valdez*, *supra*, 32 Cal. 4th at pp. 132-133.)

C. Bengal Tiger Argument: The Prosecutor's Jungle Metaphor Was a Thinly-Veiled Racist Allusion, Reprehensible Appeal to Passion and Prejudice, and Improper Argument Regarding Future Dangerousness.

During his opening penalty phase argument, the prosecutor offered an extended analogy, purporting to address appellant's docile courtroom behavior, but likening appellant to a jungle animal – a "Bengal tiger." He then used this inflammatory rhetoric in an attempt to suggest that appellant might kill again and would be a future danger in prison.

The prosecutor began by telling the jurors that the individual they observed in the court room throughout the trial – depressed and docile – was

not the real Carl Powell and contrasted his appearance in court to his appearance at the time of his arrest, referring to People's exhibit P-4, the news footage of appellant at the time of his arrest on January 27, 1992.[114] (35RT 12488.)

The prosecutor proposed to correctly portray appellant by offering the following analogy:

> There's a story that illustrates this point very well, and it's called the Bengal tiger story. And the story goes this way:
>
> There was a journalist at the turn of the century in England, and he was at the London Zoo. And he's over at the zoo, and he's at the tiger area. And he's looking at a Bengal tiger in the cage.
>
> And the tiger is lying back and by – by a pond and some bushes. And the tiger is lazily licking his paws, and the tiger's eyes are half open. And he's basking in the sun. And it looks like the tiger is just very content and very peaceful and very placid.
>
> And as the journalist draws near him, he hears, "That is not a Bengal tiger."
>
> And he turns around, and there's a hunter in back of him. And he gets into a discussion with this hunter. And he says, "What do you mean, that's not a Bengal tiger? It says 'Bengal tiger" right there on the cage."
>
> And they get into a discussion about what a Bengal tiger is. And they agree that the journalist is going to go to India with the hunter.
>
> And they go over to India, and they go out to the jungle. And they're walking through the jungle, and after several days of looking for the Bengal tiger, they come to a clearing. And the journalist enters the

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114 This two-minute videotape shows appellant, handcuffed, as he is escorted to jail by Detectives Lee and Thurston. A reporter shouts out, "How do you feel?" and appellant responds, "normal." Just before he enters the jail, appellant says, "Still a Crip." (People's Exhibit P-4.)

> clearing before the hunter, and on the other side of the clearing before the hunter, he sees the tiger. And the tiger is crouched down, and the tiger's muscles are bulging. And the tiger has seen the journalist. And the tiger's tense, and the tiger's eyes are staring at the journalist. And when the journalist looks into the tiger's eyes, a cold chill comes over him, because he is looking into the eyes of death.
>
> And he hurries on back to where the hunter is, and he says to the hunter, "Look at that; do you see that over there?"
>
> And the hunter says, "Now you've seen the Bengal tiger."
>
> Well, you don't see a Bengal tiger here, because the cage has descended on him. To see a Bengal tiger, you would have to go out in the street and meet Carl Powell in that setting, because when Keith McDade was in that parking lot and he looked into the eyes of Carl Powell, he looked into the eyes of his executioner. And he knew it. He looked into the eyes of a Bengal tiger."

(35RT 12488-89.)

To counter testimony by county jail officers witnesses that appellant did well in the county jail and could function well in an institutional setting, the prosecutor continued with his Bengal tiger characterization:

> Once again, that's the Bengal tiger story; he's doing okay in the cage. But out of the cage, different person.
>
> . . . .
>
> If you're paranoid and stressed in the institutional setting, is Carl Powell going to be a future danger in prison?
>
> Is he going to become the Bengal tiger out in the street, once he knows and once he adjusts to that setting?

(*Id.*, at p. 12492.)

And during closing argument, the prosecutor returned to his Bengal tiger theme to argue that appellant lacked remorse:

> And he looks remorseful now. Just look. He has been a sad sack throught (sic) the entire trial looking at what he's facing. But I'll tell you what. If you want to really see Carl Powell, if you really want to see the Bengal tiger, play the tape. Play that tape when you go back . . . into the jury deliberation room.
>
> This is – this is the real Carl Powell. Here he is. He's just been arrested. It's the 27th. It's eight days . . . after he shot Keith McDade in the head. The family has descended into a living hell. And . . . the reporter on here asks him how he feels. And he – in a punk way he says normal. And then he's got to add still a Crip.
>
> And . . . if you look at the curl of his lip in this . . . you see . . . just how – vicious he is in this thing, how remorseless, what – just a street punk.
>
> And – not only that this is the Carl Powell – this is the street Carl Powell and the Bengal tiger, this guy laughing here, him and Willie. They think it's really funny. You know, Carl's got his gun up to Willie's head. Then he's – then he's showing the Crip sign. And Willie's got a gun up to Carl's head I believe. Yeah. Now he's pointing a gun at Carl. And Willie's got the Crip sign.
>
> This is the real Carl Powell. This is the Carl Powell that Keith McDade faced . . . about 10:30 in the parking lot on January 19th, 1992.

(36RT 12608-12609.)

This argument constituted serious misconduct because it was (1) a thinly-veiled racist allusion, which injected racial bias into the jury's sentencing decision; (2) a dehumanizing characterization of appellant designed to inflame the jury, desensitize them, and lessen their sense of responsibility for imposing a sentence of death; and (3) an improper argument regarding

future dangerousness.[115]

1. Racist Allusion

Appellant is a Black man. The victim was a White man. Appellant was tried by a predominantly white jury.[116] Whenever there is a crime involving interracial violence, "there is some risk of racial prejudice influencing a jury . . .; the only question is at what point that risk becomes constitutionally unacceptable." (*Turner v. Murray* (1986) 476 U.S. 28, 36, fn. 8.) Here, the prosecutor's "Bengal tiger" characterization represented a thinly veiled effort to inject racial bias into the case, evoking the stereotype that this African-American defendant was a jungle savage for whom violence was natural and conveying the false message that appellant, a jungle animal, would kill again and thus present a future danger in prison. The jungle and caged animal references represented a subtle, yet unmistakable racial allusion. The prosecutor was plainly signaling appellant's jury that they should think of the Black defendant as a jungle savage naturally prone to kill – an animal which would kill again if not put to death. The sole function of the argument was to induce passion, to make the jury fear appellant, and to capitalize on prejudice and fear of this Black defendant.

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115 As argued *post* in section E, the prosecutor also committed misconduct here in arguing remorse as a factor in aggravation.

116 Appellant's jury included seven Caucasian, one Chinese-American, one Pacific-Islander, two African-Americans and one non-identified juror. (2CT 422-23; 47 CT 13698, 13738, 13778, 13818, 13858, 13898, 13938, 13977; 48CT 14017, 14057, 14136, 14176; 27RT 10139.)

A prosecutor's appeal to racial bias to secure a conviction or support a sentence of death is intolerable under the federal constitution and universally condemned by both state and federal courts. (*People v. Bain* (1971) 5 Cal.3d 839, 845-848, 849 [Judge erred in allowing the prosecutor to make an argument based on racial prejudice and the status of the public prosecutor's office -- "a serious threat to objective deliberation by jurors"]; *People v. Singh* (1936) 11 Cal.App.2d 244, 256-57 ["Our law . . . does not warrant a conviction by an appeal to race prejudice or by reference to common knowledge of mere general race characteristics"]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974 [Under "clearly established federal law," a prosecutor's appeal to race "violates a criminal defendant's due process and equal protection rights"]; see also *Withers v. United States* (6th Cir. 1979) 602 F.2d 124, 125-127; *Miller v. State of North Carolina* (4th Cir. 1978) 583 F.2d 701, 704, 706-707; *Kelly v. Stone* (9thCir. 1975) 514 F.2d 18, 19 [Closing argument exhortation to "(t)hink about the consequences of letting a guilty man, a man guilty of a serious and rather horrible crime, go free. Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know; maybe it will be somebody that I know. And maybe the next time he'll use the knife. . . ." constituted a highly inflammatory and wholly impermissible appeal to racial prejudice].)

"There is no place in a criminal prosecution for gratuitous references to race, especially when a defendant's life hangs in the balance. Elementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict on the basis of racial animosity." (*Smith v. Farley* (7th Cir. 1995) 59 F.3d 659, 663) ["[A]n appeal to racial prejudice impugns the concept

of equal protection of the laws. . . . 'the purpose and spirit of the fourteenth amendment requires that prosecutions in state courts be free of racially prejudicial slurs in argument.' (citation omitted.)"]; *Miller v. State of North Carolina*, *supra*, at p. 707.) Such an appeal is particularly repugnant in the sentencing phase of a capital case where the jury is called upon to make a "'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'" (*Turner v. Murray*, *supra*, 476 U.S. at pp. 33-34.) The scope of constitutionally permissible aggravating evidence does not permit the aggravation of penalty on the basis of a defendant's race or his constitutionally protected association with members of his own racial group. (*McCleskey v. Kemp* (1987) 481 U.S. 279.) "[T]he range of discretion entrusted to a jury in a capital sentencing hearing [presents] a unique opportunity for racial prejudice to operate." (*Turner v. Murray*, *supra*, at p. 35.) "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." (*Ibid.*)

Appellant recognizes that in *People v. Duncan* (1991) 53 Cal.3d 955, a case in which another prosecutor made this Bengal tiger argument against another Black defendant, this Court rejected a similar argument, stating; "Likening a vicious murderer to a wild animal does not invoke racial overtones." (*Id.*, at p. 977.) The argument in *Duncan*, however, was made during guilt phase argument, not penalty phase. (*Id.*, at pp. 976-77.) This Court's decision regarding the effect of this argument during guilt phase should not be extended to penalty phase argument, where the risk of prejudice from any injection of racial bias is so great, given the "highly subjective,

unique, individualized judgment" each juror must make during the sentencing phase and the broad discretion which the jurors exercise in determining sentence. (*Turner v. Murray*, *supra*, 476 U.S. at pp. 33-35.) The demands placed on jurors at the penalty phase, and the greater discretion afforded to them in making their sentencing decision, require stricter scrutiny by this Court in examining the possible effect of the prosecutor's Bengal tiger analogy. As oft stated by the United States Supreme Court, death is irrevocable, and that as a result "the qualitative difference of death from all other punishments requires a greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998-999.)

Moreover, appellant respectfully asks the Court to reconsider its decision in *Duncan* for the following reasons. The racial appeal of a prosecutor's argument need not be explicit to render the trial an unfair denial of due process. In *Carter v. Rafferty* (D.C. N.J. 1985) 62 F.Supp. 533, the court held that the "unarticulated assumptions" in the prosecutor's reference to unhappy race relations between whites and blacks created a risk of stirring racially prejudiced attitudes and required reversal of the convictions. (*Id.*, at p. 546 ["The prosecutor, in analogizing the longstanding racial or ethnic wars abroad-and the accompanying television images of senseless violence-to the depth of racial antipathy that existed in Patterson in June, 1966, without basis in the record, imputed the 'powerful motive of revenge' on the entire black community, and thus on (defendants)."].) "Even a reference [to race] that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." (*McFarland v. Smith* (2d Cir. 1979) 611 F.2d 414,

417.) And as recognized by Justice Brennan in *Turner v. Murray*, "the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent." (*Turner v. Murray*, *supra*, 476 U.S. at p. 39 (conc. and dis. opn. by Brennan, J.).)

Appellant submits that the Bengal tiger metaphor would likely trigger prejudiced responses and be viewed by many as a derogatory reference to African-Americans. The description of the Bengal tiger in the jungle evokes other derogatory racial slurs commonly used during the history of this County by white people to refer to African-Americans: jungle, and jungle bunny. (*The Color of Words: An Encyclopaedic Dictionary of Ethnic Bias in the United States*, Philip H. Herbst, Intercultural Press, Inc., 1997, pages 131-132.) As explained by Philip H. Herbst, the term "jungle" appears where the allusion is to the primitive and is meant as a slur on black people. "African Americans, the racist stereotype goes, are both tough, mean street people and biologically primitive – people close to their ancestors in the 'jungle.'" (*Id.*, at p. 131.)

Even affording the prosecutor the benefit of doubt and assuming that racial bias was not his intent in likening appellant to a Bengal tiger, this reference to a dangerous animal in the jungle was likely to remind many of this racist stereotype of the Black man as a biologically primitive and tough, mean street person. It is the likely effect of the telling of this story, not the prosecutor's actual intent that is crucial here. As this Court stated in *People v. Benson* (1990) 52 Cal.3d 754, 793: "What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential

injury to the defendant. [Citation]. When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations]." "[T]he question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Appellant submits that it is reasonably likely that this Bengal tiger story evoked racial bias in at least one of appellant's jurors. The prosecutor's allusion to appellant as a jungle animal carried impermissible connotations of racial bias and was destined to trigger fear and prejudiced responses. The fact that the prosecutor did not openly refer to race does not make the reference any less malignant where the remarks created a substantial risk of stirring racially prejudiced attitudes.

Although this Court found no impropriety in this argument when made during the guilt phase of Henry Duncan's trial, appellant requests that this ruling be revisited. Prosecutors continue to use this prejudicial animal analogy to describe black men whose fates are to be decided by predominantly white juries. This argument is improper and should be stopped.

2. Dehumanizing Characterization Designed to Inflame the Jurors' Fears and Emotions.

Regardless of whether this Court finds the Bengal tiger story to invoke racial overtones, it was a dehumanizing characterization of appellant designed to inflame the jury's fears and emotions, desensitize them, and lesson their

sense of responsibility for imposing a sentence of death.

Appeal to the passions and prejudices of the jury by the prosecution in a capital case violates "the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is considering." (*Sandoval v. Calderon* (9th Cir. 2000) 231 F.3d 1140, 1150.) The Eighth Amendment requires that a verdict of death must be a "reasoned *moral* response to the defendant's background, character and crime," not "an unguided emotional response." *(Penry* v. *Lynaugh* (1989) 492 U.S. 302, 328, overruled on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

Accordingly, it is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice at the penalty phase. (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.) "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 192 (Blackmun, J., dissenting), quoting ABA Standards for Criminal Justice 3-5.8(d)(c) (2nd ed. 1980); ABA Standards for Criminal Justice § 3-5.8(c)(d) (3d ed. 1993); see also *People v. Lewis* (1990) 50 Cal.3d 262, 284 ["It is, of course, improper to make arguments to the jury that give it the impression that 'emotion may reign over reason,' and to present 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely

subjective response'"]; *accord, People v. Sanders* (1995) 11 Cal.4th 475, 550 [prosecutor's argument must be examined to determine if it called upon irrelevant facts, or led the jury to be overcome by emotion].)

Improper appeals include arguments designed to inflame a juror's personal fears and emotions. (See *Darden* v. *Wainwright, supra,* 477 U.S. at pp. 179-181, fns. 11, 12 [condemning prosecutor's argument calling defendant an animal and stating "[h]e shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash."]; *Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 683-84 [Prosecutor improperly played on jurors' personal fears and emotions by calling the defendant (1) an escape artist who posed a threat to society and (2) a "mad dog" who should be "put to death."].)

Here, the prosecutor created in the minds of the jurors a picture of appellant as a dangerous, cold-blooded beast: passive and docile in front of the jury, yet – underneath – an aggressive violent animal with "the eyes of death" who would kill again. This description was designed to arouse feelings in the jurors of fear and distrust of appellant and interfered with their duty to arrive at a reasoned moral sentencing decision based on appellant's background, character and crime.

Furthermore, it was meant to dehumanize appellant – to urge the jurors to see appellant as a dangerous animal, rather than a human being who might possess redeeming and mitigating qualities. Common sense, and history, both tell us that it is much easier to contemplate the destruction of a human being if the act is viewed as ridding the world of a dangerous animal, rather than

extinguishing the life of another human being. (See, e.g., *Preston v. Delo (*8th Cir. 1996) 100 F.3d 596, 602 [Court strongly disapproves of prosecutor employing a dehumanizing comparison of the defendant to a useless, discardable object ("what do you do at the end of the day with the garbage that you have accumulated? ... You throw it out").].) In this way, the prosecutor's argument desensitized the jurors to the gravity of the task before them: deciding whether the aggravating circumstance so outweighed the mitigating circumstances that each juror should and could sanction the ultimate penalty of death.

In addition to analogizing appellant to a wild, dangerous beast, the prosecutor threw in other descriptive language designed to inflame the jurors and arouse their fears: "vicious," "street punk," and "looked into the eyes of his executioner." (See., e.g., *Sherman v. State* (1998) 114 Nev. 998, 1015, 965 P.2d 903, 914-15 (1998) [The prosecutor's use of the word "execution" was extremely inflammatory.].)

This argument, in its totality, was so inflammatory as to divert the jury's attention from its proper role and invite a visceral, irrational response to the image of appellant as an aggressive, non-human executioner. It was meant to inflame the jury's passions and arouse their fears to base a death sentence on speculation that appellant was nothing more than a beast who would kill again, not only outside prison but inside prison.

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3. Improper Argument Regarding Future Dangerousness

This argument must also be condemned because the prosecutor twisted defense expert testimony to suggest there was expert opinion supporting reason to believe that appellant would kill again in prison:

> Once again, that's the Bengal tiger story; he's doing okay in the cage. But out of the cage, different person.
>
> . . . .
>
> If you're paranoid and stressed in the institutional setting, is Carl Powell going to be a future danger in prison?
> Is he going to become the Bengal tiger out in the street, once he knows and once he adjusts to that setting?

(35RT 12492.)

The prosecutor's remarks were improper because there was no evidence in the record to support this argument that appellant would pose a danger to others in prison if given a sentence of life without parole. In fact, the evidence showed otherwise. Sacramento County Jail officers Scott Jones and Stephen Dickerson testified that appellant, who was chosen to be an inmate worker or trustee during his pretrial incarceration, had never been involved in any violent acts in the county jail and was reliable, trustworthy and non-combative. (34RT 12161-64, 12170, 2181-83, 12193.) Appellant was well institutionalized – capable of following directions and going along with the program at the jail. (*Id.*, at p. 187.)

To counter this evidence, the prosecutor twisted testimony by defense expert Dr. Nicholas to speculate that appellant, if paranoid and stressed in prison, would be a future danger to others. Dr. Nicholas' testimony did not

support this speculation and, in truth, belied it. On direct examination, Dr. Nicholas testified that he conducted MMPI testing on appellant and that appellant scored high on the paranoid scale. (34RT 12027.) This meant that appellant would distrust others, feel that he "has to watch his back at all times," and probably misinterpret situations on the street to think that he is personally threatened. (*Id.*, at pp. 12027-28.) Dr. Nicholas further testified that appellant scored high on the schizophrenia scale and that "a lot of items on [this] scale are elevated, both when someone is experiencing a lot of severe situational stress, and they're not coping well with it." (*Id.*, at p. 12029.) Dr. Nicholas agreed that would include a situational stress situation such as incarceration in the county jail. (*Ibid.*)

The prosecutor conducted the following cross-examination of Dr. Nicholas:

> Q. And he came out with a profile that shows that he's paranoid, right?
>
> A. Right.
>
> Q. And he's criminally oriented?
>
> A. Yes.
>
> Q. And you said that in a – In a restricted setting such as jail he's going to be more stressed and become more paranoid, right?
>
> A. Yes.
>
> Q. And be more dangerous, right?
>
> A. Not necessarily, no.
>
> Q. Well, if you're more paranoid, aren't you more dangerous?

Aren't you more likely to strike out at others?

A. No. An individual who's more paranoid could be just as likely to strike out [at] themselves.

Q. Well, is there any indication this he striked (sic.) out at himself?

A. Well, if you're applying this to Carl, I mean – If you're going from a hypothetical now to the actual, no, there's no indication that he's ever tried to hurt himself.

Q. Wouldn't he, if he is put in a jail setting for life, based on your M.M.P.I. test, isn't it true that he would become more and more paranoid and more and more dangerous to those around him, other inmates and guards?

A. No, I can't say that's true.

(34RT 12106-07.) Dr. Nicholas also explained later in his testimony that appellant might become stressed to the point of needing medication for his paranoia but again, did not testify, or even suggest, that appellant would be a danger to others. (*Id.*, at pp. 12131-32.)

Dr. Nicholas was thus clear that appellant's paranoia would not render him dangerous to guards and inmates in prison. Nevertheless, the prosecutor falsely twisted the doctor's testimony regarding appellant's elevated paranoia scale to suggest that his paranoia would render him a danger to others in prison. This argument was improper because it constituted an attempt to introduce before the jury a prediction of future dangerousness which the prosecutor was unable to elicit from any witness at trial.

Future dangerousness is not a statutory aggravating factor [Penal Code,

§ 190.3; *People v. Davenport* (2004) 11 Cal. 4th 1171, 1223, abrogated on other grounds by *People v. Griffin*, 33 Cal. 4th 536 (2004)] and a prosecutor may not introduce expert testimony forecasting that, if sentenced to life without possibility of parole, a defendant will commit violent acts in prison. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 779.) This Court has permitted argument regarding a defendant's future dangerousness but only when based on proper evidence in the record, such as the defendant's conduct, rather than based on inadmissible expert opinion predicting future dangerousness [*People v. Ervin* (2000) 22 Cal.4th 48, 99] or speculation. (See, e.g., *People v. Padilla* (1995) 11 Cal.4th 891, 957, as modified on denial of rehearing, 12 Cal. 4th 825H (1996), overruled on other grounds in *People v. Hill, supra*, 17 Cal.4th 800 [The prosecutor's speculation that appellant was likely to join a prison gang and kill for drugs if sentenced to life imprisonment "may have exceeded the bounds of legitimate argument."].)

Here, the prosecutor's remarks were not proper argument derived from the evidence but rather argument based on pure speculation and a twisting of defense expert testimony to suggest that there was expert opinion supporting reason to believe that appellant would kill again in prison when, in fact, there was none. There was no past conduct to suggest that appellant would be a danger to guards and inmates in prison. Indeed, the evidence of appellant's conduct during pretrial incarceration showed otherwise. And so the prosecutor twisted and speculated in an attempt to negate that mitigating evidence and, in doing so, used extremely inflammatory rhetoric designed to arouse the jury's fears. This Court has never allowed a prosecutor to seek a death sentence by using such improperly inflammatory rhetoric urging the jurors to speculate that

a defendant will kill again.

This argument was particularly egregious because it not only introduced an improper aggravating factor of future dangerousness but improperly attacked appellant's case in mitigation. First, the argument, without factual support, denigrated the case offered by appellant in mitigation as to his clean institutional behavior. Second, the prosecutor committed *Boyd* error in arguing that appellant's evidence in mitigation – mental health testimony that appellant's paranoia might result in his interpreting situations on the street to think that he is personally threatened – should be considered aggravating. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776 [Evidence of a defendant's background and character is admissible under 190.3, factor (k) only to mitigate the gravity of a crime and it is improper for the prosecutor to urge that such evidence should be considered in aggravation].)

4. Conclusion

The prosecutor's Bengal tiger story subjected the jurors to an argument based on fear, premised on speculation rather than facts in the record evidence, and calculated to inflame the jury and remove reason from the sentencing process. It was improper and should be condemned.

D. The Prosecutor Made Further Improper Appeals to Jurors' Passions and Prejudices.

In addition to its Bengal tiger analogy, the prosecutor made further improper appeals to passion and prejudice. The prosecutor called for the jury

to consider and apply irrelevant issues, composed mostly of the elements of fear, passion and prejudice, including the following: (1) urging the jury not to consider sympathy or mercy because none was showed to the victim; (2) urging the jury to see the crime through the victim's eyes via a graphic, invented script; (3) urging the jury to speculate that appellant could have killed others because of his involvement in a drive-by shooting; and (4) capitalizing on highly-charged gang-affiliation evidence and an inflammatory photograph of appellant and Williams Akens holding guns and making gang signs, to arouse the jurors' fears of gangs. These arguments violated the Eight Amendment requirement that a verdict of death must be a "reasoned moral response to the defendant's background, character, and crime," not "an unguided emotional response." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328; see authorities cited in Argument (C)(2), *supra*.)

1. Urging Jury Not to Consider Sympathy or Mercy Because None Was Showed to the Victim

As recognized by this Court, "*Eddings* [v. *Oklahoma* (1982) 455 U.S. 104, 113-15] and *Lockett v. Ohio* (1978) 438 U.S. 586 [citation omitted] 'make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any sympathy' factor raised by the evidence before it." (*People v. Lanphear* (1984) 36 Cal.3d 163, 166-67.) The prosecutor in this case, however, urged the jury not to consider sympathy or mercy for appellant because he did not show any to the victim, Keith McDade:

> Sympathy, Factor K, in this situation; Sympathy is a natural human reaction. And it's – It's something that we have in us.
>
> But the question is: Is that sympathy deserved? If you feel sympathy

> for Carl Powell, is that sympathy deserved? What sympathy did he give Keith McDade?
>
> If you deliberate in this case for five minutes, you'll have deliberated longer about the fate of Carl Powell than Carl Powell ever thought about the fate of Keith McDade.

(35RT 12487.)

This argument, with its sarcastic intimation that five minutes of deliberation was more than appellant deserved, improperly appealed to the passions and prejudice of the jury, asking them to ignore the guided discretion of United States Supreme Court and California's death penalty law and decide appellant's fate based on emotion and vengeance rather than as a reasoned moral response to the evidence, thereby violating principles of both the Fourteenth and Eighth Amendments.

Most jurisdictions addressing the legality of similar arguments have found them improper. In *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, the Third District condemned, as misconduct, a prosecutor's argument that the jury should show the same sympathy toward the defendants as they showed the victims ["Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980 [the date of the crime]. No more. No more."]. (*Id.* at p. 1540.) The Third Circuit found that these comments by the prosecutor were "'directed to passion and prejudice rather than to an understanding of the facts and of the law.'" (*Id.*, at p. 1541.) "[T]he prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned

[their victims]." (*Ibid.*)

The Tenth Circuit in *Duvall v. Reynolds* (10th Cir. 1998) 139 F.3d 768, reached a similar conclusion. *Duvall* found that the prosecutor improperly encouraged the jury to allow sympathy, sentiment or prejudice to influence its decision in a capital case where he argued, "you may find that only those who show mercy shall seek mercy, and that as a verdict of this jury, that you may show him the same mercy that he showed [the victim] on the night of the 15th of September." (*Id.*, at p. 795.)

The Supreme Court of Tennessee followed *Lesko* in *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812: "The prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings. . . , and encouraging the jury to give the defendant the same consideration that he had given his victims." The Court held that this was an improper argument that "encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*Ibid.*)

Florida has repeatedly found similar arguments by prosecutors to be error. (E.g., *Nowell v. State* (Fla. 2008) 998 So.2d 597, 606-07 [Court condemns, as unnecessary appeal to the sympathies of the jury, the following argument: "Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever."]; *Urbin v. State* (Fla.

1998) 714 So.2d 411, 421-422 [urging the jury to show defendant the same mercy he showed the victim was "blatantly impermissible"]; *Rhodes v. State* (Fla. 1989) 547 So.2d 1201, 1206 [argument for jury to show defendant the same mercy shown to the victim on the day of her death was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence recommendation"]; see also *Kearse v. State* (Fla. 2000) 770 So.2d 1119, 1129-1130; *Richardson v. State* (Fla. 1992) 604 So.2d 1107, 1109.)

This Court has taken a different view, repeatedly stating it is not improper to urge the jury to show the defendant the same level of mercy he showed the victim. (*People v. Ochoa* (1998) 19 Cal.4th 353, 464-65; *People v. Benavides* (2005) 35 Cal.4th 69, 108; *People v. Leonard* (2007) 40 Cal.4th 1370, 1418; *People v. Collins* (2010) 49 Cal.4th 175, 229-30.)

In *Ochoa*, where the prosecutor urged the jury to "show [defendant] the same mercy that he showed [the victim]," this Court stated its rationale for finding no state law violation on the basis of such arguments. (*People v. Ochoa*, *supra*, 19 Cal.4th at pp. 464-65.) This Court reasoned that in light of the instruction that the jury could show mercy or sympathy, the prosecutor was simply arguing that defendant did not deserve mercy given the circumstances of the crime. (*Id.*, at p. 465.)

Ochoa noted that "other jurisdictions reflect various views on this question," [19 Cal.4th at p. 465], citing to the contrasting opinions of *Duvall v. Reynolds*, *supra*, 139 F.3d 768, and *Commonwealth v. Pelzer* (1992) 531 Pa. 235, 252 [612 A.2d 407, 416] [no error in prosecutor arguing that "the jurors

should 'show (the defendants) the same mercy they showed (the victim)'"]. In fact, Pennsylvania appears to be the only jurisdiction besides California which has repeatedly and consistently approved this argument. *Ochoa* and the Pennsylvania cases are not endorsements of appeals to vengeance. Instead, they rely on *interpreting* the prosecutor's remarks as simply urging the jury not to show sympathy or mercy consistent with the instructions in the case.[117]

Appellant submits that the cases taking the prosecutor's words at face value – as an improper, direct call for vengeance – reflect a better understanding of the prosecutor's argument. Prosecutors who truly want to argue that sympathy and mercy are uncalled for in a particular case need not resort to the inflammatory and prejudicial language used in this case. This Court should disapprove of the argument in this case and such arguments generally.

Such disapproval would be consistent with California law condemning a prosecutor's use of deceptive or reprehensible methods to persuade the jury.

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[117] Pennsylvania cases, including *Commonwealth v. Pelzer*, *supra*, 531 Pa. at pp. 252-253, which approve such arguments, do so with little or no analysis until traced back to *Commonwealth v. Travaglia* (1983) 502 Pa. 474, 500 [467 A.2d 288, 301], where the prosecutor urged the jury to "Exhibit the same sympathy that was exhibited by these men on [the date of the crime]." In *Travaglia,* the jury was instructed that sympathy was *not* to be considered in making its sentencing decision. The appellate court found, from reading the whole argument, "that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy." (*Id.*, at p. 501.) *Travaglia*, however, is the state court decision reversed in *Lesko v. Lehman*, *supra*, 925 F.2d 1527, for prosecutorial misconduct during argument, including the improper appeal to vengeance approved by the state court. As such, the

Such methods include (1) appeals to passion or prejudice during argument to the jury (see *Bains v. Cambra*, *supra*, 204 F.3d at pp. 974-75 [prosecutor's inflammatory argument invited the jurors "to give into their prejudices and to buy into the various stereotypes that the prosecutor was promoting"]); and (2) arguments urging the jury to apply extra-judicial law and ignore the trial court's instructions. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107; *People v. Hill* (1998) 17 Cal.4th 800, 830 [misstatement of applicable law].) The prosecutor's comments (1) urging the jury to show no mercy or sympathy to appellant because none was shown to the victim and (2) arguing that five minutes of deliberation was more than appellant deserved, were improper appeals to the passions and prejudices of the jury and invitations for the jury to misapply the applicable law.

Furthermore, this Court has repeatedly held that appeals to religious principles by the prosecution in argument are improper. (*People v. Wash* (1993) 6 Cal.4th 215, 258-261; *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194.) Such appeals imply that extra-judicial law should be applied in the case, "displacing the law in the court's instructions." (*People v. Wrest*, *supra*, 3 Cal.4th at p. 1107.) An appeal to extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. (*Sandoval v. Calderon*, supra, 231 F.3d at p. 1150.)

Pennsylvania line of cases appears to be based on a shaky foundation.

Although the prosecutor's "no-sympathy" argument did not invoke the Bible, it improperly invoked the Biblical concept of vengeance, which is antithetical to the California system of guided discretion in capital cases. (See *Jones v. Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, at pp. 1559-1560.) Calling on the jury to show no mercy to appellant because none was shown to Keith McDade was appealing to the "crude proportionality of 'an eye for an eye'" [see *Tison v. Arizona* (1987) 481 U.S. 137, 180-181 (dis. opn. of Brennan, J.)], which this Court has condemned when prosecutors directly invoke Biblical authority.

This Court should therefore reconsider the propriety of the kind of argument made by the prosecutor here in light of its own authorities condemning reliance on extra-judicial authority and appeals to passion and prejudice, and in light of substantial authorities from other jurisdictions condemning the specific argument made to this jury.

2. Improper Appeal to See the Crime Through the Victim's Eyes Via a Graphic, Invented Script

The prosecutor made an improper appeal to the jurors to see the crime through the victim's eyes through the vehicle of a graphic, invented script:

> Let's think about what Keith McDade was thinking about as he was leaving the store. He left the store. He's got a bag – got a box of chicken. We know that because we found the box and because Colleen testified about that.
>
> So – he particularly liked his little girl, Monique. He was going to bring her home some chicken – Monique and Buddy and Colleen. He was thinking at the time he left that Sunday night that he was going to go home to his family. It's a cold, foggy, Sunday night.

He goes to get in the car. And he sees Carl Powell coming down – down – the parking lot. After he – what he probably does – he probably says damn. They're we go again. It's going to get – he wants his job back.

He's probably also thinking to himself this is kind of strange here because it's – the store is closed. I'm getting ready to go home. I got the money. In fact he had two bank bags in his car. And he's probably – he – it was probably going through his mind a little bit, jeeze, this – I mean, you know, Carl usually comes to the store and talks to me about this.

And now keep in mind the family's kind of – the family's a little afraid. They know – first of all they know that Carl has stolen three times from them. So they know he has some – he has this criminal orientation there.

And – remember when Colleen pulled in with the police officer she immediately started screaming about Carl Powell. So they had some idea that . . . it seems there was at least some anxiety about Carl Powell.

So then Carl Powell comes up to the car. He starts talking to Keith McDade. Carl – Keith still got to the door and he just getting in the car. He got the key in the ignition. But it was not turned on all the way.

. . . . .

All right. So when Carl pulls the gun out what has to go through Keith McDade's mind very soon after this process starts? It's got to go through his mind how in the hell is Carl Powell planning on getting away with this? Because I mean . . . he's not going to make – the next morning . . . I'm going to call the police. After he leaves here I'm going to the store and call the police. And the police will – I know where he lives, and the police will have him this evening.

So then he's got to . . . say to himself at some point – or . . . it's got to come into his psyche Carl Powell's not planning on letting me leave here.

> I mean – and then what has to happen then? He's . . . looking down the barrel. He's looking down the barrel of this. What must that look like as he is staring at the barrel of this in this isolated, lonely place?
>
> Then what – as a human being what has to go through his mind? I'm not going to see Colleen again. I'm not going to see Buddy again. I'm not going to see Monique again. This is it.
>
> What – think about that. Think about what sheer – sheer terror he had to be in at that point.

(35RT 12448-12451.)

Arguments inviting the jurors to view the crime through the eyes of the victim, often called "Golden Rule" arguments, have been condemned by many federal and state courts. (*Fields v. Woodford* (9th Cir. 2002) 309 F.3d 1095, 1109, *amended*, 315 F.3d 1062 (9th Cir. 2002); *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 711-13; *Urbin v. State* (Fla. 1998) 714 So.2d 411, 421 [Court condemns prosecutor's creation of imaginary script demonstrating the victim was shot while pleading for his life. "By literally putting his own imaginary words in the victim's mouth, *i.e.*, 'Don't hurt me. Take my money, take my jewelry. Don't hurt me,' the prosecutor was apparently trying to 'unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused'"]; *State v. Rhodes* (Mo. 1999) 988 S.W.2d 521, 528-529 [Prosecutor committed reversible error in the penalty phase by asking jurors to imagine themselves in the place of the victim experiencing every detail of the crime. "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization that can 'only arouse fear in the jury'"]; *Bertolotti v. State* (Fla.1985) 476 So.2d 130, 133 ["Golden Rule" argument inviting the jury to imagine the victim's final pain,

terror and defenselessness, has long been prohibited under Florida law]; *Chandler v. State* (Tex. App. 1985) 689 S.W.2d 332, 334 ["It is improper in argument for a prosecutor to ask members of the jury to place themselves in the shoes of the victim"]; *State v. Johnson* (Minn. 1982) 324 N.W.2d 199, 202 ["Generally, arguments that invite the jurors to put themselves in the shoes of the victim are considered improper"]; *accord, State v. Blaine* (S.D. 1988) 427 N.W.2d 113, 115.)

In *Fields v. Woodford, supra*, 309 F.3d 1095, where the prosecutor asked the jury to think of themselves as the victim and described the crimes committed against her from her perspective, the Ninth Circuit found this argument to be improper, stating: "'[he] inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim.'" (*Id.*, at p. 1109, quoting *Drayden v. White, supra*, 232 F.3d 704, 712-13; *accord, Drayden v. White, supra* [prosecutor engaged in misconduct when he delivered a soliloquy in the voice of the victim].) As explained by the Ninth Circuit in *Drayden*, "the prosecutor seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim and by 'testifying' in the voice of the character as if he had been a percipient witness. . . . [and] . . . also risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve his dismal fate." (*Id.*, at p. 713.)

This Court, however, has approved this genre of argument in several cases. (*People v. Haskett* (1982) 30 Cal.3d 841, 863-864; *People v. Wrest*

(1992) 3 Cal.4th 1088, 1108; *People v. Garceau* (1993) 6 Cal.4th 140, 206, overruled on other grounds *in People v. Yeoman* (2003) 31 Cal.4th 93; *People v. Scott* (1997) 15 Cal.4th 1188, 1220; *People v. Bradford* (1997) 15 Cal.4th 1229, 1379.)

In *Haskett*, this Court explained that assessment of the offense from the victim's viewpoint would appear germane to the task of capital sentencing but cautioned:

> Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. (Citation omitted.) In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. (Citations omitted.) On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtained.

(*Haskett*, 30 Cal.3d at p. 864.) This Court found that the Haskett prosecutor's invitation to the jurors to put themselves in the shoes of the victim and to imagine suffering the acts inflicted on her, was insufficiently inflammatory to justify reversal. (*Ibid.*)

In this case, however, the prosecutor went beyond a mere invitation to the jurors to place themselves in Keith McDade's shoes. He graphically detailed every inch of the crime through McDade's eyes and invented a script putting his own imaginary thoughts into McDade's head: "how in the hell is Carl Powell planning on getting away with this? . . . Carl Powell's not planning

on letting me leave here . . . . He's looking down the barrel of this. . . . I'm not going to see Colleen again. I'm not going to see Buddy again. I'm not going to see Monique again. This is it. . . . Think about what sheer – sheer terror he had to be in at that point." (35RT 12449.)

The prosecutor was creating a scenario of facts not in the record and asking the jurors to consider this hypothetical situation in choosing appellant's fate. (See *People* v. *Coddington* (2000) 23 Cal.4th 529, 600, overruled on another point in *Price* v. *Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 ["It is misconduct for a prosecutor to go beyond the evidence before the jury in argument."].) In effect, the prosecutor was urging the jurors to disregard the very cornerstone of our jury system - a decision based solely on the applicable law and the evidence admitted at trial. (See *Chandler* v. *Florida* (1981) 449 U.S. 560, 574 ["Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."]; *People* v. *Lopez* (1948) 32 Cal.2d 673, 685 ["[T]he function of the jury is solely that of deciding what the facts of the case are and applying to these facts the law as given in the court's instructions."].

Moreover, the prosecutor's graphic script of the crime was inflammatory and highly prejudicial. As recognized by the states of Florida and Missouri, such graphic details and imaginary scripts have only one purpose – "to 'unduly create, arouse, and inflame the sympathy, prejudice, and passions of [the] jury to the detriment of the accused.'" (*Urban v. State*, *supra*, 714 So.2d at p. 421; *accord*, State *v. Rhodes*, *supra*, 988 S.W.2d at pp. 528-529.) This point is made abundantly clear by the prosecutor's emotional tug on the

juror's hearts at the beginning of his soliloquy, where he reminds the jury that McDade was bringing chicken home for his family and emphasizes that it was a cold, foggy night:

> So – he particularly liked his little girl, Monique. He was going to bring her home some chicken – Monique and Buddy and Colleen. He was thinking at the time he left that Sunday night that he was going to go home to his family. It's a cold, foggy, Sunday night.

(35RT 12448.) It is these kinds of emotional details, coupled with imaginary thoughts of terror attributed to Keith McDade, which place this argument over the acceptable boundaries of legitimate argument. This is exactly the kind of "irrelevant information and inflammatory rhetoric that diverts the jury's attention from its proper role [and] invites an irrational, purely subjective response," which must be stopped. (*People v. Haskett*, *supra*, 30 Cal.3d at p. 864.)

3. Urging Jurors to Speculate that Appellant Could Have Killed Others

The prosecutor made a further appeal to the passions and prejudices of the jury when he urged the jurors to speculate that appellant could have killed others because of his involvement in the drive-by shooting at Kennedy High School:

> "[H]ere's another situation where any family could now be suffering that same hell that the McDade family has suffered as a result of Carl driving by and taking a shot at the bus stop. Any family could now be robbed . . . of the lifetime of love and memories of another loved one. Just because of what Carl Powell does. Just because of his character.
>
> Just because of his – I'm lost for words to describe what – What

> kind of – What you have to be thinking about when you do something like that.
>
> When you couple that, when you couple that type of situation, and then you consider what he did in this case, clearly, the circumstances in aggravation are overwhelming. And the death penalty is the appropriate sentence."

(35RT 12464-65; see also 35RT 12470 ["Once again, reflect on that. Reflect on what Carl Powell could have done in that situation. Any – Any one of 15 kids standing at that bus stop could have been dead"].)

This argument was not a fair comment on the evidence. Although the evidence showed that Zeke Moten, the target of that drive-by shooting, was standing at the bus stop with 12 to 15 other people, there was no evidence that the others were standing in the line of fire. (33RT 11753-55, 11808.) There was no evidence that people scattered or ducked for cover. (*Id.*, at p. 11755.) Moreover, the evidence showed that it was Akens, rather than appellant, who shot at Moten. Although Akens initially told the police that appellant, not Akens, was the shooter, Akens eventually admitted to the judge that he was the one doing the shooting and pled guilty to the crime. (*Id.*, at pp. 11752-53, 11759, 11792-93.) And, although Akens testified at one point during the penalty phase that appellant also shot at Moten, Akens explained that he was told this by the police and merely assumed that appellant was also shooting. (*Id.*, at pp. 11755, 11790, 11795-96.) Akens, who was sitting in the front seat, testified that he did not see appellant, who was behind him in the backseat, with a gun and did not see him shoot. (*Id.*, at pp. 11789-91.)

"It is misconduct for a prosecutor to go beyond the evidence before the

jury in argument." (*People v. Coddington, supra*, 23 Cal.4th at p. 600.) Argument that goes beyond reasonable inferences based on the evidence is improper. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724.) Nor may prosecutors make comments calculated to arouse the passions and prejudices of the jury. (*United States v. Leon-Reyes* (9th Cir. 1999) 177 F.3d 816, 822.)

Here, it was clearly improper for the prosecutor to provoke the jurors and prey on their fears by speculating that appellant could have killed others. (See, e.g., *Slagle v. Bagley* (6th Cir. 2006) 457 F.3d 501, 519 [Prosecutor's speculative arguments, "[I]t's a damn good thing the kids didn't wake up" and "It is a good thing [defendant] didn't know that Howard could identify him," suggesting that the defendant might have committed more killings, were improper.].) The prosecutor's use of inflammatory language ("[H]ere's another situation where any family could now be suffering that same hell that the McDade family has suffered . . . . [and] could be robbed . . . of the lifetime of love and memories") demonstrates that the very purpose of this argument was to inflame the passions and prejudices of the jury based on nothing more than speculation. These comments, based on unfounded and prejudicial speculation, were improper and constituted misconduct.

4. Encouraging Jurors to Make Sentencing Decision on the Basis of Their Fears of Gang Violence.

In another improper appeal to the passions and prejudices of the jury, the prosecutor repeatedly emphasized highly-charged gang-affiliation evidence, thereby encouraging the jurors to make a sentencing decision based on their fears of gangs and gang violence. As evidenced by the number of

times the prosecutor mentioned the gang affiliation of appellant and his friend, William Akens, and the inflammatory language which he used to describe the evidence, this was a deliberate attempt to play on the jurors' fears of gangs in order to secure a sentence of death.

First, in discussing the Hernandez bicycle incident, the prosecutor suggested that it was gang-related even though there was no evidence that there was any gang angle to the taking of Hernandez' bicycle. In discussing this incident where appellant and a group of boys assaulted Hernandez and took his bicycle, the prosecutor argued that this incident by itself "is not extremely serious," but it shows that appellant's "involved with his Crip buddies at this point" and also shows "a certain amount of criminal sophistication." (35RT 12463.) Thus, argued the prosecutor, "it shows where Carl Powell was going two years, or, well, a year and a half before this incident anyway." (*Ibid.*) Accordingly, not only did the prosecutor erroneously suggest that the incident itself was gang-related, but he then used that characterization to imply that a year and half before the capital crime, appellant was already a criminally sophisticated gang member.

The prosecutor, in discussing the Rigsby assault at Land Park bowl, emphasized that it was gang-related criminal activity and then urged the jury to use that activity to define appellant's entire character: "By itself, not the most horrendous incident, but it's criminal activity, violent criminal activity, just like the other was violent criminal activity. And it just gives you some indication of the character of Carl Powell – early on, before this incident." (35RT 12463.)

The prosecutor, however, drove home his message that appellant was a dangerous gang-banger when he described appellant's friend Akens as a sophisticated gang-banger and then used appellant's association with Akens, as well as Akens' testimony about appellant, to paint appellant in the same light:

> Willie Akens, clearly, when he walked into this courtroom, clearly, you could tell that he's a gang-banger, and you could tell that he's a long-time gang-banger.
>
> He says that he's been in the criminal gang four or five years; his pants are down to his knees. He's got his Freeport hat here.
>
> The way he talks, the way he acts, Willie Akens is a tough, sophisticated gang criminal.
>
> Now, what did he say about Carl Powell? He respected Carl Powell a great, great deal. Carl Powell was a leader.
>
> Here are some of the things that Willie Akens said about Carl Powell:
>
> First of all, I said, "But before he was in here – meaning in jail – Carl, was – When he was out there, you and him were running buddies, weren't you?"
>
> He said, "Yeah, pretty much."
>
> I said, "In other words, you were close friends?"
>
> And he says, "Yeah."
>
> Then I asked Willie: "What gang are you a member of?"
>
> Willie said, "The Freeport Crips."
>
> Then I said, question: I said, "Was Carl in the Freeport Crips with you at that time?"

> And I'm speaking about the time of the shooting.
>
> Willie said, "Carl, he's not from Freeport; I mean, he's from Los Angeles."

(35RT 12466-12467.)

The prosecutor then emphasized testimony elicited from Akens that appellant was his "running buddy," that he and appellant ran together for four or five years in Sacramento but that, before arriving in Sacramento, appellant was a Los Angeles Crip. (*Id.*, at p. 12470-71.) The prosecutor quoted Akens' testimony that appellant was respected by Akens and Akens "was somebody" when he was young, then argued: "In other words, Willie is saying, "I'm a big, tough guy. I'm a big Crip member, and I respect Carl." The prosecutor also quoted his question to Akens whether appellant was well respected in the gang community and Akens' answer, "[p]retty much." (*Id.*, at p. 12472.)

The prosecutor continued his argument that appellant was a ruthless, hard-core gang member by emphasizing Detective Aurich's unsubstantiated testimony that appellant was a main player, described by the detective as a hard-core gang member and sophisticated criminal:

> Now, Carl was in the Los Angeles Crips before he came up to Sacramento, and it's also how tough you are and how ruthless you are. . . . Age is just one factor. And here we clearly see that Carl Powell is a well-respected gang member, a leader.
>
> Now, this is backed up not just by Willie Akens, but what about Detective Orrick (sic)? Detective Orrick testified that he was a gang detective for ten years, from 1984 to 1994.
>
> . . . . And Detective Orrick also testified that part of his business was to know what was happening in the gang community in Sacramento. And he knew about Carl Powell.

> And what did he say about Carl Powell? He was a main player.
>
> So it's just not Willie Akens saying this."
>
> . . . .
>
> Then I asked Detective Orrick about Carl Powell's reputation in the gang community.
>
> He says, "the information that I was receiving was that he was a Freeport Crip and was a main player."
>
> I said, What do you mean by a main player?"
>
> He says, "Main player – usually categorized gang members into three different levels: Wannabe's, associates and main players.
>
> And then your main players, he said, are a little more hard-core gang members who promote their gangs, being involved in gang activity and gang-type crimes, and be a little more blatant about what they are and what they do.
>
> I said, "Would this be a more sophisticated criminal?"
>
> He said, "Yes."

(35RT 12473-74; see also id., at pp. 12475-76; 36RT 12607.)

And finally, during his closing penalty phase argument, the prosecutor returned to his gang theme to argue that appellant was merely a vicious gang member who lacked remorse:

> And he looks remorseful now. Just look. He has been a sad sack throught (sic) the entire trial looking at what he's facing. But I'll tell you what. If you want to really see Carl Powell, if you really want to see the Bengal tiger, play the tape. Play that tape when you go back . . . into the jury deliberation room.
>
> This is – this is the real Carl Powell. Here he is. He's just been arrested. It's the 27th. It's eight days . . . after he shot Keith

> McDade in the head. The family has descended into a living hell. And . . . the reporter on here asks him how he feels. And he – in a punk way he says normal. And then he's got to add still a Crip.
>
> And . . . if you look at the curl of his lip in this . . . you see . . . just how – vicious he is in this thing, how remorseless, what – just a street punk.
>
> And – not only that this is the Carl Powell – this is the street Carl Powell and the Bengal tiger, this guy laughing here, him and Willie. They think it's really funny. You know, Carl's got his gun up to Willie's head. Then he's – then he's showing the Crip sign. And Willie's got a gun up to Carl's head I believe. Yeah. Now he's pointing a gun at Carl. And Willie's got the Crip sign.[118] This is the real Carl Powell. This is the Carl Powell that Keith McDade faced . . . about 10:30 in the parking lot on January 19th, 1992.

(36RT 12608-12609.)

As noted *ante* in section (C)(2), it is misconduct for the prosecutor to make comments calculated to arouse the passions, prejudices, or vulnerabilities of the jury. (*People v. Mayfield, supra,* 14 Cal.4th at p. 803; see also *Viereck v. United States* (1943) 318 U.S. 236, 247-48; *Commonwealth of Northern Mariana Islands v. Mendiola* (9th Cir. 1992) 976 F.2d 475, 486-87, overruled on other grounds in *George v. Camacho* (9th Cir. 1997) 119 F.3d 1393.) Improper appeals include arguments designed to inflame a juror's personal fears and emotions. (*Newlon v. Armontrout* (8th Cir. 1989) 885 F.2d 1328, 1335-1338; *Bains v. Cambra, supra,* 204 F.3d at pp. 974-975.)

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[118] The prosecutor was obviously referring to, and pointing to, People's Exhibit P-3, the photograph depicting appellant and Akens holding guns, pointed at each other's head, and making Crip gang signs. (See 35RT 12299-12300.)

Although emotion need not be entirely excluded from the jury's moral assessment, this Court has made it abundantly clear that "[e]motion must not reign over reason" and "inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1418; *People v. Haskett*, *supra*, 30 Cal.3d at p. 864.)

The prosecutor's argument painting appellant and Akens as hard-core gang-bangers, and culminating with the display of the photograph of the two young men, pointing guns at each other and making gang signs, was calculated to arouse the jurors' fears and vulnerabilities.[119] As noted in Argument VIII.C., *ante*, the public views gang members as violent criminals, considers gangs a serious problem and greatly fears individuals identified as gang members. (See, e.g., *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 231, fn. 17 ["the very mention of the term 'gangs' strikes fear in the hearts of most"]; *People v. Hernandez* (2004), *supra*, 33 Cal.4th at p. 1047 [California Legislature enacted the Street Terrorism Enforcement and Prevention Act because it recognized that "'California is in a state of crisis caused by violent greet gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.'"].)

Both state and federal courts recognize the serious concern that jurors' fears of gangs will negatively influence verdicts. (See Argument VIII.C. & D.,

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[119] As argued, *infra*, in Argument XXV, *post*, the trial court erred in admitting this inflammatory photograph whose only purpose was to portray appellant as a cold-blooded gang member and thereby inflame the jury's prejudices.

ante; United States v. Irvin (7th Cir. 1996) 87 F.3d 860, 865.) As explained by the Seventh Circuit:

> Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. Guilt by association is a genuine concern whenever gang evidence is admitted.

(*United States v. Irvin*, *supra*, at p. 865.)

California case law recognizes that in light of the public's perception of gang members as violent criminals, evidence of a defendant's gang affiliation invites reasoning that the defendant has a criminal disposition. (*People v. Williams*, *supra*, 170 Cal.App.4th at p. 612; *People v. Cardenas*, *supra*, 31 Cal.3d at p. 905.)

That reasoning is certainly what the prosecutor capitalized on here in playing on the jurors' fears of gang violence to secure a sentence of death. The prosecutor repeatedly emphasized appellant's gang affiliation, as well as the gang affiliation of appellant's associate, William Akens, during his penalty phase arguments and did so with inflammatory references -- "long-time gang banger," "involved with his Crip buddies," "tough, sophisticated gang criminal," "hard-core gang members," "vicious," and "street punk." The prosecutor's dramatic appeal, displaying the photograph and comparing appellant to a Bengal tiger, invited "an irrational, purely subjective response." (*People v. Haskett*, *supra*, 30 Cal.3d at p. 864.) The prosecutor used this

photograph and the highly-charged gang-affiliation evidence to appeal to the jurors' gut fears of gang members. By painting, and constantly emphasizing, this picture of appellant as a vicious gang-banger, the prosecutor improperly appealed to the passions, prejudices and vulnerabilities of the jury, asking them to decide appellant's fate based on fear and vengeance rather than the reasoned moral response to the evidence required by the Eighth Amendment.

E. The Prosecutor Improperly Argued Lack of Remorse As a Factor In Aggravation

The prosecutor also improperly argued lack of remorse as a factor in aggravation. In fact, as evidenced by the number of times in which he mentioned and emphasized this issue, it was clearly one of the central themes of his case in aggravation.

The prosecutor began his opening closing argument with a discussion of the factors in aggravation and during this discussion, argued:

> "What did Carl Powell do after the crime? Well, you can consider in this case – you can consider remorse, because as human beings we have the capacity for great, great mistakes, and we also have the capacity for great empathy and great compassion.
>
> And if the mistake is great and you can see some level of human empathy of compassion . . . you can say, well, gee, you know, knowing how human beings are we ought to – can't – maybe not forgive him, but – mitigate – think about mitigation of what he did.
>
> Well, let's examine that issue of remorse of Carl Powell. What did Carl Powell do after this crime? According to the Hodge brothers they went and smoked some cocaine. According to Carl Powell he got himself some girls. And one point I think he said he got himself some whores. Angela Littlejohn says he got girls. And he bought

everybody – splurged with that money, took five – they split it three ways. He got 5, 600 bucks. What did he do with it? He . . . partied. . . . [T]hey haven't even found Keith McDade yet. The blood is still dripping onto the pavement. And Carl Powell is partying. I mean think of the enormity of the outrage of that.

What else did he do? He bragged . . . about murdering -- murdering Keith McDade. And she said he brags to some of the girls he was with to gain a little more favor and respect from them I suppose. This is how twisted – criminally twisted his mind is.

And what else did he do? He told Angela Littlejohn that he needed his gun back . . . on the trip actually back from Los Angeles.

Why did he say he needed this gun back? Well, first of all he talked about if the police caught him, he was going to kill the police. So if – you have any feelings that maybe as a result of this terrible, terrible, horrendous crime that somehow Carl came to grips with what he had done – now he's talking about killing police.

And then – and then he goes a little further and Angela Littlejohn says he bugging her. . . . He wanted the gun back. What for? He tells her to do more robberies and to get more money. He says . . . the gun is his ticket to money.

So what – what does that show about what he's doing here? I mean he's already killed Keith McDade for money. . . . [M]aybe he will pick another victim who he knows and maybe the victim will give him a little trouble. He's going to kill that victim too.

He showed . . . absolutely no remorse and Angela Littlejohn said that . . . ."

(35RT 12451-12453.)

After discussing appellant's statement to Littlejohn that McDade threatened him and "had it coming," the prosecutor continued:

"But he – Carl probably thought that was actually mitigating. But

then Eric Banks said John Hodges said the kid – he just had no remorse. It . . . just didn't bother him.

And Dr. Nicholas said that Carl Powell was a sophisticated criminal with no remorse. So that's not back – that's not just back then at the time of the crime. That's also now, because Doctor Nicholas examined him recently."

(*Id.*, at p. 12454.)

And later during this discussion, the prosecutor argued:

"And then Detective Thurston says so he didn't show any remorse at all?

Angela Littlejohn said he didn't really care. Okay. And she says, you know, he don't care."

(*Id.*, at pp. 12457-58.)

Thereafter, the prosecutor continued his lack-of-remorse theme by quoting Eric Banks' testimony, "From what I understand, this youngster is easy to manipulate and handle it. . . . You know, without no remorse, you know, because he's young, and he ain't never been into anything" [35RT 12484], and arguing: "So what he's saying there about manipulation is that Carl Powell didn't have any remorse." (*Ibid.*)

During his closing penalty phase argument, the prosecutor again argued lack of remorse:

"And he [defense counsel] talks about Angela Littlejohn saying she thought Carl was a – was a special kid. When you think about it in context of how she phrased it in court being a special kid was

> not mental retardation. He was a special kid because he was so callused (verbatim) and remorseless about what he had done, and she just couldn't believe that he had – she couldn't put it together."

(36RT 12607.)

And, finally, referring to the videotape showing appellant at the time of his arrest, when escorted to jail by Detectives Thurston and Lee, the prosecutor delivered one final argument emphasizing appellant's post-crime remorse: "[I]f you look at the curl of his lip in this. . . you see . . . just how – vicious he is in this thing, how remorseless, what – just a street punk." (*Id.*, at p. 12609.)

Appellant submits that the prosecutor improperly argued lack of remorse as an aggravating circumstance to support imposition of a death sentence in this case, which in turn allowed the jurors to erroneously conclude that they could attach aggravating weight to this nonstatutory factor.

Lack of remorse is not a statutory aggravating factor and thus a prosecutor may not argue that a defendant's post-crime remorselessness is an aggravating factor. (*People v. Jurado* (2006) 38 Cal.4th 72, 141; *People v. Boyd*, *supra*, 38 Cal.3d at p. 773 [aggravating factors are limited to those set forth in Penal Code, § 190.3].)

A defendant's overt remorselessness "*at the immediate scene of the crime*" may be argued by the prosecutor and considered by the jury as aggravation because factor (a) of section 190.3 allows the sentencer to evaluate aggravating aspects of the "*capital crime itself.*" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 (original emphasis), superseded on other grounds by

statute as stated in *Barnett v. Superior Court* (2010) 50 Cal.4th 890.) "On the other hand, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*Gonzalez*, *supra*, at p, 1232, citing *People v. Boyd*, *supra*, 38 Cal.3d at pp. 771-776; *see also People v. Crittenden* (1994) 9 Cal.4th 83, 150, fn. 17.)

Although the prosecutor referenced his lack-of-remorse argument as part of his discussion of the circumstances of the crime [see 35RT 12443-12461], his remarks make clear that he was not merely arguing remorselessness as a circumstance of the crime, but rather arguing it as a factor in aggravation. First, appellant's statements to Angela Littlejohn, made several days after the crime [31CCT 9255], as well as his behavior after the crime, cannot be construed as showing remorselessness "*at the immediate scene of the crime*." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1232.) These statements and behavior plainly expressed appellant's state of mind after, as opposed to at, the time of the killing. (Compare *People v. Ramos* (1997) 15 Cal.4th 1133, 1163-1164 [defendant's subsequent jail house statements that he enjoyed hearing the victims beg for their lives expressly conveyed his state of mind contemporaneous with the killing].)

Second, the prosecutor's arguments based on Dr. Nicholas' testimony and the videotape of appellant at the time of his arrest ["How remorseless, what – just a street punk" (35RT 12609)] conclusively demonstrate that the State's lack-of-remorse argument was directed toward more than merely showing remorseless as a circumstance of the crime:

And Dr. Nicholas said that Carl Powell was a sophisticated

> criminal with no remorse. **So that's not back – that's not just back then at the time of the crime. That's also now, because Doctor Nicholas examined him recently.**

(35RT 12454, emphasis added.) The prosecutor was plainly arguing lack of remorse as an aggravating factor – that appellant was a sophisticated criminal, a street punk, with no remorse.

Nor was prosecutor merely pointing out the absence of remorse as a mitigating factor. A prosecutor may argue that mitigation in the form of remorse has not been shown; he may not, however, argue that lack of remorse constitutes a factor in aggravation supporting a death sentence. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 150.) The prosecutor did much more than simply urge the jury to find appellant's post-crime conduct demonstrated the absence of a mitigating factor. The prosecutor devoted a lengthy portion of his argument to dismissing appellant's offered factors in mitigation [see 35RT 12475-12493] and only once did he mention appellant's remorselessness in that section. (*Id.*, at 12484.) Instead, the prosecutor referenced appellant's post-crime conduct during the portion of his argument devoted to the discussion of aggravating factors. (See 35RT 12443-12461.) Rather than underscore the lack of a mitigating factor, the prosecutor's argument emphasized the absence of remorse as the presence of a factor supporting a sentence of death. This was improper.

F. The Prosecutor Committed *Boyd* Error in Improperly Converting Mitigating Evidence Into Aggravation.

During argument, the prosecutor converted appellant's mitigating

evidence of his impoverished childhood and his family's love of, and support for, him into aggravation. The prosecutor argued:

> And he – is he is here today not because of anyone else but him. He's not here because he didn't get a little red wagon when he was a kid. In fact I'll argue that he had a fairly good life. He had a loving mother. He had loving brothers. There's far, far worse situations in life than he had, and yet people don't wind up executing somebody.
>
> He had – he had a family that cared for him enough to move him out of Los Angeles. He had a brother that cried for him on the stand. He had
>
> . . . two brothers who both have good jobs. Both are responsible contributing citizens in our society. And either one of them would have done anything to get him a job had he graduated from high school or even if he didn't graduate from high school. It's obvious those two brothers would have done anything for him. He had – he had opportunities in life.

(35RT 12438.)

The prosecutor thus urged the jurors to consider the details of appellant's impoverished childhood, growing up without a father in a dangerous, gang-infested area of Los Angeles, as aggravating evidence by arguing: (1) there are far worse situations; (2) appellant did not have it so bad since he was loved by his mother and brothers; (3) it could not have been so bad, since his brothers turned out alright. The argument comparing appellant to his brothers and suggesting that it was appellant's fault for not graduating from high school and failing to afford himself of all the opportunities his brothers would have provided, was particularly disturbing, given the evidence

of appellant's mental deficiencies.[120] This argument was also improper in its conversion of the mitigating evidence of his family's love and support into aggravation. In essence, the prosecutor argued that because appellant was so loved, he should have turned out better.

It was error to argue that this mitigating evidence could be considered as aggravating evidence. Evidence offered by the defense in support of factor (k) can only be used in mitigation. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776 [Evidence of a defendant's background and character is admissible under 190.3, factor (k) only to mitigate the gravity of a crime and it is improper for the prosecutor to urge that such evidence should be considered in aggravation].)

G. The Prosecutor Made Improper and Misleading Arguments Based On Material Mischaracterizations of Evidence.

The prosecutor further compounded the prejudice to the defense case in mitigation and aggravated the circumstances of the crime and evidence offered under 190.3(b) (violent criminal activity) by mischaracterizing critical testimony and evidence favorable to appellant. Although this Court has stated that the "the prosecutor 'enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom,'" it has made clear that it is misconduct for the prosecutor to go beyond reasonable inferences based on the evidence before the jury and to

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120 Dr. Nicholas' testing showed that appellant's full-scale I.Q. score is 75, falling in the borderline mentally retarded range. (34RT 12006, 12032.) According to the doctor, appellant would not be able to compensate for his intellectual deficiencies. (*Id.*, at pp. 12056-57.)

misstate facts during argument. (*People v. Collins* (2010) 49 Cal.4th 175, 230; *People v. Coddington*, *supra*, 23 Cal.4th at p. 600; *People v. Kirkes*, *supra*, 39 Cal.2d at p. 724.) Here, the prosecutor based crucial elements of his penalty phase argument on misstatements of fact and arguments beyond the evidence. As shown below, the prosecutor's comments were **not** reasonable inferences from the record.

1. Misrepresentations Designed to Distort Appellant's Relationship with the McDades In Order to Aggravate Crime, Inflame Jurors, and Prevent Consideration of Sympathy.

In order to aggravate the circumstances of the crime, outrage the jurors, and prevent them from considering sympathy as a mitigating factor, the prosecutor deliberately distorted facts and made assertions not supported by the record regarding appellant's relationship with the McDades. The prosecutor argued:

> "[W]hen you stop and think of the enormity, of the outrage of the situation like this . . . with what he then does he does not deserve your mercy or sympathy in any way, shape, or form.
>
> He work at Kentucky Fried for nine – he witnessed the family – and just think about the situation. He – he shoots Keith McDade January 19th, 1992. He went through the Christmas holiday season with the family.
>
> . . . . .
>
> Remember Kim Scott? Carl Powell talked to Kim Scott many, many times about robbing the Kentucky Fried Chicken outlet. So it's not like this was a spontaneous, spur of the moment kind of thing.
> He . . . was thinking about this for a long time . . . as he's being friends with them, . . . as Keith McDade is picking him up to take him to work, as he's talking to the wife of Keith McDade, as he's dealing with the children.

(35RT 12444-12445.)

The record does not support this blatant attempt to inflame the jurors and prevent consideration of mercy for appellant, because he was plotting the robbery while sharing a close working relationship with the McDades, including going through the Christmas season with them.

First, appellant was fired in May of 1991 [16RT 6514-15] and there was no evidence that appellant "went through the Christmas holiday season with the [McDade] family" in any shape or form. Colleen McDade testified at the penalty phase that during "the summer of 1991, into the fall," appellant stopped by the store "maybe once or twice a week" to order food or ask for his job back.[121] (32RT 11545-46.) When asked whether anything eventful happened during the Christmas period between appellant and her or Keith McDade, Mrs. McDade responded no. (*Id.*, at p. 11546.) There was no testimony by Mrs. McDade or anyone else that appellant was even seen at the store during the Christmas season. In short, there was no evidence which

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[121] Guilt phase testimony on this subject was similar. That evidence showed that between his firing in May of 1991 and January 19, 1992, appellant only sporadically stopped by the KFC store, to buy food, chat with his friends, employees Bruce Goulding and Kim Scott, or to ask for his job back. According to Junell Rodriguez, appellant came by the KFC store a dozen times, between June 1991 and January 1992, to see Goulding. (16RT 6575.) Colleen McDade testified that appellant came to the store more than ten times after stopping work. (*Id.*, at pp. 6552-53.) Specifically, Mrs. McDade testified that after appellant's firing, she next saw him in July 1991 and during the next two months, he periodically stopped by the store to ask for his job back. (*Id.*, at pp. 6514-15, 6517.) She also testified that appellant called once or twice a month to ask for his job back. (*Id.*, at p. 6549.)

could support a reasonable inference that appellant "went through the Christmas holiday season" with the family. This was a deliberate misrepresentation designed to create a distorted picture of the relationship between appellant and the McDades in order to aggravate the crime and inflame the jurors.

Second, the prosecutor deliberately misrepresented Kim Scott's testimony regarding appellant's statements about robbing KFC to further distort this relationship. Contrary to the prosecutor's emotionally charged argument that appellant was plotting this robbery "as Keith McDade is picking him up to take him to work, as he's talking to the wife of Keith McDade, as he's dealing with the children," Scott's testimony makes clear that none of appellant's statements about robbing KFC were made during the time that appellant worked at the store. Ms. Scott testified that it was in November and December of 1991 when appellant made those statements [18RT 7255, 7258-59] and as noted above, appellant was fired at the end of May 1991. Scott testified that in mid-November 1991, appellant told her that he was going to rob KFC, because he got fired and he wanted money. (18RT 7255-58.) Thus, there was no evidence whatsoever to support the prosecutor's argument that appellant was plotting any such robbery while he and the McDades had such a wonderful and close working relationship.

2. Improper Denigration of Defense Case in Mitigation By Misstating Defense Mental Health Expert's Testimony to Persuade Jury to Reject His Opinions.

The prosecutor misstated Dr. Nicholas' testimony in order to persuade the jury to reject his opinions:

> The interesting part about this is Dr. Nicholas came in and testified that Carl was being pressured by the Hodges brothers.
> And then Mr. Holmes asked him something to the effect of: **Did you read about him being pressured?**[122]
>
> And he says, "Yes."
>
> **And Dr. Nicholas thought the pressure here was from the Hodges brothers. Dr. Nicholas doesn't know enough about this case to know that the pressure that Carl Powell was talking about was the pressure from Keith McDade, which, of course, was a lie. But, nevertheless, that just shows you what Dr. Nicholas based his – opinion on.**

(35RT 12480, emphasis added.)

In fact, the exchange between the prosecutor and Dr. Nicholas shows that the doctor did not testify his recall was that appellant told the police the Hodges pressured him. Rather, the doctor, albeit acknowledging that appellant told the police it was McDade who pressured him, testified that, in his opinion, appellant was pressured by the Hodges (34RT 12141-12142):

> Question: . . . Mr. Holmes read something in the transcript about Carl said that I was pressured. Do you remember that?

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[122] During his direct examination of Dr. Nicholas, defense counsel Holmes read a portion of Eric Banks' testimony, that John Hodges referred to his accomplice "as a younger" and that John Hodges was known to be able to manipulate younger people, and asked whether that confirmed the doctor's opinion that appellant was susceptible to manipulation by older gang members who could propel appellant to commit a very serious crime, which he would not do on his own. (34RT 12047-48.) It was the prosecutor, however, who questioned the doctor about his review of appellant's statement that he was pressured. (*Id.*, at p. 12141.)

Answer: Yeah.

Question: And you read that transcript right?

Answer: Yes.

Question: And by whom did Carl say that he was pressured?

(No Response)

Question: Who was he referring to when he said that?

Answer: Well, in my opinion, Carl was pressured by Terry and John Hodges.

Question: I didn't ask you what your opinion was; I'm asking you this. [¶] In that transcript, in the transcript of the interview between Carl Powell and Detective Lee, when Carl Powell said he was pressured, who was Carl Powell referring to?

. . . .

Question: All right. Did the defendant say in the interview who he felt he was being pressured by that led up to him shooting Keith McDade?

Answer: I don't recall that.

. . . . .

Question: . . . Are you aware that he said that it was Keith McDade that was pressuring him?

Answer: Well, it – It kind of rings a bell from my reading. That was some months ago when I read that document.

This was a cheap shot to persuade the jurors that Dr. Nicholas' opinions should be rejected because he did not know the facts. Moreover, it was a deliberate distortion of the doctor's testimony, for the transcript is very clear ["I didn't ask you what your opinion was"] that the prosecutor understood Dr.

Nicholas was referring to his own opinion, rather than appellant's statement to the police.

The prosecutor thus deliberately misled the jury and undermined appellant's case for mitigation by this improper attack on Dr. Nicholas testimony. Dr. Nicholas' testimony was crucial to support one of the foundations of appellant's case in mitigation – that the Hodges manipulated and pressured appellant to kill Keith McDade, an act that appellant did not want to commit. The doctor testified that appellant's full-scale I.A. is 75 [34RT 12006] and opined that because of his low I.Q. and high need for approval, appellant would be susceptible to manipulation by an older well-established gangster, such as John Hodges, who was more criminally sophisticated. (34RT 12083, 12114, 12040.) Given evidence of John Hodges' reputation for manipulating young people, as well as his referring to appellant as a youngster who was easy to manipulate, Dr. Nicholas opined that John Hodges would have been able to manipulate and push appellant to commit a very serious criminal act, one that he was not prepared to do and would not do on his own. (*Id.*, at pp. 12041, 12046-48.) This deliberate misstatement of Dr. Nicholas' testimony was thus improper denigration of appellant's case in mitigation.

3. Argument that Appellant Acted Alone in Committing the Crime Based on Misrepresentation of the Record

The prosecutor's central theme for aggravation and simultaneous attack on the defense case in mitigation was its argument that appellant acted alone in committing the crime: the Hodges brothers were back in the car when appellant

robbed and shot Keith McDade. In making this argument, the prosecutor misrepresented the record. The prosecutor argued:

> The Hodges brothers were there. **But they were back in the car. They all say that.** . . . [I]f you look at what Carl Powell told the police, if you look at what Terry Hodges says to Daryl Leisey, what John Hodges says to Eric Banks, they are back in the car. Carl Powell was alone at the time."

(35RT 12447, emphasis added; see also *id.*, at p. 12481 ["that (Hodges were in the car when appellant robbed McDade) is consistent with Eric Banks' statement and with Daryl Leisey's statement about what John Hodges and Terry Hodges said"].)

In fact, Daryl Leisey testified to his belief, as well as statements by Terry Hodges which indicated, that Terry Hodges was present when McDade was shot. Leisey testified that Terry told him the following: Terry and the other guy "were at the scene and they were waiting for him to get done," because "Terry and the other guy went over there to rob him." (25RT 9494.) Terry "had to go up there and jack him up a bit, tell him to . . . get it over with." (*Ibid.*) Terry told him "'[j]ust whack the motherfucker,' because he didn't want to leave any witnesses." (*Ibid.*) Terry said that "a couple minutes later, the guy came back, running to the car and they took off." (*Id.*, at p. 9495.) When asked if Terry said whether or not he was actually at the place where the shooting took place, Leisey testified that Terry said "[h]e was right there with Carl Powell." (*Ibid.*) Terry also told Leisey that the shooter was "chicken-shit" and "didn't have no heart." (*Id.*, at p. 9498.) Terry "had to go over there and . . . jack him up. . . ." (*Ibid.*) Leisey testified that Terry Hodges made statements which indicated to Leisey that Terry was present when

McDade was shot, including the following: Terry said he had to "coach him [the boy] on," Terry "didn't want no witnesses at all," Terry "wasn't going to leave no witnesses," and Terry "told Mr. Powell to get it over with so we can get the hell out of here." (27RT 10031.)

And although Eric Banks' preliminary hearing testimony (which was read to the jury) was that John Hodges never explicitly said he was present during the shooting, Hodges' statement to Banks that he told the youngster to kill the "partner" so he "can't I.D. us" indicated to Banks that John Hodges was present at the shooting. (25RT 9449, 9452, 9462-63.)

The prosecutor repeated this misrepresentation when he later argued that appellant was capable of doing the murder all by himself without any help from the Hodges and it was appellant who had the cold-blooded nature to have no remorse about eliminating witnesses. (35RT 12484.) To support this allegation, the prosecutor quoted from Daryl Leisey's account to an unidentified interviewer but in doing so, took Leisey's statements out of context in order to make it appear that appellant was all alone when he robbed and shot McDade and both Hodges were in the car:

> And then Terry says, "I was hanging out, waiting for the boy to get back."
>
> So Terry confirms what Carl Powell says: Terry was not there because he was back in the car.
>
> Daryl Leisey: "John – John was the driver. John was sitting behind, was in the car waiting for Terry."
>
> So John's back in the car, according to this version of the events too.

> And then Mr. Leisey says, "Okay," and Terry said, "'Just whack the motherfucker and be done with it.'"
>
> "And Terry walked off, or took off, or whatever, went back to his car. And then the other guy come running up to the car, you know, about a minute or so later, and they took off."
>
> He says – Leisey says, "Terry took off, walked back to the car, okay. Couple minutes later the dude comes back in the car. He says, 'Terry, hey, it's finished. Let's get the hell out of here.' And I guess they got the money and shit and took the bag; they got the bag."
>
> So by all scenarios, Terry and John are back in the car; Carl Powell's alone out there, when – When he murders Keith McDade.

(*Id.*, at p. 12486.)

In fact, what Leisey told the interviewer is that whereas John Hodges remained in the car, Terry Hodges and appellant robbed McDade and Hodges then told appellant to "whack" McDade. The entire exchange, with no omissions, makes this clear:[123]

> MR. LEISEY: . . . He [Terry Hodges] goes, "Hey, I didn't do no shooting, you know." ¶ And I said, "Well, I said, "Well, where in the hell were you at?" ¶ He goes, "**I was hanging out, waiting for the boy to get back.**" ¶ And I said, "Well, why – why did the boy kill him?" ¶ Again, he goes, "I just told you, man, no witnesses, you know." ¶ I said, "Well, you know, Terry, " I said, "there's no difference, you know. You were at the scene, you know."
>
> INTERVIWER: Uh-huh.

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[123] The bolded portions of the quoted statements correspond to the prosecutor's argument, allegedly quoting from Leisey's account. A comparison of the bolded portions to the other statements in that account evidences the significance of the prosecutor's omissions.

MR. LEISEY: He goes, "I was more than just – more – more than at the scene." He says, "My brother" – and he brought his brother into it. He didn't mention his name. Okay? But I presumed it was John anyway, you know.

INTERVIEWER: Uh-huh.

. . . . .

MR. LEISEY: Terry said to me that he and the other boy were right there. Okay? And Terry said, "Just whack the motherfucker and be done with it." And Terry walked off, or took off or whatever. Okay? Went back to his car and then the other guy come running up to the car, you know, within a minute or so later and they took off. Okay?

INTERVIEWER: So you're saying that Terry told you that he –

MR. LEISEY: Terry was right –

INTERVIEWER: -- and his brother –

MR. LEISEY: Yeah, Terry – Terry and his brother were out there. Okay?

INTERVIEWER: They were out of their car?

MR. LEISEY: John – **John – John was the driver. John was sitting behind** – was – **was in the car waiting for Terry.**

INTERVIEWER: But he never mentioned John by name?

MR. LEISEY: No. He was waiting for the brother, his brother, and the other guy to get back. Okay?

INTERVIEWER: Okay. So Terry and the other guy got out.

MR. LEISEY: Yeah. Terry and the other guy got out. **Okay?** The whole deal was Terry and the boy robbed the guy, were standing there robbing the guy, and **Terry** turned around and **told him**, "Hey, **just whack the – the motherfucker**," or something like that. He – he was running his mouth, you know. "Just whack

the motherfucker." The guy started running off his mouth to – to -- the guy from KFC.

INTERVIEWER: Uh-huh.

MR. LEISEY: **Terry took off, walked back off to the car. Okay? Couple minutes later the dude comes back in the car. He tells Terry, "Hey, it's finished. Let's get the hell out of here."** . . . .

(32CCT 9306-9308.)

As made clear by Leisey's testimony regarding Terry Hodges' statements, Terry Hodges was not back in the car when Keith McDade was robbed. Furthermore, appellant did not act alone but was goaded into committing the crime by Terry Hodges. Nonetheless, the prosecutor used his misrepresentation to strike at the heart of appellant's mitigating argument that the Hodges pressured him to rob and kill McDade: "How can he be the least culpable of the three? The other two are back in the car. They say it and he says it." (36RT 12611.) The prosecutor thus used this crucial misrepresentation of the record to both aggravate the crime and denigrate appellant's case in mitigation.

4. Argument Beyond the Evidence Vouching For Truthfulness of Witness Statement that Appellant Fired Gun During Kennedy High School Drive-By.

The prosecutor went beyond the evidence to support his argument that it was appellant, not William Akens, who was the shooter during the drive-by shooting at Kennedy High School. Akens pled guilty to that shooting and was sent to the California Youth Authority. (33RT 11758-61, 11798-99.) At

appellant's penalty phase, Akens admitted that he fired the gun during that drive-by shooting. (*Id.*, at pp. 11789-91.) Akens testified that during the shooting, appellant was in the backseat of the car. Akens did not see appellant with a gun and did not see appellant fire a gun. (*Id.*, at pp. 11789-91.) Akens admitted that during the investigation of that drive-by shooting, he told a detective that it was appellant, not Akens, who was the shooter. (*Id.*, at pp. 11792-93.) And in response to questioning by the prosecutor during the penalty phase, Akens testified that appellant fired the gun. (*Id.*, at p. 11755.)

There was good reason to disbelieve Aken's statement that appellant was the shooter, not him. First, Akens admitted the shooting and pled guilty to that crime. (*Id.*, at pp. 11759, 11798-99.) Second, Akens explained that he told the police appellant was the shooter, because they were intimidating him and he was under medication as a result of his own shoot-out with the police. (*Id.*, at pp. 11792-94, 11798.) Akens also explained that he told the police and stated in court that appellant was the shooter, because that is what the police told him. Akens merely assumed, as a result of information from the police, that appellant was also shooting. (*Id.*, at pp. 11790, 11793-94.)

The prosecutor, however, told the jurors that they should believe Akens' testimony that appellant fired a gun during that drive-by shooting, because "he's on the stand under penalty of perjury" and '[h]e's on probation, so he's worried about that type of thing. He's got to tell the truth, even though he really doesn't want to. Kind of matter of fact about the thing, but he says that Carl shot at that group, at the bus stop." (35RT 12464.)

This argument was improper, because there was no evidence that Akens was on probation. Akens never testified to that [33RT 11747-11799], nor did any other witness so testify. And, in fact, the prosecutor knew that Akens was not on probation, for he stated on the record, outside the jury's presence, that Akens had been paroled. (*Id.*, at p. 11733.) It was thus improper for the prosecutor to use this false argument to persuade the jurors to find that appellant, not Akens, was the shooter during that drive-by shooting.

"While counsel is accorded 'great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation],' counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation]." *(People* v. *Valdez* (2004) 32 Cal.4th 73, 133-134, citing *People* v. *Cash* (2002) 28 Cal.4th 703, 732 and *People* v. *Hill, supra,* 17 Cal.4th at p. 823.) This Court has held that while a prosecutor may vigorously present facts favorable to his side, that argument ". . . does not excuse either deliberate or mistaken misstatements of fact." *(People* v. *Purvis* (1963) 60 Cal.2d 323, 343, disapproved in part on other grounds in *People* v. *Morse* (1964) 60 Cal.2d *631; People* v. *Valdez, supra,* 32 Cal.4th at p. 134.) The federal courts similarly have found that "it is misconduct for a prosecutor to misstate the evidence or to assume the existence of prejudicial facts not in evidence." *(Blaclanon* v. *Booker* (2004) 312 F.Supp.2d 874, 889, citing *Gordon* v. *Kelly* (6th Cir. 2000) 205 F.3d 1340 [prosecutor was "not entitled to create out of whole cloth a reason for [the witness's] fear that [the witness] himself denied"]; *Darden* v. *Wainwright* (1986) 477 U.S. 168, 182; *Berger* v. *United States* (1935) 295 U.S. 78, 84-85; *Gomez* v. *Ahitow* (7th Cir. 1994)

29 F.3d 1128, 1136, *cert. denied,* (1995) 513 U.S. 1160 [The prosecutor may not, consistent with a defendant's Due Process rights and Sixth Amendment right to confrontation, seek to obtain a conviction by going beyond the evidence before the jury]; *United States* v. *Edwards* (9th Cir. 1998) 154 F.3d 915, 921; *United States* v. *Molina* (9th Cir. 1991) 934 F.2d 1440, 145.)

Appellant's case in mitigation was severely undermined by the prosecutor's misstatements. The prosecutor's misleading attack on Dr. Nicholas' testimony went to the core of appellant's proffered mitigation that he was pressured and manipulated by the Hodges to commit a crime he did not want to commit. And, the prosecutor's blatant attempt to inflame the jurors on the basis of an emotionally charged, mischaracterization of appellant's relationship with the McDades, was effectively aimed at destroying appellant's plea for mercy. It would be difficult for any juror to consider mercy for appellant after hearing that during the time when appellant was interacting with the McDade children and receiving rides to work from Keith McDade, he was plotting the robbery and killing and that he had the temerity to commit the crime after spending the Christmas season with the family.

But the prosecutor's misstatements went further. He used his misrepresentations to support his argument that appellant acted entirely alone and it was appellant, not the Hodges, who had the cold-blooded nature to have no remorse about eliminating witnesses. Thus, with his material misstatements of Daryl Leisey's testimony, the prosecutor both attacked appellant's mitigation and aggravated the circumstances of the crime. The prosecutor's misrepresentations of such critical elements were improper arguments which

should be condemned.

H. The Prosecutor Improperly Denigrated the Defense

As noted in Argument XX.A., *ante*, it is misconduct for the prosecutor to attack the integrity of defense counsel, cast aspersions on defense counsel or suggest that defense counsel has fabricated a defense. (See Argument XX.A., *ante*.) Likewise, it is misconduct for a prosecutor to allege that defense counsel has acted in bad faith. (*People v. Perry*, *supra*, 7 Cal.3d 756, 790.)

Federal courts, like this Court, have also condemned such behavior and held it impermissible for a prosecutor to bias the defense case by either denigrating defense counsel or witnesses testifying at their behest. (*Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097 [The prosecutor "stray[ed] beyond proper advocacy" by offering her own opinion of the defense witness' credibility and by implying that defense counsel had fabricated evidence]; *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 315 [Prosecutor improperly and prejudicially disparaged defendant's expert witness by belittling the medical and psychological tools used by the experts and ridiculing the doctors' testimonies].)

1. Attacks on Integrity of Defense Counsel

During his penalty phase opening and closing arguments, the prosecutor made repeated attacks on the integrity of defense counsel. The prosecutor continued his guilt phase vilification of defense counsel but took it one step further in his penalty phase opening argument by telling the jury that counsel's

argument regarding factor (g) (whether appellant acted under extreme duress or substantial domination) was nothing more than a fabricated well-known defense tactic:

> That's [Factor G, whether appellant acted under extreme duress or substantial domination of the Hodges brothers] where the defense is going – that's where they are going to hang their hat. I'd like to make a comment about that.
>
> There was a famous attorney. His name is Percy Foreman. And Percy Foreman . . . is renowned in legal circles because he's alleged to have tried more death penalty cases and more murder cases than any other attorney in the United States.
>
> . . . . And in his obituary in August of 1988 he was quoted from a seminar that he had given. And in this seminar he said this. And this is a quote. In the death penalty matter you should never allow the defendant to be tried. Try someone else. Try the husband, the lover, or the police or if the case has social implications society generally.
>
> Well, Percy Foreman was a very, very, very successful attorney – criminal defense attorney. And . . . this has been what this case has been all about in terms of the defense tactics.
>
> You just – you just consider . . . the dynamics of this case. You have John Hodges, who is a menacing, brooding kind of person and older. You have Terry Hodges, who is a big guy. And you have Carl Powell. Which at the time of this crime was fairly young looking. . . . He's young looking. He's slight of build.
>
> Well, . . . if you gave this case to a thousand attorneys – thousand defense attorneys, what they're going to do with it – the thousand attorneys would say . . . we're going to try the Hodges brothers here.

(35RT 12440-41; see also *id.*, at p. 12442 ["But this is – this – this Percy Foreman says that's what the defense has to do with this case."]

In his closing penalty phase argument, the prosecutor continued this attack:

> Then he [defense counsel] talks about John and Terry. He wants you to focus on that. Remember – remember this – this statement by one of the greatest defense attorneys in the history of our country. In a death penalty matter you should never allow the defendant to be tried. Try someone else. Try the husband, the lover or the police or, if the case has social implications, society generally.
> Well, this case has John and Terry Hodges. If he knew . . . they would be trying this case, he would have given them the advice try John and Terry Hodges. And that's what he's doing.

(36RT 12604.)

Thus, in one fell swoop, the prosecutor not only improperly denigrated defense counsel's integrity but also committed misconduct in urging the jury to reject one of appellant's main mitigating factors as nothing more than a fabricated defense tactic.

The prosecutor, not content to urge the jury to reject one mitigating factor as nothing more than a defense tactic, made the same attack on another component of the defense case in mitigation – lingering doubt. After noting that "[t]he defense is also going to argue lingering doubt," the prosecutor stated: "There is no lingering doubt in this case, and don't fall for this defense tactic." (35RT 12493.) He continued this attack in his closing penalty phase argument: "Lingering doubt. That's – that's this area up here. That's – Mr. Holmes threw in all kinds of red herrings here in the red herrings defense."

(36RT 12603.)

As shown by the case law cited and quoted in Argument XX.A., *ante*, these repeated attacks on defense counsel's integrity constituted misconduct. It is misconduct for a prosecutor to suggest to the jury that defense counsel's role in a criminal trial is something other than facilitating the discovery of truth. (*See, e.g., People v. Perry* (1972), *supra*, 7 Cal.3d. at pp. 789-790 [misconduct for prosecutor to suggest that role of defense counsel is to obscure the truth and confuse the jury]; *see also United States v. Matthews* (9th Cir. 2001) 240 F.3d 806, 819 [where prosecutor argued "[t]hey're trying to get away, so they gotta hide what they're doing, they gotta hide all the facts, cloud the facts, throw up all kinds of dirt, squirt the ink," prosecutor "walked – and may have overstepped – the line by insinuating that defense counsel was trying to hide the truth"]; *Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897, 913 [Prosecutor's argument impugning character of defense counsel ("cheap lawyer tricks") was improper]; *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224-25 [Prosecutor committed prejudicial misconduct during closing argument by vouching for government witnesses, denouncing the defense case as a sham ("scam that has been perpetrated on you") and telling the jury it was their duty to find the defendant guilty.]; *United States v. Rodrigues* (9th Cir. 1998) 159 F.3d 439, as amended, 170 F.3d 881 (1999) [In case where both sides misinformed jury during closing arguments, prosecutor's disparaging statements about defense counsel ("has tried to deceive you from the start in this case about what this case is really about," "has tried to introduce a number of nonissues, false issues") distorted the trial process and required reversal of convictions] .)

This Court has observed that if there is merely "a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1992) 4 Cal.4th 1233, 1302; *see also People v. Clair* (1992) 2 Cal.4th 629, 663 ["reasonable likelihood" standard applies in assessing prejudice from improper prosecutorial comment].) Here, the prosecutor's argument wrongfully insinuated that defense counsel was attempting to mislead the jury with dishonest defense tactics and that one of the main tenets of appellant's case in mitigation --lingering doubt based on the actions of the Hodges' brothers in manipulating appellant to commit the robbery and then ordering him to kill McDade -- was nothing but a fabrication based on standard defense tactics. This vilification of defense counsel's role and dismissal of appellant's mitigation as mere deception was unwarranted, highly improper and constituted misconduct.

2. Improper Attack on Defense Mental Health Expert

The prosecutor continued his improper attack on this central feature of appellant's mitigation case by personally attacking the testimony of the defense expert, based on intelligence and other psychological testing, that (1) appellant had a full-scale I.Q. of only 75 (borderline mentally retarded range); (2) appellant would gravitate to a follower position, rather than leader, because his intellectual abilities and capacity for thinking would be at the bottom of most groups; and (3) appellant would be susceptible to manipulation by older individuals such as the Hodges. (34RT 12002, 12006-07, 12033, 12083,

12114.) The prosecutor denigrated Dr. Nicholas' testimony by misstating trial testimony, asserting false facts, and belittling his test results without evidentiary support:

> Dr. Nicholas, he was – He was bought and paid for in this case. Dr. Nicholas was bought and paid for, in the sense that he was – He's an expert witness; he makes his money by coming in and testifying. He's not going to make his money if he doesn't come to conclusions that the defense wants.
>
> Of course, he says that he's – Lots of times he doesn't do that. But I doubt that there's lots of times. Probably very seldom. But he made little or no effort to find out if his – his studies in the laboratory, so to speak – in other words, his tests that he gave Carl Powell about I.Q. would be confirmed out in the community.
>
> In fact, they weren't. In fact, everybody says that Carl Powell is of normal intelligence, except for Dr. Nicholas.
>
> Dr. Nicholas says that Carl Powell is easily manipulated. Did he go and interview any of Carl Powell's friends of anybody in the community to see if in fact Carl Powell is easily manipulated? He came to this conclusion based on – on I.Q. tests.
>
> And then his logic is: If you have a low I.Q., you're – the lower the I.Q. the further you are away from being a leader and the more you are to a follower and the more easily you are manipulated.
>
> If you look at some of the leaders that we have in the world, you'll find, according to Dr. Nicholas, a high I.Q., and high leadership ability. And then as that descends, the ability to lead becomes less and less.
>
> Well, one of the greatest leaders in the world was Winston Churchill, and it was well known that he was a terrible, terrible student. And he probably wouldn't have done well in that I.Q. test because it measures those kinds of things.

(35RT 12490-91.)

Although this Court has held that a prosecutor "is free to remind the jurors that a paid witness may accordingly be biased," arguments that an expert witness' testimony is unbelievable, unsound, or a lie must be based on the evidence. (*People v. Parson* (2008) 44 Cal.4th 332, 360.)

They were not based on the evidence in this case and the arguments here were more than mere reminders that a paid witness might be biased. The prosecutor accused Dr. Nicholas, a "bought and paid" for witness, of tailoring his conclusions to suit the defense. He used this argument in a particularly egregious attack on Dr. Nicholas' refusal to support the prosecutor's unsubstantiated belief that appellant's elevated paranoia scale rendered him a danger to guards and inmates in prison. (35RT 12492 ["Dr. Nicholas is bought and paid for by the defense, so he knew he was heading down a path here that he didn't want to go down. So he said, oh he'd do fine, he'd do fine in an institutional setting."].) Dr. Nicholas explained that appellant's paranoia might render him a danger to himself but did not agree with the prosecutor's opinion that it would render him dangerous to others. (34RT 12106-07.) Rather than challenge the doctor's conclusion by pointing to counter-evidence to support his speculative opinion, the prosecutor simply assaulted the doctor's character and accused him of falsifying his testimony. There was no evidence to support this attack.

The prosecutor belittled Dr. Nicholas' I.Q. testing as "studies in the laboratory, so to speak," and argued that the results of that testing were not "confirmed" in the community because "everybody says that Carl Powell is of

normal intelligence, except for Dr. Nicholas." (35RT 12490; see also *id.*, at p. 12470 [false argument that "[t]here's no evidence in the real world of him being dumb"].) That was a misstatement of the trial testimony. Angela Littlejohn described appellant as both stupid and "mental" [31CCT 9263, 9269] and testified that she thought he was "on S.S.I." because he was "kind of like a special kid," by which she meant mentally slow. (28RT 10412, 10431.)

And to denigrate Dr. Nicholas' explanation that as I.Q, descends, the ability to lead becomes less and less, the prosecutor argued:

> Well, one of the greatest leaders in the world was Winston Churchill, and it was well known that he was a terrible, terrible student. And he probably wouldn't have done well in that I.Q. test because it measures those kinds of things."

(35RT 12491.)

Again, there was no evidence to support this argument and, in fact, it is palpably false. As made clear by the Welcome to Winston-Churchill.org (http://www.winstonchurchill.org), the allegation that Churchill was a poor student in school is one of the leading myths about his life, which has been refuted. (*http://www.winstonchurchill.org/ learn/ myths/ myths;* see also *http://www.winstonchurchill.org/ learn/ myths/ myths/he-was-a-poor-student.*)

In *Gall v. Parker*, *supra*, 231 F.3d 265, a prosecutor used similar tactics to attack the defendant's insanity evidence: "Rather than attacking Gall's insanity evidence by pointing to counter-evidence that Gall was sane, the Commonwealth simply assaulted the very use of the defense." (*Id.*, at p. 314.)

The Sixth Circuit strongly condemned the prosecutor's tactics[124] and held that the misconduct rendered the entire trial fundamentally unfair:

> "[F]acing Gall's considerable evidence of insanity and EED, counsel for the Commonwealth chose not to rebut that evidence directly. Instead, he expressed his personal belief as to the weakness and partiality of Gall's expert witnesses' testimony, and he mischaracterized crucial aspects of that testimony. He disparaged the very use of an insanity defense as the "last line of defense" and the "M1 Rifle"; he belittled the medical and psychological tools used to support such a defense; and he equated the doctors' testifying about Gall's condition to three blind men "asked to identify an elephant" – "you can imagine the bizarre opinions which they got back." (Citation omitted.) He then

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[124] The Court described the prosecutor's tactics as "comments . . . peppered with the type of 'know-nothing appeals to ignorance' that deprive defendants of their right to a fair consideration of their insanity defense," which included:

> [T]he Commonwealth mocked Dr. Noelker's use of a "House, Tree, Person Test" to show insanity as opposed to the Commonwealth's evidence of a "smoking gun." (Citation omitted.) He asked: "[i]sn't that a convenient time to go into a [schizophrenic state]?" . . . . At the same time, the prosecutor minimized the testimony of Drs. Noelker and Toppen that Gall could appear both calm and sane to an "untrained observer" even if examinations and tests revealed that he was insane or severely mentally ill: "He may look sane, but folks, he isn't. Now they're telling us folks, 'you can't look and judge for yourself.'" (Citation omitted.) He then argued to the jury that because Gall appeared intelligent at trial, he must be sane, and must have been sane on April 4. The tone of these statements was similar to the rhetorical approach the prosecutor took in cross-examining Dr. Noelker and Dr. Toppen, in which he assaulted psychology as an inexact discipline . . . and belittled the tests Dr. Noelker had used in diagnosing Gall. (Citation omitted.) ("Now here is a little one here that I think the jury ought to see. This is one of those little psychological tests."

(*Gall. v. Parker*, *supra*, 231 F.3d at pp. 314-16.)

> pleaded with the jury not to let Gall loose through the insanity defense. In addition to having no doubt that these tactics were improper, we find that they easily satisfy the criteria of "flagrancy" laid out in Boyle. They clearly misled the jury and prejudiced Gall's defense of insanity. "

(*Gall v. Parker*, *supra*, 231 F.3d at p. 315.)

The Court, although agreeing that persuading the jury there was a difference between a mental disease and legal insanity was a legitimate goal, stated that "the arsenal available to a prosecutor to achieve that legitimate goal is limited to arguments rooted in properly introduced evidence and testimony rather than words and tactics designed to inflame passions, air unsubstantiated prosecutorial beliefs, and downplay the legitimacy of a legally recognized defense." (*Id.*, at p. 316.)

Similar to Gall's prosecutor, the prosecutor here relied on improper tactics, rather than properly introduced evidence, to attack appellant's expert witness. He used language and tactics designed to (1) belittle psychological testing and the results in this case without evidentiary support, (2) air unsubstantiated opinions, and (3) attack the expert's opinions on the basis of false assertion of trial testimony and facts. These tactics should be condemned.

In combination, the prosecutor's improper attacks on defense counsel and the defense mental health expert unfairly discredited reasons why a life sentence should be imposed, introduced an improper aggravating factor of future dangerousness, and undermined the credibility of the attorney whom appellant was relying on to convince the jury that the reasons for a life

sentence were substantial.

I. The Prosecutor Improperly Invoked Biblical Authority to Justify Imposition of a Sentence of Death.

The prosecutor committed further misconduct by invoking Biblical authority to justify imposition of the death penalty in this case: "If you make certain choices in your life theology-wise you go to hell. If you make other certain choices in your life, you go to heaven. That's the way it is. That's the way – that is how life is made up." (35RT 12438.)

This Court has condemned prosecutorial reliance on the Bible as support for or approval of the death penalty. (*People v. Ervin*, *supra*, 22 Cal. 4th at pp. 99-100; *People v. Roybal* (1998) 19 Cal.4th 481, 519-521; *People v. Hill*, *supra*, 17 Cal.4th at pp. 836-837; *People v. Wash*, *supra*, 6 Cal.4th at pp. 260-261.)

The Ninth Circuit also has condemned prosecutorial use of the Bible in urging jurors to impose a sentence of death. (*Fields v. Brown* (9th Cir. 2007) 503 F.3d. 755, 780-81 [A prosecutor may not "invoke God or ... paraphrase a Biblical passage in closing argument in the penalty phase of a capital case" because such "invocation of 'higher law'" violates "the Eighth Amendment principle of narrowly channeled sentencing discretion" and "undercuts the jury's own sense of responsibility for imposing the death penalty."]; *accord*, *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 775-780 [Petitioner was deprived of a fair penalty phase by the prosecutor's invocation of religious authority in support of his argument for the death penalty.].) As explained by

the Ninth Circuit in *Sandoval*, argument invoking religious authority "violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict," "undercuts the jury's own sense of responsibility for imposing the death penalty," and "undermines the jury's role in the sentencing process." (*Id.*, at pp. 776-777.) "For these reasons," explains *Sandoval*, "religious arguments have been condemned by virtually every federal and state court to consider their challenge." (*Id.*, at p. 777.)

The prosecutor's invocation of religious authority to justify and support imposition of a death sentence in this case ran afoul of these authorities. Such argument was improper, undermined the jurors' sense of penalty responsibility, and discouraged them from giving individualized consideration to mitigating factors. This argument thus deprived appellant of his Eighth Amendment right to a reliable penalty determination.

J. **These Claims Have Not Been Waived Because the Record Is Clear That Any Further Objections Would Have Been Futile.**

As noted in Argument XX.E., *ante*, as a general rule, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion-and on the same ground-the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Hill, supra*, 17 Cal.4th at p. 820.) However, both objection and request for admonition shall be excused if they would be futile or the harm caused cannot be cured. (*Ibid.*)

During the prosecutor's penalty phase argument, defense counsel made no objections. This was obviously in response to the court's conduct during guilt phase argument, where the court gave a clear message to counsel that any further objections would be futile and the only recourse to remedy improper argument was to respond to it during defense argument. As explained *ante* in Argument XX.E., when defense counsel objected to patent prosecutorial misconduct, the trial court overruled the objection, with the curt explanation: "since this is argument[,] you can respond to it in your argument." (31RT 11191.) By refusing to sustain appellant's meritorious objection and indicating that counsel's remedy was to respond in his own argument, the trial court rendered further objections futile. (See Argument XX.E., *ante;* see also *People v. Bain, supra,* 5 Cal.3d 839.)

Additional objections were also excused as futile because admonition could not "unring the bell" of the prosecutor's intemperate behavior. The prosecutor committed repeated misconduct, interspersed throughout his penalty phase arguments in such a manner that their cumulative effect was devastating. As recognized by this Court in *People v. Kirkes*: "Repeated objections might well have served to impress upon the jury the damaging force of the challenged assertions. A series of admonitions to the jury could not have cured the harmful effect of such misconduct." (*Kirkes, supra,* 39 Cal.2d at p. 726.)

The misconduct here was not the kind which could be readily cured by admonition. "Some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect. . . ." *(Caldwell v. Mississippi*

(1985) 472 U.S. 320, 339.) As the United States Supreme Court has acknowledged:

> While juries ordinarily are presumed to follow the court's instructions [citation], we have recognized that in some circumstances "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."

(*Simmons v. South Carolina* (1994) 512 U.S. 154, 171, quoting *Bruton v. United States* (1968) 391 U.S. 123, 135.) The prosecutor here made repeated inflammatory arguments designed to appeal to the jurors' fears and emotions, denigrated both defense counsel and appellant's expert witness, argued beyond the evidence, mischaracterized the evidence in order to prevent consideration of mitigating evidence and increase aggravating circumstances, and argued improper aggravating factors. The cumulative effect of this body of misconduct could not have been cured by an admonition. Accordingly, appellant's claims of misconduct have been preserved for review.

K. <u>This Misconduct Violated Appellant's Rights Under the Federal Constitution and Was Prejudicial, Requiring Reversal.</u>

The prosecutor's arguments injecting non-statutory aggravation into appellant's penalty phase (lack of remorse and future dangerousness) violated an important state procedural protection and liberty interest (the right not to be sentenced to death except on the basis of statutory aggravating factors) protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) They, and the other arguments

identified above, misled the jurors, distorted the record, and encouraged the jurors to make the sentencing decision on improper bases. This misconduct therefore violated (1) the Eighth and Fourteenth Amendment requirement of individualized capital sentencing [*Caldwell v. Mississippi*, *supra*, 472 U.S. 320; *Zant v. Stephens* (1983) 462 U.S. 862, 879] and requirement that objective criteria guide the imposition of the death penalty [*Maynard v. Cartwright* (1988) 486 U.S. 356; *McCleskey v. Kemp* (1987) 481 U.S. 279, 299-306]; (2) "a meaningful opportunity to present a defense" [*Crane v. Kentucky* (1986) 476 U.S. 683, 690]; (3) appellant's Sixth Amendment rights to confrontation, cross-examination and effective assistance of counsel; and (4) his Eighth Amendment right to a reliable sentencing determination. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) Furthermore, the prosecutor's misconduct so infected the penalty phase with unfairness as to render appellant's death sentence a denial of due process. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.)

Because this misconduct violated appellant's federal constitutional rights, prejudice is to be assessed under the *Chapman* "harmless beyond a reasonable doubt" standard of prejudice. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) However, even if this misconduct is assessed under California's "miscarriage of justice" standard, reversal is required, for there is a reasonable probability that, in the absence of the prosecutor's misconduct, the jury would have returned a different sentence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

The jury in this case would not necessarily have been inclined to impose

a death verdict. There was only a single victim and appellant was a very young man (just 18 years of age) at the time of the crime with no prior felony convictions. Appellant's case in mitigation showed that he was mentally slow, with a full-scale I.Q, of only 75, and that he was manipulated and pushed into committing the crime by the older, criminally sophisticated Hodges brothers.

Pitted against this case in mitigation was the prosecution's egregious misconduct, which not only improperly elevated the aggravating circumstances of the crime, but denigrated evidence which should have mitigated the crime. The prosecutor's Bengal tiger argument and future dangerousness argument based on improper twisting of defense expert evidence went to the heart of the jury's decision-making process and misled the jurors into believing that appellant would be unsuitable for a sentence of life without the possibility of parole. The prosecutor used race, the jurors' fears of gang violence, and emotionally-charged rhetoric to inject an impermissible degree of unreliability and arbitrariness into the choice of death as the appropriate penalty. Appeals by a prosecutor to the fears of the jurors "have particularly potent power." (White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Phase Trial Arguments* (2002) 39 Am. Crim. L.Rev. 1147, 1182.) As a result of the prosecutor's misconduct, the jury was allowed to consider aggravating factors that it should not have considered.

Death was not a foregone conclusion in this case. There is a reasonable possibility that the jury would have rendered a different penalty verdict had the misconduct not occurred. Accordingly, the prosecutor's egregious misconduct requires that the judgment and sentence of death be set aside.

XXV.

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE, AS MORE PREJUDICIAL THAN PROBATIVE, A PHOTOGRAPH OF APPELLANT AND WILLIAM AKENS HOLDING GUNS AND EXHIBITING GANG SIGNS AND TESTIMONY BY DETECTIVE AURICH THAT APPELLANT WAS A "MAIN PLAYER" IN THE CRIP GANG.

Over defense objection, the court permitted the prosecution to introduce as penalty phase rebuttal a photograph of appellant and William Akens throwing gang signs while pointing guns at each other. Recognizing its prejudicial effect in depicting both gang membership and weapon possession, the court ruled this photograph inadmissible during guilt phase. (13RT 4521.) The court reversed its ruling at penalty phase and admitted the photograph as relevant to establishing appellant's gang status and rebutting the defense argument that appellant was manipulated and coerced by the Hodges. This photograph, People's Exhibit P-3, was circulated among the jurors during the penalty phase and also made available during their deliberations. The court further permitted the prosecution to elicit, over defense objection, Detective Aurich's testimony regarding his receipt of information that appellant was a "main player," which he defined as a hardcore gang leader who promotes his gang and is involved in gang-related crimes. Both items of evidence should have been excluded as more prejudicial than probative. The error in admitting this inflammatory evidence was so egregious as to deny appellant his right to a fair trial and due process in violation of the Fourteenth Amendment. It also rendered appellant's death sentence arbitrary and unreliable in violation of the Eighth Amendment.

A. Background Facts

As noted in Argument VIII, *ante*, the prosecutor pushed whenever feasible during the guilt phase to introduce evidence linking appellant to gangs. The trial court excluded gang evidence during the guilt phase, including the photograph of appellant and Akens making gang signs, because the capital crime was not gang related. (5RT 2116-2117.)

At the penalty phase, the prosecution introduced three instances of prior criminal activity under Penal Code section 190.3(b): (1) an assault on David Hernandez and robbery of his bicycle in October 1990 [32RT 11636-11637, 11640, 11647, 11651-52]; (2) an assault on Harold Rigsby at Land Park Bowl in November 1991 [33RT 11709-11]; and (3) a threat to Zeke Moten in a John F. Kennedy High School classroom and subsequent drive-by shooting in front of the school in November 1991 [*id.*, at pp. 11659-61, 11752-55]. Two of these incidences, the Rigsby assault and Kennedy High School incident, were arguably gang-related and motivated. The prosecution also sought to introduce two additional aggravators: (1) the photograph of appellant and William Akens holding guns and exhibiting gang signs; and (2) "background and history of gang activity" by appellant. (13RT 4520-22.) In the photograph, appellant and Akens are pointing guns at each other and laughing. (36RT 12609.)

Appellant moved to strike the "gang involvement" and photograph aggravators on the basis that they did not constitute permissible aggravating circumstances under Penal Code section 190.3. (2CT 407-409.) The prosecutor agreed that the "gang involvement" aggravator was not admissible as a circumstance in aggravation and thus agreed to strike it. (13RT 4521-22.)

The State argued, however, for admission of the photograph under 190.3(b) as evidence of a threat of violence. (*Id.*, at pp. 4520-21.) The trial court rejected that argument and preliminarily granted the defense motion to strike the photograph, stating:

> It apparently depicts membership, arguably, membership in a gang and arming by the gang in that membership. It doesn't otherwise focus on any specific incident of a threat or force or any specific victim or any other specific criminal purpose.

(*Id.*, at p. 4521.)

In response to defense objection to the admission of any gang references during the penalty phase, the court ruled that if any of the three instances of prior criminal activity was gang-related, gang-involved, and/or gang-motivated, evidence of such would be admissible. (*Id.*, at p. 4523; 32RT 11437-11440.) The defense requested the court to adhere to its guilt phase ruling excluding all references to gang-related activity. (32RT 11437.) However, the court held that evidence of gang affiliation/motivation for the acts of violence and threat was necessarily relevant and admissible and its argued prejudice was outweighed by the probative value. (*Id.*, at pp. 11437-11439.) Subsequently, evidence was introduced at the penalty phase, suggesting that both the Rigsby assault and the Kennedy High School threat and drive-by shooting were gang-motivated and related.

Harold Rigsby testified that in November 1991, he was a member of the Broderick Boys street gang and wore red gang colors. (33RT 11689, 11691.) Rigsby told police that he was confronted by six male black juveniles, who

identified themselves as Crips, and asked him what he was doing in their hood. (*Id.*, at pp. 11709-10, 11728.) Rigsby was assaulted by the individuals and tentatively identified appellant as one of them. (*Id.*, at 11710-11, 11714.)

Further evidence showed that in November 1991, appellant and William Akens entered a classroom at John F. Kennedy High School and threatened a student, Zeke Moten. (*Id.*, at pp. 11659-61.) Appellant told Moten: "Motherfucker, we're going to do you in; we're going to get your ass." (*Id.*, at p. 11660.) Subsequently, Moten was standing at a bus stop in front of the high school when a car containing Akens and appellant drove by and someone inside the car fired at Moten. (*Id.*, at pp. 11752-54.)

Akens testified at the penalty hearing that he was a "Freeport Crip" gang member and he and appellant used to be running buddies. (*Id.*, at pp. 11748-49.) Akens described Moten as a "gang banger," because he had left the Crips to join another gang, the Bloods. (*Id.*, at pp. 11748-11750.) Akens admitted that the classroom threat incident was gang-related but stated that it was he, not appellant, who threatened Moten. (*Id.*, at pp. 11750-11751.) Akens further admitted doing the drive-by shooting. (*Id.*, at pp. 11752-11754.) Akens said that he stuck his foot out the car window to show Moten the blue color of his shoes and said, "What's up, cuz [a term referring to a Crip]?" (*Id.*, at 11787-11788.) Moten or one of his friends shot at Akens' car so Akens fired back. (*Id.*, at p. 11754.) Akens testified at one point that appellant also shot at Moten, but explained he was told this by the police and merely assumed appellant was also shooting. (*Id.*, at pp. 11755, 11790, 11795-11796.) In fact, Akens did not see appellant shoot. (*Id.*, at pp. 11789-11791.) Akens admitted

telling the police that appellant did the shooting but only did so because he was intimidated, under medicated, and merely assumed appellant was shooting. (*Id.*, at pp. 11792-11794, 11798.) Akens further testified that it would not be unusual for a couple of sophisticated, higher-ranking Bloods to use a less sophisticated, youngster Crip to do their "dirty work." (*Id.*, at pp. 11762-11763.)

Sacramento Police Detective Ronald Aurich was called to testify to his interview of Akens in December 1991 regarding the Kennedy High drive-by shooting. (*Id.*, at pp. 11803-11804.) Akens told the detective that he was in the car but did not shoot anyone; appellant was the shooter. (*Id.*, at p. 11806.) Detective Aurich was working in the gang unit in 1991. Over defense objection, he was permitted to testify that he recognized appellant's name; he had received information that appellant was a Freeport Crip and a "main player." (*Id.*, at pp. 11809-11810.) A main player, according to the detective, was a "little more hardcore" gang member who promotes his gang and is involved in gang activity and gang-related crimes. (*Id.*, at p. 11810.) Detective Aurich also testified that a main player would be a leader, rather than a follower, and a more sophisticated criminal. (*Ibid.*) Detective Aurich did not personally know appellant in 1991 or 1992; appellant, who was 18 or 19 years old at that time, had no felony convictions. (*Id.*, at pp. 1814-15.) And the detective had not heard of appellant from others until he began investigating the Kennedy High incident. (*Id.*, at p. 11815.)

During the defense penalty phase case, further testimony was elicited regarding gang affiliation. Appellant's mother and brothers testified that

appellant's childhood was spent in a dangerous area of Los Angeles, plagued by gangs and drive-by shootings, but denied that appellant was ever a gang member. (33RT 11925-26; 34RT 11963-64, 12210, 12213-14, 12217-18, 12247; 35RT 12266.) The defense mental health expert testified, however, that appellant had been in a gang since age 10 or 12. (34RT 12088.) According to the doctor, appellant was a member of the Hoover Crips in Los Angeles and was 100% committed to that gang. (*Id.*, at pp. 12088-89.) When appellant moved to Sacramento at the age of 16, he continued his affiliation with the Crip gang, but it was a different Crip gang. (*Id.*, at p. 12099.) Because of where he was from, appellant automatically had some degree of notoriety in Sacramento and he chose to exaggerate that while he participated in gang activities in Sacramento. (*Id.*, at pp. 12099-12100.) Dr. Nicholas acknowledged writing in his report that appellant was street-wise or criminally sophisticated. (*Id.*, at p. 12110.) The prosecution also introduced and played a two-minute videotape of news footage of appellant's arrest, in which appellant identified himself as a "Crip."[125]

Following this testimony, the prosecution once again sought admission of the photo of appellant, Akens, the guns, and the gang signing. This time, the prosecutor sought to introduce the photograph on rebuttal. (35RT 12299.) The defense objected on the basis that the photograph was inflammatory and cumulative of other penalty phase evidence which already established appellant's gang membership. (*Id.*, at p. 12301.) The defense argued that after Akens' testimony, there could be no doubt in anyone's mind that he and

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[125] This videotape, People's Exhibit P-4, shows appellant, handcuffed, as he is escorted to jail. Just before he entered the jail, appellant said, "Still a Crip." (People's Exhibit 4; 35RT 12429-12430.)

appellant were Crips. (*Ibid.*) If the prosecution wanted to establish that appellant and Akens were in a gang together and recognized each other as gang members, that had been established and the defense would stipulate so. (*Ibid.*) The defense further argued that the photograph was inflammatory, portraying appellant and Akens on an endless trail of crime and very proud of their guns. The photograph was indicative and symbolic of criminal activity. (*Id.*, at pp. 12301-02.)

The court admitted the photograph subject to the prosecution laying a sufficient foundation. (*Id.*, at p. 12302.) The court found it relevant to establish appellant's gang status, stating:

> It's relevant to the whole issue that now has been developed in the penalty phase as to what level the defendant was involved in gangs or wanted to be a gang member, wanted to prove himself or already was before he came to Sacramento or only after he came to Sacramento. There have been many different scenarios in which gang membership has relevance, and this is relevant to that.

(*Ibid.*) The court further found the photograph relevant to rebutting the defense argument that appellant was manipulated and coerced by the Hodges to shoot McDade, stating:

> This photograph lends itself to the argument that [appellant] was receptive to do such things on other occasions. Whether he's joking or what the whole purpose of the photograph is it shows him holding a gun to somebody's head and laughing. And it can lend itself to the argument that the defendant had considered doing such a thing previously.

(*Id.*, at p. 12305.) The court found that the probative value of the photograph outweighed the argued prejudice. (*Id.*, at p. 12303.)

The photograph was then circulated among the jurors during the penalty rebuttal phase. (*Id.*, at pp. 12327, 12329-12330.) It was stipulated that (1) the photograph was found in a car belonging to Melanie Land on November 16, 1991, in West Sacramento; (2) the two individuals in the photograph were appellant and Willie Akens; (3) appellant was the individual standing on the right side of the photograph and Akens was standing to the left; and (4) the signs that appellant and Akens were making were Crip gang signs. (*Id.*, at pp. 12326, 12429.)

B. Argument

1. Applicable Law

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has no discretion to admit irrelevant evidence. (Evid. Code, § 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Evidence that is technically relevant must still be excluded under Evidence Code section 352 when "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Rulings under Evidence Code section 352 are reviewable for abuse of discretion. (*People v. Turner* (1984) 37 Cal.3d 302, 321; *In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Evidence has potential for "undue prejudice" if it threatens to evoke an emotional bias against a defendant as an individual which lacks any legitimate bearing on the issues. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) This may occur if evidence is threatened to be misused by jurors as reflecting on the defendant's propensity for criminal conduct (*ibid.*; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905) or evokes an emotional reaction which may motivate jurors to punish the defendant. (E.g., *id.* at p. 907 [loathing of narcotics problem and narcotics users]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn. 17 ["the very mention of the term 'gangs' strikes fear in the hearts of most"]).

2. Erroneous Admission of Photograph

The trial court found that the photograph was relevant for two purposes –to establish and clarify appellant's gang status and to rebut the defense argument that the Hodges manipulated and coerced him. Given evidence suggesting that two of the aggravators presented under Penal Code section 190.3(b) were gang-motivated and related, the court determined that appellant's gang status was relevant. However, after presentation of both the prosecution's and the defense case at penalty phase, there was no dispute as to appellant's gang status and no need for clarification. The evidence already established the extent of appellant's gang affiliation, including his gang involvement prior to moving to Los Angeles. William Akens admitted that he was a Freeport Crip and that appellant was his running buddy."[126] (33RT 11748-11749.) Although appellant's family members understandably stated

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126 The prosecutor argued during his penalty phase argument that Akens' testimony, as well as his presence, left no doubt as to appellant's gang status.

their lack of knowledge of appellant's gang affiliation, appellant himself admitted that he was a Crip during the news footage played of his arrest. (People's Exhibit P-4; 35RT 12429-30.) Moreover, the defense mental health expert acknowledged appellant's gang membership, as well as the depth of his participation. Dr. Nicholas testified that appellant had been a member of a gang since the age of 10 or 12; he was a member of the Hoover Crips in Los Angeles and was 100% committed to that gang; upon moving to Sacramento, appellant continued his affiliation with the Crip gang, albeit a different chapter; appellant chose to exaggerate his Los Angeles Crip notoriety while participating in gang activities in Sacramento; and appellant was street-wise. (34RT 12088-12089, 12099-12110.)

After this testimony, there was nothing that could be added by the photograph other than to inflame the jurors and evoke both fear of and emotional bias against appellant. The photograph simply was not necessary to clarify appellant's gang status and should have been excluded as both prejudicial and cumulative. "'[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.' [Citation omitted.]" (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 905.) It is a "well settled rule that the use at trial of cumulative evidence of ... gang-affiliation ... constitutes an abuse of discretion." (*People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 342; see also *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905 [If gang evidence is merely cumulative of other evidence, its probative value is minimal and it should be excluded because of its serious potential for prejudice.]) A number of decisions have

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(35RT 12466-12467.)

reversed due to introduction of irrelevant or minimally probative gang evidence, particularly where such evidence was cumulative of other less prejudicial evidence also presented. (E.g., *Cardenas, supra,* at pp. 904-905; *People v. Albarran, supra,* 149 Cal.App.4th at pp. 225-232 [granting new trial]; *People v. Bojorquez, supra,* 104 Cal.App.4th at p. 345 [reversing and collecting cases].) The photograph was therefore inadmissible to prove appellant's gang status.

Neither was the photograph admissible under the trial court's second reason of relevancy – that it could rebut the defense argument that the Hodges manipulated and coerced him to kill McDade. As explained by the court, under this theory of admissibility, the photograph of appellant laughing and holding a gun to Akens' head "lends itself to the argument that [appellant] was receptive to do such things on other occasions." (35RT 12305.) And, found the court, "it can lend itself to the argument that the defendant had considered doing such a thing previously." (*Ibid.*)

The photograph, however, had no relevance to establishing that appellant had previously considered robbing and killing Keith McDade or was receptive to doing so. The law is well-settled that appellant's mere possession of a firearm not used in any of the charged crimes is not relevant to his intent with respect to the charged offenses. As explained in *People v. Henderson,* where the Court found reversible error in admission of evidence regarding the defendant's possession of a second loaded gun in his home where there was no contention that he used that gun in committing the charged offense (assault with a firearm):

> Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of assault with a deadly weapon. Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons – a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant. (Citations omitted.) [¶] The claimed relevance of the loaded Derringer gun on the issue of defendant's intent is without substance. The inference sought by the prosecution is purely one of *sheer speculation* – the antithesis of relevancy.

(*People v. Henderson*, *supra*, 58 Cal.App.3d at p. 360, emphasis in original.)

Nor can it be argued that appellant's manner of displaying the gun rendered the photograph relevant to his intent. The trial court rejected the prosecution's argument that the photograph displayed a threat of violence. (13RT 4520-4521.) This rejection was for good reason, because appellant and Akens were laughing and obviously goofing around in the photograph. It is illogical and speculative to draw an inference, from this facetious, non-threatening display, that appellant was receptive to robbing and killing a human being and had considered doing so. In short, the photograph was not relevant to prove the court's second rationale because it had no tendency in reason to prove appellant's receptiveness to using a firearm to kill and his prior consideration of doing so. The court thus had no discretion to admit the photograph. (Evid. Code, § 350 [only relevant evidence is admissible]; *People v. Babbitt*, *supra*, 45 Cal.3d at p. 682 [evidence is irrelevant if it produces only speculative inferences].)

Further, the court's second theory of relevance is also unacceptable because it requires resort to impermissible propensity reasoning: because appellant is predisposed to crime, his mocking display of a weapon was for a criminal purpose, and thus, he had robbery and murder on his mind when he and Akens posed for the photograph. Such propensity reasoning is impermissible. (Evid. Code, § 1101, subd. (a) [It is impermissible to prove any fact through reasoning requiring an inference of a person's propensity to act in conformity with a particular character trait]; see also *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1380-1381 [Evidence of defendant's possession of knife which could not have been used in the crime and defendant's arming himself and scratching "Death is His" on his door, was irrelevant and constituted impermissible propensity evidence.].) It served simply to blacken appellant's character. As noted in Argument VII, *ante*, evidence of a defendant's connections to weapons that could not be the instrumentality of the crime is inadmissible, because it tends to prove "not that [the defendant] committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser*, *supra*, 47 Cal.2d at p. 577.)

Thus, the probative value of the photograph was minimal at best. It was not necessary to the state's case to prove appellant's gang status and had no probative value to proving appellant's consideration of, and receptiveness to, using a gun to rob and kill. On the other hand, it exhibited substantial potential for prejudice. Evidence is prejudicial in the context of Evidence Code section 352 if it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value on the issues." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

Although appellant and Akens were joking in the photograph, the visceral image of two young black men pointing guns at each other, while throwing gang signs, no doubt triggered the jurors' fears. This Court has recognized the "highly inflammatory impact" of gang evidence, which preys on jurors' fears. (*People v. Cox*, *supra*, 53 Cal.3d at p. 660; *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 231, fn. 17; see Argument VIII.C, *ante*.) Both California and federal courts have also recognized the "highly prejudicial" impact of evidence of a defendant's possession of deadly weapons. (*People v. Henderson*, *supra*, 58 Cal.App.3d at p. 360; see also *McKinney v. Rees*, *supra*, 993 F.2d 1378.) As evidenced by voir dire and the juror's questionnaires, appellant's jury contained several jurors who were quite vulnerable to such fears. Three of appellant's selected jurors blamed gangs as the cause of society's most significant crime problems. (47CT 13984 [Juror No. 8]; 48CT 14024 [Juror No. 9]; 48CT 14143 [Juror No. 12].) Several jurors also expressed concern about weapon use. (47CT 13721 [Juror No. 1 (cannot be a fair and impartial juror in a case in which the use of a firearm to commit a crime)]; *id.*, at p. 13881 [Juror No. 5 (*accord*)].) Moreover, six of the jurors expressed views of varying degrees that racial minorities are more violent than people of the majority race. (47CT 13722-23 [Juror No. 1]; 47CT 13802 [Juror No. 3]; 47CT 13842 [Juror No. 4]; 48CT 14001 [Juror No. 8]; 48CT 14041-42 [Juror No. 9]; 48CT 14200-01; 8RT 2880-81 [Alternate No. 1, seated as replacement to Juror No. 11 (27RT 10122-24, 10139-40].)

People's Exhibit P-3 created a "legitimate concern" of "produc[ing] a visceral response that unfairly tempts jurors to find the defendant guilty of the

charged crime []." (*People v. Box*, *supra*, 23 Cal.4th at p. 1201.) The photograph was particularly disturbing because it combined two of the most substantial fears expressed by the jurors and recognized by this Court, gangs and weapons. The trial court, therefore, erred in admitting appellant's statements under Evidence Code section 352.

3. Erroneous Admission of Testimony that Appellant Was a "Main Player"

The trial court further erred in permitting the prosecution to elicit Detective Aurich's testimony regarding his receipt of information that appellant was a "main player" in the Crip gang. This Court has upheld the admission of expert opinion by gang experts regarding the culture and habits of criminal street gangs and has found it proper for an expert to base such opinion on material that is not admitted into evidence. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617-620.) However, it has made clear that an expert may rely on such out-of-court sources only if that material is reliable. (*Id.*, at p. 618.) Under Evidence Code section 801(b), an expert's opinion is not admissible unless the matter upon which it is based is of a "type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801(b); see *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 [In a medical malpractice action, a doctor's declaration was not admissible, because it did not disclose the matter relied upon in forming the opinion expressed. "The required foundational showing that the opinion rests on matters of a type experts reasonably rely on is not made where, as here, the expert does not disclose what he relied on in forming his opinion."].)

"When [an expert's] opinion is not based on matter perceived by or personally known to the witness, but depends on information furnished by others, the opinion will be of little value unless the source is reliable." (Witkin, Cal. Evidence, *supra*, § 31, p. 561.) As explained by this Court in *People v. Albillar* (2010) 51 Cal.4th 47, "the value of an expert's testimony lies not in the expert's ability to articulate the ultimate fact, but in the material from which the opinion is fashioned and the reasoning by which the expert progresses to his or her conclusion. (*Id.*, at p. 72.) In *Albillar*, this Court found that a gang expert's opinion, "given without adequate explanation or supporting evidence," "had no evidentiary value."[127] (*Ibid.*)

The same is true for Detective Aurich's opinion that appellant was a "main player." Detective Aurich gave no basis for his opinion that appellant was a "main player" in the Crip gang. Unlike the expert in *Gardeley*, who based his opinions on discussions with the defendants, other members of their gang, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies [*Gardeley*, *supra*, 14 Cal.4th at p. 620], Detective Aurich provided no information about the source of his information.

Detective Aurich testified that "[t]he information I was receiving was that [appellant] was a Freeport Crip and a main player." (33RT 11809-10.) The detective explained that a main player is a "little more hardcore" gang

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127 The gang expert in *Albillar* opined that the defendants' crimes were committed for the benefit of the gang but articulated no reason for that opinion. (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 71-72.)

member --a leader who promotes his gang and is involved in gang crimes. (*Id.*, at p. 11810.) Detective Aurich also testified that he worked as a gang detective for 10 years, from 1984 to 1994, and part of that job was to try to identify people involved in gang activity. (*Id.*, at p. 11803.) However, he did not provide the source or date of his information identifying appellant as a main player. When asked if he was basing his opinion on what he had heard on the streets, the detective responded:

> Not necessarily. [¶] If . . . I don't know somebody specifically – I have physical contact with them and people refer to them a (sic) main player, that's taken somewhat in its context, depending on how much activity, how many people tell you this. [¶] If I've had contact with them and arrest them or investigated or started investigating crimes, I can generally evaluate the level . . . of his involvement based on that."

(*Id.*, at p. 11814.) But Detective Aurich admitted that he did not personally know appellant in 1991 or 1992 and had not even heard his name until the detective began investigating the Kennedy High School incident. (*Id.*, at pp. 11814-15.)

This opinion, given without adequate explanation or supporting evidence, had little, if any, evidentiary value and the trial should have excluded it under Evidence Code section 352. For all that is known, the "information" that appellant was a main player could have been an unsubstantiated rumor, a tip from a disgruntled former girlfriend, erroneous information intentionally provided by a member of another gang, or simply hearsay upon hearsay, repeated by gang members who, in reality, did not know appellant. The questionable evidentiary value of Detective Aurich's opinion was substantially

outweighed by its strong potential for prejudice. As noted above and in Argument VIII, *ante*, gang evidence is highly inflammatory. Detective Aurich's testimony that appellant was known to be a hardcore gang leader, who was involved in gang crimes, carried even greater potential for prejudice. Not only did it paint appellant as a hardcore gang leader but it also suggested that appellant had committed numerous uncharged gang crimes. Although this information could have come from any number of unreliable sources, unfortunately, Detective Aurich's status as a gang expert afforded his opinion a sense of credibility it did not deserve. Because he, in his 10 years as a gang detective, trained to "monitor and . . . investigate" gang activities [33RT 11803], opined that appellant was a main player in the Crip gang, the jury would no doubt accept and believe that opinion with little, if any, questioning.

Such a label is certain to strike fears in jurors and, when presented during a penalty phase, not only overshadows the presentation of any mitigating evidence but diminishes any chance that the jurors will afford a defendant mercy. This Court should not countenance the application of such a prejudicial label on a defendant fighting to convince jurors that he deserves to live without demanding some indicia of reliability. The trial court's admission of Detective Aurich's highly inflammatory opinion, which lacked any indicia of reliability, was an abuse of discretion.

4. Prejudice

Appellant was prejudiced by the erroneous admission of the photograph and Detective Aurich's opinion testimony that he was a "main player" in the Crip gang. Typically, the erroneous admission of evidence is analyzed as state

law error under California's miscarriage of justice test: reversal is required if there is a reasonable probability of a more favorable outcome in the absence of the error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) However, the admission of this unnecessary and inflammatory gang and weapon evidence was so egregious as to render appellant's trial fundamentally unfair in violation of his Fourteenth Amendment right to due process and his Eighth Amendment right to a reliable penalty determination. (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1381, 1384-1385 [introduction of "emotionally charged" evidence serving only the impermissible purpose of proving defendant's bad character violates due process right to fair trial]; *People v. Partida*, *supra*, 37 Cal.4th at p. 439; see also Argument VIII.C.1. & D., *ante*.) Thus, this federal constitutional error must be analyzed for prejudice under the stringent *Chapman* standard: reversal is required unless the state proves the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Reversal of appellant's death sentence is required under either standard. This wrongly admitted evidence severely prejudiced appellant's efforts to persuade the jurors that his life was worth saving. Detective Aurich's testimony painted appellant as a hardcore gang leader who had committed uncharged crimes. Evidence suggesting the commission of uncharged crimes is "inherently prejudicial," involving the risk of serious prejudice. (*People v. Williams*, *supra*, 44 Cal.3d at p. 904; *People v. Thompson*, *supra*, 27 Cal.3d at pp. 317-318.) Gang evidence only increases that prejudice, for "the very mention of the term 'gangs' strikes fear in the hearts of most." (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 231, fn. 17.)

The photograph of appellant and Akens, mockingly pointing guns at each other, while gang signing, surely evoked the jurors' fears and biases against minorities, gangs, and weapons. The prosecutor knew full well the visceral response that this photograph would evoke, as evidenced by his repeated attempts to persuade the Court to introduce it into evidence.[128] During his penalty argument, he took full advantage of the photograph's inflammatory character, urging the jurors to respond emotionally by comparing appellant's presence in the photo to an animal:

> And – not only that this is the Carl Powell – this is the street Carl Powell and the Bengal tiger, this guy laughing here, him and Willie. They think it's really funny. You know, Carl's got his gun up to Willie's head. Then he's – then he's showing the Crip sign. And Willie's got a gun up to Carl's head I believe. Yeah. Now he's pointing a gun at Carl. And Willie's got the Crip sign. This is the real Carl Powell. This is the Carl Powell that Keith McDade faced . . . about 10:30 in the parking lot on January 19th, 1992.

(36RT 12609.)

The prosecutor also used the photograph and Detective Aurich's "main player" opinion testimony to attack one of the central tenets of appellant's mitigation case – that the Hodges manipulated and coerced him to kill McDade, an act he sorely did not want to commit. During his closing penalty phase argument, the prosecutor argued that appellant could not claim to be

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128 The prosecutor first attempted to introduce this photograph during the guilt phase. When he was unsuccessful in that effort, he tried again during penalty phase, attempting to introduce it as an aggravating circumstance under 190.3(b). When that attempt failed, he once again argued for admission as rebuttal and finally succeeded in convincing the court to admit the photograph.

afraid of Terry Hodges, despite his size, because appellant had a gun. (36RT 12606-07.) The prosecutor continued:

> If you got a gun – and it doesn't matter if the guy's 600 pounds – and Carl had guns. I mean – and not only did Carl have guns Carl had his Crip buddies. This is a picture of Carl in November of '91. He's . . . holding a gun up to Willie's head. He's got a gun and Willie's got a gun.
>
> Now, this is just one of Carl's friends. If you have friends like this, you're not going to be afraid of the Hodge brothers. And this just wasn't a casual friend. This was a blood brother kind of friend.
>
> And Carl had lots of friends. He does not need to be afraid of the Hodges brothers. Maybe the Hodge brothers need to be afraid of Carl.

(*Id.*, at p. 12607.) The prosecutor also argued that the detective's testimony that appellant was a gang leader, not a follower, defeated the defense claim that the Hodges manipulated and intimidated appellant. (35RT 12474-12475, 12476.)

In *McKinney v. Rees*, the Ninth Circuit condemned the irrelevant introduction of character evidence of a similar type and granted habeas relief to a California defendant under the Due Process Clause. In *McKinney*, the prosecution introduced evidence that McKinney had once possessed a knife, which was no longer available at the time of the commission of the crime; that he was proud of his knife collection, that he armed himself with a concealed knife while wearing camouflage pants; and that he had scratched "Death is His" on his door. (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1382-1383.) In reversing, the Ninth Circuit noted that "[t]he gravamen of the historic attempt

to exclude such character evidence is to force the jury, as much as humanly possible, to put aside emotions and prejudices raised by phrases such as 'fascination with knives' and 'Death is His' . . . ." (*Id.*, at p. 1384.) The character rule, observed *McKinney*, is based on "a 'fundamental conception of justice' and the 'community's sense of fair play and decency'. . . ." (*Ibid.*) The sort of character evidence admitted against McKinney was "emotionally charged" and "just the sort of evidence likely to have a strong impact on the minds of the jurors." (*Id.*, at pp. 1385-1386.) "It served only to prey on the emotions of the jury" and "to lead them to mistrust McKinney." Under these circumstances, the Ninth Circuit found the admission of evidence so egregious as to violate federal due process. (*Id.*, at pp. 1384-1386.)

The same is true here. A prosecutor's use of a blatantly inflammatory photograph, which could serve no purpose other than to trigger the jurors' fears and biases, in order to secure a sentence of death, is neither decent nor fair play. Nor should a death sentence be secured on the basis of unsubstantiated rumor or gossip, disguised under a label of expert authority.

Given that this emotionally charged evidence struck at both the heart of the public's fears about crime and appellant's central mitigating theme that he was used and coerced by the sophisticated, manipulative Hodges brothers, this error cannot be deemed harmless. In the absence of the introduction of this evidence, the jury may well have rendered a sentence of life without possibility of parole on the basis of the following mitigating circumstances: (1) appellant suffers significant intellectual deficiencies; (2) appellant was extremely young and susceptible to manipulation at the time of the crime; (3) appellant suffered

a deprived childhood, growing up in a dangerous, gang-infested area; (4) appellant's family loves and supports him; (5) appellant has the ability to function well in a structured environment; (6) appellant had no prior felony convictions; and (7) appellant confessed to the crime.

Thus, the erroneous introduction of this prejudicial evidence could well have tipped the scales in favor of the verdict rendered. These errors require that the judgment and sentence of death be set aside.

XXVI.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE.

The prosecution presented a considerable amount of victim impact testimony by McDade's widow, Colleen McDade, and her mother, Edwina Pama. Their testimony described the McDades' life together -- their work, relationship, children, and dreams. They also described the impact of the crime and their emotional loss in great detail. Their testimony was extensive, covering almost 100 pages of transcript. (See 32RT 11533-11624.) It was also vivid, deeply personal and highly emotional. The picture which emerged from this testimony was one of complete devastation of the McDade family.[129]

Over defense objection, the court permitted the prosecution to introduce additional victim impact evidence by Pama describing what she believed to be the effects of McDade's death on his mother and brother, as well as on Colleen and the McDade children. This testimony was not admissible as lay opinion evidence. It was irrelevant, emotional evidence which invited an irrational, purely subjective response and diverted the jury from its proper role. The erroneous admission of this evidence rendered the penalty phase fundamentally

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[129] Inexplicably, trial counsel offered no objection to the admission of this highly prejudicial victim impact evidence, despite the fact that it exceeded proper boundaries of state and federal law. Accordingly, arguments concerning such improper admission must be raised in habeas corpus proceedings. (See, e .g., *People v. Pope* (1979) 23 Cal.3d 412, 426 [claims of ineffective assistance of counsel are more appropriately raised in petitions for writ of habeas corpus.].)

unfair under the Due Process Clause and the death verdict unreliable under the Eighth Amendment.

A. Background Facts

The victim impact testimony by Colleen McDade and Edwina Pama filled 92 pages of reporter's transcript. Colleen McDade testified that she met Keith McDade when she was 19 years old and they were both working as clerks at KFC. (32RT 11533, 11536.) They married and had two children together, Monique and Andrew ("Buddy"). (*Id.*, at pp. 11535-36.)

The McDades worked their way up until they became co-managers of the Freeport Boulevard KFC in 1990: they ran the store and owned 40% of it. (*Id.*, at pp. 11536, 11538.) Each worked 80-hour weeks and because of those long hours, their children were often at the store. (*Id.*, at pp. 11537, 11547.)

The McDades wanted to build esteem in the kids they hired and treated their employees like family. (*Id.*, at pp. 11539-40.) In August 1990, McDade hired appellant, then age 16 or 17, as a cook. (*Id.*, at pp. 11538, 11566.) The McDades tried to help appellant, as they tried to help all their employees, and would loan him money if his paycheck was not ready. (*Id.*, at p. 11539.) Appellant respected McDade and wanted to please him. (*Id.*, at p. 11568.) Appellant often played with the McDade children at the store. (*Id.*, at p. 11547.) After the thefts and his firing, appellant continued to return to the store, asking for his job back. (*Id.*, at pp. 11544-45.) The McDades never confronted appellant about the thefts and simply told him that they were full but he might check back in a month. (*Id.*, at pp. 11544-45, 11569, 11595-96.)

Colleen described the sequence of events leading to her discovery of her husband in the KFC parking lot. When she had not heard from McDade by 10:30 p.m. on January 19, 1992, Colleen called him but nobody answered. (32RT 11552.) Colleen called employee Junell Rodriguez and her mother, both several times; continued to try to reach McDade at the store; and then called 911. (*Id.*, at pp. 11553 -11554.) Colleen and her mother drove to the KFC; upon their arrival, Colleen could see lights all around the store and McDade's car in the parking lot. (*Id.*, at p.1555.) Colleen tried to exit her car, but people pushed her back into her car. (*Ibid.*) She could see her husband and the back of his head in his car. Colleen could only recall somebody holding her in the car and her mother driving home. (*Ibid.*)

When asked how McDade's death affected her, Colleen responded that at first, she did not even want to be alive. (32RT 11557.) People told her that she had to go on because of her children but she could not eat or sleep, lost considerable weight, and suffered nightmares for an entire year. (*Ibid.*)

When asked how her daughter Monique had been affected, Colleen responded that her husband was everything to Monique. (*Id.*, at pp. 1557-58.) At first, Monique never asked for her daddy. (*Id.*, at p. 11558.) When Colleen told Monique that daddy was not coming home anymore, Monique did not understand. (*Ibid.*) At the time of trial, Monique, then four, constantly asked for her daddy or would say "I see daddy in the sky. He's angry. He gets mad at me." (*Ibid.*) Colleen recounted how Monique wanted to go to the store and get a new daddy and how Monique always made sure that Colleen was coming

back to get her. (*Ibid.*) Colleen described how much Monique missed her father: she would see his picture and tell her younger brother that's her daddy and he is in the sky because somebody hurt him. (*Ibid.*)

As for Andrew, he was only nine months old when McDade died and thus did not know his father. (*Id.*, at p. 11561.) At the time of trial, Andrew did not yet have the anger that Monique had. (*Ibid.*) Colleen recounted how Monique was receiving counseling for her anger, striking out, and nightmares. (*Ibid.*)

McDade's death had affected the family financially. In 1991, the McDades had a joint income of $80,000; Colleen's yearly income dropped to $30,000. (*Id.*, at pp. 11562, 11588-89.)

When asked how her husband's death affected her plans for the future, Colleen recounted their plans to buy a house and go to Hawaii. (*Id.*, at p. 11563.) Their dream was their business and the store was their life. (*Ibid.*) According to Colleen, they just had to give the business a good five years to reach the point where they would receive a comfortable income and would no longer have to work 80-hour weeks and could enjoy their family and home. (*Ibid.*) Everything came to an end: her whole life was turned upside down. Colleen lost her husband and her career. (*Ibid.*) She had to find a new way of life and it had not been easy. McDade was her best friend and her husband: "It's hard being a single parent . . . . And it's hard to go on." (*Ibid.*)

Edwina Pama testified that the McDades had a wonderful relationship; no mother could have asked for a better son-in-law. (32RT 11612-13.)

Pama told of driving Colleen to the KFC on January 19, 1992, and described how Colleen screamed and pounded on the car window and how a police officer had to accompany them during the drive home to control Colleen. (*Id.*, at pp. 11613-15.)

Pama recounted an incident on a stormy night when a black man came to Colleen's door and Colleen called her mother. (*Id.*, at pp. 11616-17.) Because Colleen was scared to death, her mother arranged for somebody to stay with Colleen. (*Id.*, at p. 11617.) After that incident, Pama realized that Colleen could not continue to live on her own and arranged for Colleen and the children to move in with her. (*Ibid.*) Buddy (the McDade's son Andrew) had his first birthday party at their house but "Daddy wasn't there." (*Ibid.*)

Over defense objection, Pama was allowed to testify to the impact of McDade's death on his family – his mother, brother, Colleen and her children. (*Id.*, at pp. 1618-21.) His death had been very, very hard on his mother. (*Id.*, at p. 11619.) At first, his mother would not discuss McDade. (*Id.*, at pp. 11619-20.) Because McDade's son Buddy looks exactly like his father, Pama thought that it was difficult for McDade's mother to see Buddy. (*Id.*, at p. 11620.) Pama believed that for the same reason, McDade's death had been difficult for his brother John: when John sees Buddy, "[h]e's seeing his younger brother." (*Id.*, at p. 11621.)

Pama testified that Colleen was suffering continuing emotional problems as a result of McDade's death and needed much more help than she

knew. (*Id.*, at pp. 11622-23.) Colleen was on a roller coaster – some days, she was fine and other days, she would just scream. (*Id.*, at p. 11622.) Pama had seen significant differences in Colleen's mental state since McDade's death and worried about her. (*Ibid.*)

Pama testified that Monique had fared the worst. (*Id.*, at p. 11617.) Monique and her daddy were like two peas in a pod; wherever McDade went, Monique went. (*Ibid.*) Although Monique was only two years old when her father died, she remembered him. (*Ibid.*) Monique knew something was wrong, but was not told about her father's death for two weeks. (*Id.*, at p. 11623.) When told, Monique did not understand. (*Ibid.*) Since her father's death, Monique had suffered great anger; she was getting worse, instead of better, and needed help. (*Ibid.*)

Pama also testified how Keith's death had affected herself. (32RT 11624.) His death had placed much stress and strain on her, because she had to be strong for Colleen and help care for Monique. (*Ibid.*) The stress and tension of the trial was affecting both Colleen and Monique. Monique was suffering more problems because of that stress. With McDade gone, Pama had to fill the void of being Colleen's support. (*Ibid.*)

B. Argument

1. Applicable Law

The Eighth Amendment to the United States Constitution imposes limits on the scope of evidence and arguments to the jury in death penalty cases. In *Payne v. Tennessee* (1991) 501 U.S. 808, the court held that the Eighth

Amendment does not prohibit evidence of the personal characteristics of the victim of a capital crime, or evidence concerning the emotional impact of the crime on members of the victim's family. The *Payne* Court determined that victim impact evidence may be admitted where it relates to "the specific harm" caused by the defendant's capital crimes, which is a legitimate sentencing consideration. However, the court did not hold that victim impact evidence must be admitted, or even that it should be. Rather the court merely held that, if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." (*Id.*, at p. 827.) While *Payne* opened the door to victim impact evidence, it did not hold that such evidence was admissible without limitation. The court recognized that if, in a particular case, a witness' testimony so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the due process clause of the Fourteenth Amendment. (*Id.*, at pp. 824-825.)

Independent of restrictions imposed by the Eighth and Fourteenth Amendments to the federal Constitution, California's death penalty law limits the scope of admissible evidence during the penalty phase of a capital trial. The prosecutor's case in aggravation is confined to the factors listed in Penal Code section 190.3. *(People v. Boyd* (1985) 38 Ca1.3d 762, 775.)

In *People* v. *Edwards* (1991) 54 Cal.3d 787, this court determined that, under Penal Code section 190.3, subdivision (a), some victim impact evidence may be admissible as "circumstances of the crime of which the defendant was convicted in the present proceeding...." (*Id.*, at p. 834.) *Edwards* held that section 190.3(a) "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." *(Ibid.)*

Edwards warned, "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*. . . ." (*Id.*, at pp. 835-836.)

2. Pama's Testimony Regarding the Impact of McDade's Death on Others Was Not Admissible as Lay Opinion Evidence.

Appellant objected to the admission of Pama's testimony concerning the impact of McDade's death on his family, arguing: "if counsel wants to ask one witness about the effects on another, I suggest he bring the other witnesses in." (32RT 11618.) The court admitted the testimony as lay opinion testimony, stating that Pama could testify to what she actually perceived and what she believed concerning those perceptions. (*Id.*, at p. 11619.) The court erred in admitting Pama's testimony, because it was simply conjecture and the projections of Pama's own feelings onto others. It was also inadmissible opinion testimony about another's state of mind.

"A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' ([Evid. Code], § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. (Citations omitted.)" (*People v. Melton* (1988) 44 Cal.3d 713, 744.)

A lay witness' opinion must be based on his own observation of facts. (Evid. Code, § 800 (a) [the opinion must be "[r]ationally based on the perception of the witness"]; see also Jefferson, Cal. Evidence Benchbook (2d ed. 1982), § 29.1, p. 976.) "When a lay witness is permitted by rules of

evidence to testify in the form of an inference or a conclusion, which is opinion evidence, the first requirement is that the inference, conclusion, or opinion stated must be based on his own observation of the facts, not on hearsay or sources other than his own observations." (Jefferson, Cal. Evidence Benchbook, *supra*, at p. 976.)

Pama's testimony regarding the effect of McDade's death on his mother and brother did not constitute proper lay opinion testimony. Pama opined that his death was so difficult for them because McDade's son Buddy was the spitting image of his father and thus was a constant painful reminder of McDade's absence. Examination of Pama's answers reveals, however, that this opinion was based on her own reactions to Buddy, rather than her observations of their reactions to Buddy:

> I think to this – the other part that is really hard – and I know it is for me as a mom and grandma – Buddy . . . That's Keith's little boy. He looks exactly like his dad. [¶] His actions – Bobby has mentioned to me too that a lot of his actions – the way he walks, the way his movements are, the way he rolls his eyes are Keith when he was little. [¶] I think that's difficult to see that again. I know that it is for me. . . . [¶] But I can see [Buddy] looking a lot like his dad all the way down to the dimples in his cheek. And if you have someone like that looking at you day in and day out that reminds you so much of the person you lost. [¶] It's not easy because you know that that child's going to grow up looking like his dad each day more. So I think that makes it real hard. I know it does on me and [McDade's mother] too because you've got little Keith sitting in front of you and big Keith should be there."

(32RT 11620.) When asked for her opinion regarding the effect of McDade's death on his brother John, Pama responded similarly:

> It's difficult for him. [¶] He accepts this I think. And he knows

> that this has happened. [¶] And like I said I think it's really hard for him just to see Buddy too. It's still the same thing. He's seeing his younger brother. [¶] One time Buddy had a runny nose and came up and wiped his nose on John's pants. And he said Keith used to do that when he was little. [¶] So things that Buddy does reminds everybody of Keith.

(*Id.*, at pp. 11621-11622.) In short, Pama was simply projecting her own feelings about seeing Buddy onto both McDade's mother and brother.

Pama's lay opinion testimony should also have been excluded as nothing more than conjecture. (See, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 427-29 [Inquiry by defendant, while cross-examining prosecution witness about whether it appeared that man and woman whom she saw struggling inside a vehicle appeared to know each other, called for inadmissible speculation; trial court implicitly ruled that question called for a conjectural lay opinion.]; *Yates v. Morotti* (1932) 120 Cal.App. 710, 719-20 [witness' testimony that "he was hurt I guess" was properly stricken as clearly based on speculation].) Pama's answers evidence that she was merely speculating as to the impact of McDade's death on his family. When asked about the effect on his mother, Pama answered: "[S]he never – at first it seemed like she didn't want to talk about Keith. [¶] To me, it was like, you know, you don't want if – if I don't say anything about it, it will go away." (33RT 11619.) Pama was merely speculating when she testified that she "think[s] that's difficult to see that again" because it was difficult for Pama to see. (*Id.*, at p. 11620.)

Moreover, Pama's testimony regarding the impact on McDade's family was inadmissible because "[g]enerally a lay witness may not give an opinion about another's state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344,

397.) A witness may testify about objective behavior and describe that behavior as being consistent with a state of mind but here, Pama was merely offering conclusions rather than testimony about objective behavior. Under these circumstances, the trial court erred in admitting Pama's highly speculative state-of-mind lay opinion testimony.

3. Pama's Testimony Regarding the Impact of McDade's Death on Others Was Irrelevant, Emotional Evidence Which Invited An Irrational, Arbitrary Response.

While the federal Constitution does not impose a blanket ban on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth, and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) In *Edwards,* this Court cautioned about the need for "limits on emotional evidence and argument," and especially the requirement to "'strike a careful balance between the probative and the prejudicial . . . [and exclude material] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" *(People* v. *Edwards, supra,* 54 Cal.3d at pp. 835-836.)

Pama's speculative opinions of how McDade's death affected his family should have been excluded because they were the type of irrelevant emotional evidence that invited "an irrational, purely subjective response" and diverted the jury's attention from its proper role. The jury had already heard extensive testimony from Colleen McDade regarding her shared life with McDade, their hopes and dreams, and the impact of his death of her and their children. The

admission of Pama's speculation as to the effects of McDade's death on his family was both irrelevant and unnecessary. This testimony, however, increased the emotional punch of the prosecution's victim impact evidence. Pama's emotionally charged testimony "if you have someone like that looking at you day in and day out that reminds you so much of the person you lost . . . It's not easy because you know that child's growing up looking like his dad each day more" and that Monique, at the age of two, knew something was wrong, although she was not told for two weeks about McDade's death, was heartbreaking and likely to provoke an irrational, purely subjective response. The degree of grief and despair suffered by the family members had no rational bearing on choice of penalty.

4. Prejudice

The erroneous admission of Pama's irrelevant and emotionally charged victim impact evidence created an atmosphere of prejudice in which emotion prevailed over reason. When added to Colleen McDade's testimony, the extent of the victim impact evidence in this case was so unnecessary, excessive and laden with emotional content, that its introduction violated appellant's right to a fair trial under the Fourteenth Amendment. It also deprived appellant of a reliable penalty in violation of the Eighth Amendment. Given the mitigating evidence presented during the penalty trial, this error cannot be deemed harmless beyond a reasonable doubt. (See Argument XXV, *ante* .) Thus, the erroneous admission of this evidence requires that the judgment and sentence of death be set aside.

XXVII.

THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTION ON VICTIM IMPACT EVIDENCE AND IN FAILING TO OTHERWISE PROPERLY INSTRUCT THE JURY ON THE USE OF VICTIM IMPACT EVIDENCE.

The trial court failed to give any instructions which specifically addressed how the jurors were to use the extensive victim impact evidence presented by the prosecution.

A. The Court Erroneously Refused Appellant's Proposed Instruction on Victim Impact Evidence.

The defense proposed a special instruction to caution the jury regarding the use of emotional victim impact evidence. The proposed instruction read:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(3CT 781; 35RT 12397-12398.) The court refused to give the proposed instruction. (*Ibid.*) That refusal was error.

The trial court must instruct on any point of law pertinent to the case if requested by either party. (Pen. Code, §1093, subd. (f).) The failure to give an instruction that is both correct and applicable to the case is error. (*People v. Benson* (1990) 52 Cal.3d 754, 807; *People v. Anderson* (1966) 64 Cal.2d 633, 641.) Appellant's proposed instruction was a correct statement of law and was applicable in this case.

The proposed instruction was legally sound. There is no question that an accepted use of victim impact evidence is to show the specific harm caused by the defendant. (*People v. Edwards* (1991) 54 Cal.3d 787, 835.) The cautionary portion of the instruction tracks often-quoted language from *Edwards* that "the jury must face its obligation soberly and rationally" and that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.*, at p. 836.)

The instruction was particularly pertinent to appellant's case. Victim impact evidence constituted a substantial portion of the prosecution's case in aggravation. The prosecution presented two witnesses, the victim's wife, Colleen McDade, and his mother, Edwina Pama. Mrs. McDade was permitted to testify to the effect of McDade's death on not just herself but on her children as well. (See 32RT 11557-11558, 11560-11564.) Ms. Pama was allowed to testify to the effect on herself, Colleen McDade, the McDade children, and McDade's mother and brother. (*Id.*, at pp. 11613-11624.) Their testimony was extensive, covering almost 100 pages of transcript. (See 32RT 11533-11624.) It was also vivid, deeply personal, and highly emotional. (See Argument

XXVI, *ante*.) The defense special instruction addressed the proper purpose for which this testimony had been admitted and was necessary to guide the jury's consideration of this highly emotional evidence.

This Court has rejected defense claims that this same instruction was wrongly refused in *People v. Harris (Maurice)* (2005) 37 Cal.4th 310, 358-359; *People v. Ochoa* (2001) 26 Cal.4th 398, 445; *People v. Carey* (2007) 41 Cal.4th 109, 134; and *People v. Russell* (2010) 50 Cal.4th 1228, 1265-66. In *Carey* and *Russell*, this Court relied on its analyses in *Harris* and *Ochoa*.

This Court has relied on two reasons for finding no error in the refusal of this instruction. First, the *Harris* Court found the instruction "unclear as to whose emotional reaction it directed the jurors to consider with caution – that of the victim's family or the juror's own." (*Accord*, *People v. Russell*, *supra*, 50 Cal.4th at p. 1266 and *People v. Carey*, *supra*, 41 Cal.4th at p. 134.) Appellant disagrees that there is a realistic possibility that jurors would be confused by that portion of the instruction. But it is not within the discretion of the trial court to refuse an otherwise proper instruction because it needs minor tailoring. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Hall* (1980) 28 Cal.3d 143, 159.) Any ambiguity in the instruction could have been easily resolved without refusing the instruction in its entirety.

The second reason supporting the Court's rejection of this argument is that the proposed instruction is merely duplicative of CALJIC No. 8.84.1. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 455; *People v. Carey*, *supra*, at p. 134;

People v. Russell, *supra*, at p. 1266.) As explained in *People v. Ochoa*, *supra*, at p. 445, "the instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1." However, appellant's proposed instruction is directed specifically toward victim impact evidence and the limited purpose for which it was admitted, whereas CALJIC No. 8.84.1 concerns the general duties of the jury and does not specifically address victim impact evidence. The proposed instruction admonishes the jurors not to make the penalty decision based on "an irrational, purely subjective response to emotional evidence and argument." One purpose of the admonition would be to assure that the sympathy jurors would naturally feel for the victims and the victim's family would not cause them to impose the death verdict. CALJIC No. 8.84.1 admonishes jurors only to avoid the influences of bias or prejudice against the defendant, and not to be swayed by public opinion and feeling. Therefore, appellant's special instruction contains pertinent information for the jurors that was not in CALJIC No. 8.84.1. Furthermore, none of the other instructions given provided the jury the information in the special instruction.

There was a critical need for a cautionary instruction on the use of victim impact evidence in this case because of the extensive amount of emotional victim impact evidence presented at appellant's penalty phase. Because these important cautionary principles were not covered by CALJIC No. 8.84.1, the trial court erred in failing to give the proposed special instruction as requested.

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B. The Trial Court Had a Sua Sponte Duty to Instruct the Jury on the Proper Use of Victim Impact Evidence.

Even assuming there was a valid basis for refusing appellant's proposed instruction, the instructions as a whole were deficient because there was no instruction directing the jury as to the proper use of victim impact evidence.

In California, the trial court is ultimately responsible for insuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) Even without a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085; *People v. Hood* (1969) 1 Cal.3d 444, 449.) The general principles of law relevant to the case are those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Marks* (1988) 45 Cal.3d 1335, 1345.)

Appellant acknowledges that this Court has rejected this argument in *People v. Carrington*, (2009) 47 Cal.4th 145, 198 and *People v. Russell*, *supra*, 50 Cal.4th at pp. 1265-1266. However, appellant requests the Court to revisit its conclusion in light of the contrary conclusion drawn by other states on this issue. Three other states – New Jersey, Tennessee, and Georgia – require that in every case in which victim impact evidence is introduced, the trial court must instruct the jury on its appropriate use, and admonish against its misuse. (See *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.)

The Supreme Court of Pennsylvania has recommended a cautionary instruction on the use of victim impact evidence. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.) "Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State*, *supra*, at p. 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.)

Here, victim impact evidence was a substantial part of the prosecutor's penalty case. He put on two witnesses, McDade's wife and mother, who were allowed to testify to the effect of McDade's death on themselves and McDade's children, as well as on his mother and brother. Their testimony was extensive, covering 92 pages of reporter's transcripts. Colleen McDade described her life with McDade, their dreams for a good life with their two children and business, how they each worked 80-hour weeks to build their business together, and how "everything . . . came to a stop." (32RT 11536-11537, 11563.)

Both witnesses gave considerable testimony about the impact of McDade's death on his family. This testimony was quite emotional. Colleen McDade, who became tearful during her testimony, described how she did not even want to be alive but had to go on because of their children. (*Id.*, at pp. 11556- 11557.) She told how she could not eat or sleep, lost substantial weight and suffered horrible nightmares for an entire year. (*Id.*, at p. 11557.) Colleen

McDade told the jurors that her whole life was turned upside down, she lost her best friend and husband, and it was hard to go on. (*Id.*, at p. 11563.)

Both Mrs. McDade and Ms. Pama also told, in painful detail, how McDade's daughter Monique, age two at the time of his death, suffered from her father's death, how close she was to her father, and how much she missed him. (*Id.*, at pp. 11557-11558, 11561, 11617-11618, 11623.) At first, Monique did not understand and thought her father's absence was because he was angry with her. (*Id.*, at pp. 11558, 11623.) However, later, she became very, very angry and suffered nightmares. (*Id.*, at pp. 11561, 11623.) At the time of trial, Monique was still receiving counseling for her emotional turmoil. (*Id.*, at p. 11561.)

Ms. Pama testified that Colleen McDade was still suffering emotional problems, was on an emotional roller coaster, and needed more help than she realized. (*Id.*, at pp. 11622-23.) Ms. Pama described an incident where Colleen became hysterical because there was a black man standing at her front door; Mrs. McDade said: " "he's at the door. And my babies are in the other room." (*Id.*, at pp. 11616-11617.) There was further testimony by Colleen McDade regarding the disastrous financial repercussions from her husband's death. (*Id.*, at pp. 11562, 11588-11589.)

Under these incredibly heart-wrenching and sympathetic circumstances, the limited purpose for which victim impact evidence was relevant and the danger that the emotional content of victim impact evidence might improperly affect the jurors were general principles of law openly and closely connected

with the evidence which were necessary for the jury's understanding of the case.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Therefore, even if the court did not err in denying appellant's special instruction on victim impact evidence, the court had a sua sponte duty to instruct the jury on the limited use of victim impact evidence.

The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., Amends. 6, 8, & 14; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the emotional nature of the victim impact evidence presented in this case, the trial court's instructional error cannot be considered harmless, and therefore the judgment and sentence of death should be set aside.

XXVIII.

THE TRIAL COURT IMPROPERLY REJECTED SEVERAL PROPOSED PENALTY PHASE INSTRUCTIONS NECESSARY TO GUIDE THE JURY'S CONSIDERATION OF MITIGATION EVIDENCE IN VIOLATION OF APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The trial court refused appellant's specially-tailored instructions dealing with how to consider and weigh mitigating and aggravating evidence. The special instructions were designed to inform the jury fully and properly of its duty to weigh and consider mitigating evidence. In particular, they explained the proper standards for applying mitigating evidence and the scope of such evidence, the role that sympathy or feelings of compassion can play in determining the appropriate penalty, and the manner in which the jury can consider evidence of mental impairment not limited to excuse or negation of an element of an offense. The instructions correctly stated the law and were necessary to permit full consideration of appellant's mitigating evidence. Accordingly, the trial court erred in refusing to instruct the jury as appellant requested.

A. General Law

The Eighth and Fourteenth Amendments require a jury to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett* v. *Ohio* (1978) 438 U.S. 586, 604 (plur. opn.).) The constitutional requirement is not satisfied by mere introduction of the evidence; jury consideration of mitigating evidence must be ensured through proper instructions. "In the absence of jury instructions . . .

that would clearly direct the jury to consider fully [defendant's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence. . ." (*Penry* v. *Lynaugh* (1989) 492 U.S. 302, 323, abrogated on other grounds by *Atkins v. Virginia* (2002) 536 U.S. 304; see also *Mills* v. *Maryland* (1988) 486 U.S. 367; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393.)

As this Court found in *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1277: "[U]nder *Locket* v. *Ohio* (1978) 438 U.S. 586 [citation omitted], and its progeny . . . [defendant] . . . had a right to 'clear instructions which not only do not preclude consideration of mitigating factors [citation], but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . .'"

Relevant mitigating evidence encompasses the "compassionate or mitigating factors stemming from the diverse frailties of humankind." (*McCleskey* v. *Kemp* (1987) 481 U.S. 279, 304, quoting *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 304.) It includes both "mitigating aspects of the crime" [*Lowenfield* v. *Phelps* (1988) 484 U.S. 231, 245; see also *Roberts* v. *Louisiana* (1977) 431 U.S. 633, 637], and mitigation that is unrelated to the crime. (See *Lockett*, *supra*, 438 U.S at pp. 604-605.)

A criminal defendant is entitled upon request to specially-drafted instructions which either relate the particular facts of his case to any legal issue, or which pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; see also

Penry v. Lynaugh, *supra*, 492 U.S. 302.) Because the defendant has that right, "[a] trial judge in considering instructions to the jury shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of ... CALJIC ...." (Stds. Of Jud. Admin. Recommended by Jud. Council, § 5.) It is well settled that this right to request specially-tailored instructions applies to the penalty phase of a capital trial. (*People v. Davenport* (1985) 41 Cal.3d 247, 281-283.)

Defense counsel offered several instructions necessary to guide the jury in its consideration of mitigation evidence during the penalty phase: Defense Special Instruction No. 2 ["Scope and Proof of Mitigation: Sympathy Alone is Sufficient to Reject Death"]; Defense Special Instruction No. 3 ["Scope and Proof of Mitigation: General"]; and Defense Special Instruction No. 5 ["Mental Impairment Not Limited to Excuse or Negation of An Element"]. The trial court denied instructions 3 and 5 and modified instruction 2 so as to eliminate one of its central principles – that "[i]f the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based on such sympathy or compassion alone, reject death as a penalty." (3CT 780.)

These denied instructions were vital to the jury's understanding of what mitigating evidence could be considered in determining the appropriate penalty, as well as the manner in which the jury could consider the evidence. The trial court's refusal to give the instructions deprived appellant of the right recognized in *Sears* and *Rincon-Pineda*, *supra*, and of his rights to a trial by jury, to due process, and fair and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, and by the applicable sections of the California Constitution. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

B. The Trial Court Erroneously Rejected Appellant's Proposed Instruction that Sympathy or Compassion Alone Could Justify a Life Sentence.

Appellant proposed a special instruction regarding the consideration of sympathy or compassion:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.

(3CT 780.)

Although the court gave a modified instruction regarding the second and third sentences in this proposed instruction, it refused to instruct that the jury could, based on sympathy or compassion alone, reject death as a penalty.[130] (35RT 12424-12426.) The court refused the instruction on the basis that it was duplicative of factor (k) of CALJIC No. 8.85. (*Ibid.*) It was not.

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[130] The court instructed (3CT 744):

> Mitigating factors and aggravating factors, except the alleged criminal activity, need not be proved beyond a reasonable doubt. There is no burden of proof except as to alleged criminal activity. A juror may find that a mitigating factor and a non-criminal activity aggravating factor exists if there is any credible evidence to support it.

The trial court erred in refusing this instruction. The trial court must instruct on any point of law pertinent to the case if requested by either party. (Pen. Code, §1093, subd. (f).) The failure to give an instruction that is both correct and applicable to the case is error. (*People v. Benson*, *supra*, 52 Cal.3d at p. 807; *People v. Anderson*, *supra*, 64 Cal.2d at p. 641.)

Appellant's proposed instruction was a correct statement of law [*People v. Lanphear* (1984) 39 Cal.3d 163, 167] and was necessary to clarify for the jurors the role that sympathy and compassion can play in making their determination of the appropriate penalty. Failure to give the requested instruction violated appellant's constitutional rights to due process and a reliable verdict. (U.S. Const., 8th and 14th Amends; Cal. Const., art. 1, §§ 7, 15.)

In *People v. Taylor* (1990) 52 Cal.3d 719, 746, this Court cited with approval the giving of the following special instruction:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty.

In particular, the Court cited this instruction as one reason why the standard penalty instructions were not misleading in that case. (*Ibid.*)

This instruction was not duplicative of CALJIC No. 8.85's factor (k) or any other given instruction. Factor (k) merely advised the jurors that they

could consider "[a]ny 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)." (2CT 743, emphasis added.) 8.85 did not inform the jury that sympathy or compassion *alone* could support a life verdict. This language was necessary to inform the jurors of the role that sympathy could play in their deliberations. Without it, the jurors would have understood only that they could weigh their feelings of sympathy for appellant against their sympathy for the victims and any other aggravating evidence.

Appellant concedes that this Court rejected this argument in several cases, including *People v. Davis (Richard Allen)* 46 Cal.4th 539, 397-398, and *People v. Loker* (2008) 44 Cal.4th 691, 744-45. As explained by this Court in *Davis*: "The trial court correctly concluded the instruction was duplicative of the CALJIC No. 8.85 given here." (*Davis*, *supra*, at pp. 397-398.) For the reasons submitted above, appellant respectfully submits that the proposed instruction was not duplicative. Furthermore, a study conducted by Professor Haney undercuts this ruling that factor (k) is sufficient to guide the jury and obviates the need for any additional instructions concerning mitigating factors. Professor Haney found the "expanded" factor (k) instruction (the version of factor (k) given in the present case) to be the least accurately understood of California's eleven sentencing factors, with 36 percent of his respondents concluding that it is an aggravating, not a mitigating factor. (Haney & Lynch,

18 *Law & Human Behavior*, *supra*, at p. 424.) Insofar as this study indicates that the lack of understanding of factor (k) is attributable to a profound lack of understanding of what "mitigation" means [Haney & Lynch, *ibid.*], the constitutional harm is even more pronounced.

C. The Trial Court Erroneously Rejected Appellant's Proposed Instruction that Mitigating Evidence of Mental Impairment Is Not Limited to Excuse or Negation of an Element.

Appellant proposed a special instruction regarding the jury's consideration of mitigating evidence of mental impairment:

> The mental impairment referred to in this instruction is not limited to evidence which excuses the crime or reduces defendant's culpability, but includes any degree of mental defect, disease or intoxication which the jury determines is of a nature that death should not be imposed. That the jury has rejected a defense of insanity, diminished capacity or diminished actuality at a previous stage of the proceedings does not prohibit its consideration of evidence showing some impairment as a reason not to impose death.

(3CT 781.) The court refused to give this instruction on the basis that it was covered by another instruction pertaining to the jury's consideration of appellant's chronological and psychological age.[131] (35RT 12397.) It was not.

The trial court erred in refusing this instruction. As noted above, the trial court must instruct on any point of law pertinent to the case if requested by either party. (Pen. Code, §1093, subd. (f).) A trial court is under an

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131 Under CALJIC No. 8.85's factor (i), the court instructed the jurors that they could consider "[t]he chronological and psychological age of the defendant at the time of the crime." (3CT 743.)

affirmative duty to give correctly-phrased instructions on a defendant's theory of defense where it is obvious that the defendant is relying upon such a defense, or if there is substantial evidence to support it. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) The failure to give an instruction that is both correct and applicable to the case is error. (*People v. Benson*, *supra*, 52 Cal.3d at p. 807; *People v. Anderson*, *supra*, 64 Cal.2d at p. 641.)

Appellant's proposed instruction was a correct statement of law. It is beyond dispute that mental impairment, even if insufficient to defeat the guilt charges, is a fact which the jury may consider in mitigation. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1029-1030; *Penry v. Lynaugh*, supra, 492 U.S. 302; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 318.)

Appellant had a right to this instruction, which pinpointed a central feature of his penalty defense. (See *People v. Rincon-Pineda*, *supra*, 14 Cal.3d at p. 885; *People v. Sears*, *supra*, 2 Cal.3d at p. 190.) Appellant presented considerable evidence at the penalty phase concerning his mental impairment. Dr. Nicholas testified that appellant's intelligence testing showed his full-scale I.Q. to be 75. (34RT 12002, 12006.) This score is in the borderline mentally retarded range. (*Id.*, at p. 12032.) Appellant's overall I.Q. score falls a little below the fourth percentile; thus, his intellectual abilities are above 4% but below 96% of the population in the United States. (*Id.*, at p. 12007.) Dr. Nicholas explained that appellant is not someone who is capable of abstract thinking or complex or advance planning. He would tend to live his life on a moment-to-moment basis. (*Id.*, at p. 12032.)

The proposed special instruction was necessary to inform the jurors that

they could consider this evidence in mitigation of appellant's sentence even if they did not believe his mental impairment excused the crime or reduced his culpability. It was necessary to pinpoint and clarify appellant's penalty phase theory that his mental impairment, although insufficient to negate any element of the offense, was a valid mitigating factor which, alone and/or in consideration of other mitigating factors, justified sparing appellant's life. As recognized by the United States Supreme Court in *Penry v. Lynaugh*, a rational juror may view a defendant who suffers mental impairment as less morally culpable than a defendant who suffers no such impairment even though the impairment is not substantial enough to negate the elements of the capital offense. (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 322-323.)

Contrary to the trial court's ruling, appellant's requested instruction was not duplicative of 8.85's factor (i), which told the jurors that they could consider appellant's psychological age. Psychological age is not the same as mental impairment and it is not reasonably probable that the jurors would understand psychological age to include appellant's significant mental impairment. A reasonable juror would interpret "chronological or psychological age" to include a defendant's actual age as well as his maturity. A reasonable juror would not interpret such language to also include mental retardation or other mental impairment. Moreover, factor (i) did not inform the jurors that they could consider evidence of appellant's mental impairment even if they believed it insufficient to excuse the crime or reduce appellant's culpability.

The trial court thus erred in refusing to give this requested instruction

which pinpointed a crucial fact in mitigation which was not covered by any of the other instructions given in this case and was a correct statement of the law. (See *People v. Brown* (1985) 40 Cal.3d 512, 540.)

D. The Trial Court Erroneously Rejected Appellant's Proposed Instruction on the Scope, Consideration of, and Weighing of Mitigating Evidence.

Appellant proposed a special instruction regarding the scope, consideration of, and weighing of mitigating evidence:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors. [¶] A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is. [¶] Any mitigating circumstance may outweigh all the aggravating factors. [¶] A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give to each mitigating factor.

(3CT 780.)

The trial court rejected this instruction on the basis that it was duplicative of CALJIC No. 8.85's factor (k).[132] (35RT 12396.) Appellant submits that the court erred in failing to give this instruction, the instruction was necessary to guide the jury's consideration of appellant's mitigating evidence, and the proposed instruction was not duplicative of CALJIC No. 8.85 or any other given instruction.

As noted above, the trial court must instruct on any point of law pertinent to the defense that is correct and applicable to the case if requested by either party. (Pen. Code, § 1093, subd. (f); *People v. Benson*, *supra*, 52 Cal.3d at p. 807; *People v. Anderson*, *supra*, 64 Cal.2d at p. 641.) The requested instruction contained an important point which was both a correct statement of law and necessary to guide the jury's sentencing discretion.

The first and fourth paragraphs were necessary to inform the jurors that the presence of just one mitigating circumstance would have been sufficient to return a verdict of life without the possibility of parole. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1099, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800 [a penalty juror may properly conclude that a single mitigating circumstance outweighs all the aggravating evidence].) In *People*

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[132] The court did give a modified instruction concerning the third paragraph of this proposed instruction. As noted *ante*, the court instructed that (1) mitigating factors and aggravating factors, except the alleged criminal activity, need not be proved beyond a reasonable doubt; (2) there is no burden of proof except as to alleged criminal activity; and (3) a juror could find the existence of any mitigating factor and non-criminal activity aggravating factor on the basis of any credible evidence. (3CT 744.) Thus, the current argument does not concern the third paragraph of the proposed instruction.

v. Sanders (1995) 11 Cal.4th 475, this Court noted with approval the following instruction:

> "[I]n weighing the aggravating and mitigating factors, you are not merely to count numbers on either side.... You are instructed, rather, to weigh and consider the factors. [¶] You may return a verdict of life imprisonment without possibility of parole even though you should find the presence of one or more aggravating circumstances. One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without possibility of parole."

(*Id.*, at p. 557, emphasis added.) This Court concluded that such an instruction "significantly reduced the risk of juror misapprehension." (*Ibid.*; see also *People v. Anderson* (2001) 25 Cal.4th 543, 598-600 [approving an instruction that "[a]ny one [mitigating factor] may be sufficient, standing alone, to support a decision that death is not the appropriate punishment"]; *accord*; *People v. Hardy* 91992) 2 Cal.4th 86, 202.)

This proposed special instruction was thus a correct statement of law, which was necessary to guide the jury's consideration of appellant's mitigating evidence. Contrary to the trial court's conclusion, it was not duplicative of CALJIC No. 8.85's factor (k). Factor (k) merely informed the jurors that they could consider "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 . . . whether or not related to the offense . . .)." Factor (k) did not tell the jurors that one mitigating factor, alone, was sufficient to outweigh all aggravating factors and support a sentence of life without the possibility of parole. The court thus erred in refusing to give this special instruction.

E. The Trial Court's Failure to Give the Requested Instructions Was Prejudicial.

The trial court's refusal to give appellant's three requested instructions violated the Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, subdivision (a), and 15, of the California Constitution, because it precluded the jury from giving mitigating effect to appellant's penalty phase evidence. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 323.) This refusal violated appellant's federal constitutional rights to due process, heightened capital case due process, a fair trial by jury, and an individualized and reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. By refusing to give appellant's requested instruction, the trial court failed to give specific guidance to the jury with respect to all of the potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

These violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d 432 at pp. 447-448.) The requested instructions were correct statements of law necessary to guide the jury's consideration of mitigating evidence, to define the scope of that evidence, and the roles that sympathy and

compassion and evidence of mental impairment could play in the ultimate penalty decision. Accordingly, the erroneous refusal to give those instructions requires reversal of appellant's death sentence, whether the error is evaluated as federal constitutional error, or as a violation of California statutory or decisional law.

XXIX.

THE REPETITION OF SEVERAL ERRONEOUS GUILT PHASE INSTRUCTIONS AT PENALTY PHASE DEPRIVED APPELLANT OF A FAIR AND RELIABLE DETERMINATION OF PENALTY.

As argued in Arguments VI, XV, and XVI, *ante*, the trial court erred in: (1) failing to instruct that duress is a defense to robbery and murder and may raise a reasonable doubt about the existence of specific intent to rob and deliberation and premeditation (Argument VI); (2) instructing the jurors under CALJIC No. 2.71.7 to view appellant's exonerating unrecorded oral statements with caution (Argument XV); and (3) instructing, pursuant to CALJIC Nos. 3.10 and 3.16, that the Hodges were accomplices as a matter of law (Argument XVI).

The trial court repeated these instructional errors at the penalty phase. (2CT 718, 736, 740; 36RT 12627-12629.[133]) For the reasons expressed in Arguments VI, XV, and XVI, *ante*, and the additional points argued below, the court erred in failing to instruct on duress and in giving CALJIC Nos. 2.71.7, 3.10, and 3.16 at the penalty phase. For the same reasons set forth in

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[133] The Court did not re-read CALJIC 2.71.7 ("Pre-Offense Statement by Defendant") during the penalty phase but gave a written copy to the jurors. (2CT 718.) The court informed the jurors that instructions, which had been given at the guilt phase and also applied at the penalty phase without modification, were being provided solely in writing and they were to consider all instructions equally, whether read or unread. (2CT 696.)

appellant's previous arguments, and the additional points argued below, these errors prejudiced appellant's right to a fair and reliable penalty determination in violation of the Eighth and Fourteenth Amendments. Appellant incorporates, as though fully set forth herein, Arguments VI, XV, and XVI.

A. Error in Repeating CALJIC No. 2.71.7

Appellant's pre-offense statement that he did not want to kill McDade was just as critical, if not more so, at the penalty phase as it was at the guilt phase. The central tenet of appellant's case in mitigation was that he shot McDade only due to fear and pressure from the Hodges, which the defense argued as mitigation under lingering doubt. The majority of the defense opening penalty phase argument was devoted to arguing lingering doubt. (See, e.g., 35RT 12523-12550; 36RT 12551-12591.) Thus, for the reasons expressed in Argument XV, *ante*, this error, which undercut appellant's mitigation and deprived appellant of a fair, reliable penalty determination, was prejudicial.

B. Error in Failing to Instruct On Duress

Appellant's counsel requested the Court to instruct on duress because it intended to argue lingering doubt as mitigation. (32RT 11520; 34RT 12149.) As explained above, appellant's case in mitigation centered on lingering doubt, which rested on the argument that appellant robbed and killed McDade because the Hodges threatened to kill him if he did not commit the crimes. The court refused to instruct on duress at the penalty phase on the basis of insufficient evidence to support the requested instructions. (35RT 12398.) For the reasons submitted in Argument VI, this was error because there was

sufficient evidence presented at the guilt phase to support a defense of duress. (See Argument VI.C.) Moreover, at penalty phase, additional evidence was introduced to support this defense. Dr. Nicholas, the defense mental health expert, testified that the combination of appellant's very low I.Q. and personality characteristics rendered him ripe for manipulation and intimidation by the older, more experienced and sophisticated Hodges brothers. (34RT 12040-41.) The doctor opined that an individual like John Hodges could push appellant to commit acts, such as robbery and murder, that he would not normally do. (*Id.*, at pp. 12042-44, 12046-48.)

Given that the mainstay of appellant's case in mitigation rested on appellant's claim that he acted under duress, the court's failure to provide the requested instructions was just as prejudicial at the penalty phase as it was at the guilt phase. For the reasons expressed in Argument VI, *ante*, this error, which undercut appellant's mitigation and deprived him of a fair, reliable penalty determination, was prejudicial.

C. Error in Instructing that the Hodges and William Akens Were Accomplices as a Matter of Law

In addition to instructing that the Hodges were accomplices as a matter of law, the court instructed that William Akens was an accomplice as a matter of law to the alleged Kennedy High School threat and drive-by shooting incidents, introduced as aggravating evidence under Penal Code section 190.3(b). (3CT 740.) For the same reasons expressed in Argument XVI, it was error to instruct that Akens was an accomplice as a matter of law to this other criminal activity. Although there was conflicting evidence, Akens

testified that he, alone, entered the classroom and threatened Moten. (33RT 11750-51.) Akens also testified that he was the person who shot at Moten; although appellant was sitting in the car at the time, Akens did not see appellant shoot. (*Id.*, at p. 11754, 11789-91.) Akens provided no testimony that appellant encouraged or aided him in any manner when Akens fired at Moten. Akens pled guilty to the crime, admitting that he was the one who shot at Moten. (*Id.*, at p. 11759, 11798-99.) Thus, the jurors could have determined that Akens was the direct perpetrator who committed these offenses without appellant's participation or encouragement.

For the reasons submitted in Argument XVI, the erroneous accomplice instructions regarding the Hodges were prejudicial, given that lingering doubt was one of the foundations of the defense case in mitigation. For similar reasons, the erroneous accomplice instructions regarding Akens were prejudicial. The prosecutor relied heavily on the Kennedy High School threat and drive-by shooting to urge the jury to vote for death. While acknowledging that the other two incidents introduced under 190.3(b) (the Hernandez bicycle incident and Rigsby's minor pummeling) were fairly minor, the prosecutor emphasized that it "can't get any more serious" than the drive-by shooting, "an incident that could have resulted in the death of a totally innocent person." (35RT 12462, 12463-12465.) This was not a case void of mitigation. (See Argument XXV, *ante.*) Accordingly, this instructional error directing the jurors to see appellant as the direct perpetrator of both the capital crime and the Kennedy High School drive-by shooting was prejudicial and requires that the judgment and sentence of death be set aside.

XXX.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S APPLICATION FOR MODIFICATION OF THE DEATH SENTENCE UNDER PENAL CODE SECTION 190.4(e), DEPRIVING APPELLANT OF A FAIR AND RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In denying appellant's automatic motion to modify the verdict of death (§ 190.4, subd. (e)), the judge erred by attaching aggravating weight to factors this Court has held may only be mitigating and by failing to consider mitigating evidence. This error requires that the death judgment be vacated and the case be remanded for reconsideration of the motion to modify.

A. The Court's Ruling

The court made an oral ruling in which it refused to modify the death verdict after reviewing the circumstances in aggravation at length, and then minimizing and considering as aggravating the mitigating factors as follows:

> And, yes, I have considered the factors under factor (k) that can be argued as mitigating factors about the defendant's family atmosphere and support.
>
> It's compelling for a jury, I would think, to have seen members of the defendant's family, his mother and his brothers, to see that he comes from a loving and caring family, but that cuts both ways. *The defendant did not come from a deprived family, deprived of love and caring. In fact, they brought him to Sacramento out of Los Angeles to help nurture him further.*
>
> If the defendant had been deprived, had he been abused, had he come from a family situation that was the opposite of what

in fact he came from, the defense certainly would have presented that, and that would have been argued in support, I suppose, of the defendant, he was a product of that family's strife.

This is just the opposite. He should have been the product of a loving and caring family, and I would think any trier of fact, any jury as I feel now, my sympathy and empathy goes out to the defendant's mother and the defendant's family, but that pales in comparison with what someone has to feel in empathy towards the victim's family.

I do agree that there was some evidence that the jury could have considered concerning the defendant's mental status or intellectual level or ability, but, again, that does not nearly compare against the other factors in aggravation, which include under subsection (b) the presence and absence of criminal activity of the defendant other than the crimes for which he was convicted.

I am in my consideration focusing more on the offense that he admitted in the assault and robbery of the bike from David Hernandez and the threat and assault at Kennedy High School witnessed by the teacher and corroborated through, albeit, the accomplice testimony of Willie Akens.

Yes. I have agreed that the jury would have found that there was an absence of prior felony convictions. That was a factor in mitigation for them to consider.

The issue of whether or not the defendant – the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, really is nothing to support that there was such. At the very least, that's a neutral factor, neither an aggravating or mitigating factor.

Subsection (e), whether or not the victim was a participant in the defendant's homicidal conduct or . . . consented to the homicidal act, and obviously the victim was not such a participant, and for that reason that could have been considered an aggravating factor by the jury.

And subsection (f), whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of its conduct, this offense was not such, and, therefore, that can be considered an aggravating factor, because it was not committed where the defendant reasonably believed it was justified.

The issue that counsel has focused on, some of the other evidence concerning whether or not the defendant acted under extreme duress or under the substantial domination of another person, while it certainly could be concluded by the jurors that there was influence of other persons on the defendant, it did not rise to the level of extreme duress or substantial domination. All the jury had for them to consider was the presence and assistance on the part of the other two.

Subsection (h) about whether or not at the time that the offense, the capacity of the defendant to appreciate his criminality was in any way impaired, and there was insufficient evidence to establish as a mitigating factor that the defendant was suffering from mental disease or defects or the effects of intoxication that should have been considered as a compelling factor in mitigation.

The age of the defendant at the time of the crime, that could in some jurors' or fact finders' minds be a mitigating factor because the defendant was relatively young at the time of the offense, but I don't find this to be of – the defendant's age at the time of the offense to constitute a mitigating factor. At best, it's a neutral factor.

And lastly, subsection (j), whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor, indeed, it's just the opposite; that the defendant was not just an accomplice, he was the principal primary participant, the one who wielded the gun and fired the gun and inflicted the death.

For those reasons, I am making my determination that the jury's findings and verdicts are supported by the law and the evidence, and the verdict of death is to that extent confirmed or

affirmed.

(36RT 12687-12690, emphasis added.)

B. Applicable Law

Pursuant to Penal Code section 190.4(e), a motion for modification of penalty is heard automatically after a death verdict has been returned. Section 190.4(e) provides:

> In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3 and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigation circumstances are contrary to law or the evidence presented.

(Pen. Code, §190.4(e).)

"Pursuant to section 190.4, in ruling upon an application for modification of a verdict imposing the death penalty, the trial court must reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict." (*People v. Crittenden* (1994) 9 Cal.4th 83, 150.) In effect, the motion affords the defendant a second penalty determination in addition to that reached by the jury. (*People v. Ketchel* (1963) 59 Cal.2d 503, 546, overruled in part by *People v. Morse* (1964) 60 Cal.2d 631.)

This independent, on-the-record evaluation is designed to make the process for imposing a sentence of death rationally reviewable, and to help ensure the reliability of any determination that death is the appropriate sentence. (See *People v. Frierson* (1979) 25 Cal.3d 142, 178-179.) This Court subjects the trial court's ruling to independent review, scrutinizing the trial court's determination after independently considering the record, but without making "a de novo determination of penalty." (*People v. Berryman, supra*, 6 Cal.4th at p. 1106.)

To withstand constitutional scrutiny, the trial court must adhere to well-established limitations in conducting its section 190.4(e) review. First, the trial court must only consider evidence that was before the jury. (*People v. Brown* (1993) 6 Cal.4th 322, 337.) Second, the trial court must restrict its evaluation of aggravating circumstances to those specifically enumerated in California's death penalty statutory scheme. (*People v. Boyd* (1985) 38 Cal.3d 762, 773 [matters that are not within the statutory list of aggravating factors are not to be given any weight in the penalty determination]; see § 190.3 [enumerating statutory factors].) Third, the trial court must state its ruling on the record [§ 190.4, subd. (e); *People v. Marshall* (1990) 50 Cal.3d 907, 939] and, if denying the motion, must make a statement of reasons why it concluded the aggravating circumstances exceeded those in mitigation that is "sufficient 'to assure thoughtful and effective appellate review.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1227, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 794.) Such a record is necessary to ensure that California's death penalty scheme complies with the Eighth and Fourteenth Amendment requirements that the death penalty not be imposed in an arbitrary or capricious manner. (See *Gregg*

v. Georgia (1976) 428 U.S. 153, 195; *Proffitt v. Florida* (1976) 428 U.S. 242, 259-260; *Pulley v. Harris* (1984) 465 U.S. 37, 51-53 [citing § 190.4, subd. (e), as one of the key "checks on arbitrariness" in California's death penalty scheme].)

Where the trial court fails to properly exercise its responsibilities under section 190.4, subdivision (e), the death judgment must be vacated, and the case must be remanded for a new hearing on the application for modification of the verdict. (*People v. Burgener* (2003) 29 Cal.4th 833, 892.)

Importantly, because section 190.4(e)'s review procedure creates a constitutionally protected liberty interest for any defendant sentenced to death, an error in that sentence review process also constitutes a violation of a defendant's constitutional right to due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522.)

In this case, the trial court failed to follow these legal requirements in denying the motion. The court erred by giving aggravating weight to factors which, as a matter of law, may only be mitigating, and by failing to consider mitigating evidence. The court denied appellant his right to a fair and reliable penalty determination secured by the Eighth and Fourteenth Amendments, as well as his right to due process, when it treated mitigating evidence as aggravating in violation of state law and failed to consider the mitigating evidence.

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C. The Judge Erred By Giving Aggravating Weight to Factors Which As a Matter of Law May Only Be Mitigating and In Failing to Consider Mitigating Evidence.

A judge ruling on a motion to modify, like a jury rendering a penalty verdict, may rely only on those aggravating circumstances specified in Penal Code section 190.3, factors (a), (b), and (c). (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, 1186.) Because factors (d), (e), (f), (g), (h), (j), and (k) can only mitigate, it is improper to consider the absence of any of these factors as aggravation. (*Ibid.*; *People v. Davenport* (1985) 41 Cal.3d 247, 288-290.)

The trial court committed *Davenport* error in its consideration of 190.3's factors (e), (f), and (k). As quoted above, the court treated the absence of mitigating evidence that the victim was a participant in the homicidal conduct or consented to the homicidal act as aggravating under factor (e). (36RT 12689.) Similarly, the court treated factor (f) as aggravating due to the lack of evidence that the offense was committed under circumstances which appellant reasonably believed to be a moral justification or extenuation for his conduct. (*Ibid.*)

The trial court also committed *Boyd* error in its consideration of appellant's factor (k) evidence. Appellant presented testimony by his family regarding his childhood. His mother and brothers testified to their love for appellant and that they tried to do their best by him. (34RT 11973; 35RT 12289-90.) Although the trial court stated that it "considered the factors under factor (k) that can be argued as mitigating factors about the defendant's family atmosphere and support," the trial court, in fact, treated this evidence as

aggravating. (36RT 12687.) The court noted that appellant came from a loving, caring and nurturing family and that appellant's situation was opposite to an abusive, deprived background. The trial court concluded that "[appellant] should have been the product of a loving and caring family." (*Id.*, at pp. 12687-88.) This was error because evidence offered by the defense in support of factor (k) can only be used in mitigation. That factor does not create an additional aggravating factor. (*People v. Hardy* (1992) 2 Cal.4th 86, 207; *People v. Boyd, supra*, 38 Cal.3d at pp. 775-776 [Factor (k) "encompasses only extenuating circumstances and circumstances offered as a basis for a sentence less than death."].) Evidence that appellant was loved and supported by his family constituted mitigating evidence which the trial court should have considered.

Moreover, in its consideration of factor (k), the trial court ignored and failed to consider mitigation evidence which showed that contrary to the court's statements, appellant did suffer a deprived childhood. Appellant, the youngest of six children, lived with his mother and siblings in a rough area of south-central Los Angeles, which was plagued by gangs, drugs and drive-by shootings. (33RT 11925-26; 34RT 12209-14, 2217-18, 12247.) Appellant grew up without a father. (34RT 12211-12; 35RT 12259.) His childhood was rough. They were poor and often survived on food stamps despite the desire of appellant's mother not to do so. (34RT 12216-17; 35RT 12261-62.) Appellant's mother frequently had to work two jobs, leaving for work at 3:00 p.m. and not returning home until 9:00 the following morning. (35RT 12262.) When appellant was in junior high school, he was jumped by some gang members at a bus stop in front of the school. (35RT 12263-65.) Because

appellant identified his attackers to the school administration, his family was advised that it was too dangerous for appellant to remain in the neighborhood. (35RT 12263-65, 12274.) Appellant was thus sent to live with a brother in Sacramento. (34RT 12198-99.)

In addition, the trial court ignored and failed to consider mitigating evidence of appellant's many positive personality traits, as well as his youth. Testimony showed that appellant was deeply involved in the church, even as a young teenager. (34RT 12022-23, 12206; 35RT 12315-12316.) He loved helping the younger children at his church and was very gentle and patient with them. (35RT 12268-12269; 35RT 12316-12318.) Appellant also took care of his brother's children in Sacramento. (33RT 11930-11931.) He was good with the children, displaying patience and care. (*Ibid.*) And, testimony by two county jail officers showed that appellant, who was chosen to be an inmate worker or trustee during his pretrial incarceration, is able to function well in a structured environment. (34RT 12161-64, 12170, 2181-83, 12186-12187, 12193.)

Appellant was only 18 years old at the time of the offense. (3CT 856.) His extreme youth was compounded by his marginal intellectual functioning.[134] The trial court's refusal to consider appellant's youth as a mitigating circumstance [36RT 12690] flies in the face of the decision of the United States Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551. "*Roper* established that because juveniles have lessened culpability they are

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134 Testimony by defense psychologist Larry Nicholas established that appellant's full-scale I.Q. is only 75, placing him in the borderline mentally retarded range. (34RT 12002, 12006, 12032.)

less deserving of the most severe punishments." (*Graham v. Florida* (2010) 130 S.Ct. 2011, 2026 [176 L.Ed.2d 825].) *Roper* found that juveniles differ from adults in three major respects. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." (*Roper*, *supra*, 543 U.S. at pp. 569-570.) As explained by the High Court, these salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (*Id.*, at p. 573.) The United States Supreme Court concluded:

> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' (Citation omitted.) Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. (Citation omitted.) The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'

(*Roper v. Simmons*, *supra*, 543 U.S. at p. 570.)

Roper thus held that the Eighth Amendment prohibits the execution of an offender who was under 18 years of age at the time of his offense. (*Id.*, at p. 568.) It necessarily follows, from both the holding and reasoning in *Roper*, that where a defendant is merely 18 years old at the time of the offense, his age must be considered as a mitigating factor. (See *Bryant v. State* (Md. 2003) 374 Md. 585, 620-631, 824 A.2d 60, 81-87 [If defendant committed offense before 19th birthday, "youthful age" mitigating factor is established as a matter of law and must be weighed in determining the sentence.].) Given that the eighteen-years-of-age limit establishes a "floor" below which the death penalty cannot be imposed, appellant's age of 18 must be viewed as mitigating evidence and the trial court should have considered it as such.

The trial court's improper consideration of mitigating evidence as aggravation and failure to consider the mitigating evidence presented by the defense tainted its conclusion that the aggravating factors outweighed the mitigation. These errors also violated appellant's rights under the federal constitution. Penal Code section 190.4(e)'s review process created a constitutionally protected liberty interest which entitled appellant to an independent reweighing of the aggravating and mitigating evidence in order to ensure the reliability of the judgment and sentence of death. This statutory scheme, and its various state rules including the limits on aggravating evidence discussed in *Davenport* and *Boyd*, created "a substantial and legitimate expectation" that a California capital defendant will not be deprived of his life except in conformity with those rules. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Such an expectation is protected against arbitrary deprivation by the

Due Process Clause of the Fourteenth Amendment, and is not merely a matter of state law. (*Ibid.*; see also *Campbell v. Blodgett*, *supra*, 997 F.2d at p. 522.) The trial court's improper conversion of mitigating factors to aggravating factors, in violation of California's death penalty statutory scheme, thus constituted an arbitrary deprivation of this protected liberty interest in violation of the Fourteenth Amendment. (*Ibid.*)

The Eighth Amendment requires reliability in the processes by which a state adjudicates capital cases, and forbids arbitrary and capricious imposition of the death penalty. (E.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) Once a state has adopted rules for death-penalty adjudication such as the rules of *Davenport* and *Boyd*, even if those rules are not themselves required by the federal Constitution, the Eighth Amendment nevertheless requires the state to apply them in every case. To do otherwise would substitute forbidden arbitrariness and caprice for the reliability which the Eighth Amendment demands. Some defendants would be afforded the protection of these rules and others would not, based only on the sentencing judge's level of understanding of the law, the judge's success at predicting future appellate decisions, or other factors so capricious that they are impossible to isolate or identify. If the trial judge's errors in the present case go uncorrected, appellant will be the victim of precisely the kind of arbitrariness and caprice which the Eighth Amendment prohibits.

The trial court's improper consideration of mitigating evidence as aggravation and failure to consider mitigating evidence also violated the rule announced by the United States Supreme Court in *Lockett v. Ohio*, *supra*, 438

U.S. at p. 604, "'that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, emphasis in original.) In reversing a death judgment where the trial court had refused to consider mitigating evidence relating to the defendant's background, *Eddings* held:

> "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law,* any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentence, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

(*Id.*, at pp. 113-115, emphasis in original.)

In *Magwood v. Smith* (D.C. Ala. 1985) 608 F.Supp. 218 (affd. 791 F.2d 1438), a death sentence was overturned where a trial court had found that a mentally impaired defendant was not mentally impaired. The district court stated:

> "If courts can find on the evidence in this case that Magwood was not so mentally impaired, then the requirements of *Gregg v. Georgia* [Citation omitted]; *Proffitt v. Florida* [Citation omitted]; and *Jurek v. Texas* [Citation omitted], which upheld the imposition of the death sentence where there were standards and the sentence of death was not arbitrarily or capriciously imposed become only parts of a litany without practical meaning. To find that mitigating circumstances do not exist where such mitigating circumstances

> clearly exist returns us to the state of affairs which were found by the Supreme Court in *Furman v. Georgia* to be prohibited by the Constitution."

(*Id.*, at p. 228.)

The actions of the trial courts in *Eddings* and *Magwood* are indistinguishable from that of the court below. In each case, evidence relevant to sympathy and mercy was ignored, and in each case the sentence was vacated and the case remanded for a sentencing hearing at which the evidence was to be considered. "It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*People v. Haskett* (1982) 30 Cal.3d 841, 863.) The Eighth Amendment demands as much. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."].) This obligation is equally applicable to a trial judge considering a motion for modification.

D. Prejudice

The trial court's errors in performing its 190.4, subdivision (e) review, which violated the federal constitution, compel reversal unless the prosecution proves them harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The trial court found two aggravating circumstances – the circumstances of the crime, including victim impact evidence, and juvenile criminal activity involving violence or threats to use violence. (36RT

12685-12687.) The court found the circumstances of the crime to be the most compelling factor [*id.*, at p. 12685], but as cautioned by the United States Supreme Court, the reality of juvenile frailties "means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 570.) On the other hand, had the court considered all of the mitigating evidence presented by the defense, it would have found the following mitigating circumstances: (1) appellant suffers significant intellectual deficiencies; (2) appellant was extremely young and susceptible to manipulation at the time of the crime; (3) appellant suffered a deprived childhood, growing up in a dangerous, gang-infested area; (4) appellant's family loves and supports him; (5) appellant has the ability to function well in a structured environment; (6) appellant had no prior felony convictions; and (7) appellant confessed to the crime. Under these circumstances, the trial court's errors cannot be considered harmless.

The judgment of death must be set aside and the case must be remanded for reconsideration of the automatic motion to modify.

XXXI.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the federal Constitution. Because this Court has rejected challenges to most of these features, appellant presents the below arguments in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. "The constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6;[135] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme

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[135] *Marsh* considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and thus concluded beyond a reasonable doubt that those in mitigation did not outweigh those in aggravation. This was acceptable, given the overall structure of "the Kansas capital sentencing system," which "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. 163, 178.)

may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional because it might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., victim's youth versus victim's age, that the victim was killed at home versus that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no penalty phase safeguards in California to enhance the reliability of the trial's outcome. Instead, factual prerequisites to the

imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a foundational finding for the imposition of death. The result is truly a "wanton and freakish" system that randomly selects among the thousands of California murderers a few victims of the ultimate sanction.

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

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. [Citations.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) To meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in Penal Code section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law (Proposition 7, the Briggs Initiative) came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") At the time of the offense charged against

appellant (1992), the statute contained 28 special circumstances[136] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broadly defined as to encompass nearly every first-degree murder.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Penal Code section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, shall be accomplished by the Legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should review the death penalty scheme currently in effect and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and

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136 This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number has now increased to 33.

Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See § E, *post.*)

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(A), As Applied, Allows Arbitrary And Capricious Imposition Of Death.

Penal Code section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with those deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Penal Code section 190.3(a), directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[137] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[138] or having had a "hatred of religion,"[139] or threatened witnesses after his

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137 *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also 3CT 772-773 [CALJIC No. 8.88, par. 3, given in appellant's case].)

138 *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

139 *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.

arrest,[140] or disposed of the victim's body in a manner that precluded its recovery.[141] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

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

Prosecutors throughout California have argued that jurors can weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. 967, 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) Consequently, prosecutors may turn entirely opposite facts from case to case –

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140 *People v. Hardy* (1992) 2 Cal.4th 86, 204.

141 *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35.

or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh in favor of death.

In practice, Penal Code section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing *Godfrey v. Georgia* (1980) 446 U.S. 420].) As used, section 190.3 allows any fact involved in a murder to be an "aggravating circumstance." This empties that term of meaning and allows arbitrary and capricious death sentences in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death.

California's death penalty scheme violates the federal constitution for not only the reasons discussed above, but also because it lacks basic safeguards necessary to protect against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity about aggravating circumstances. They do not have to unanimously find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. Except for the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality

review not required, it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death. Therefore, California's death penalty scheme violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

1. Appellant's Death Verdict Is Invalid Because It Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and Outweighed Mitigating Factors and that Death Was the Appropriate Penalty.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to unanimously agree on the presence of any particular aggravating factor or that aggravating factors outweighed mitigating factors beyond a reasonable doubt before determining whether or not to impose a death sentence. (See 3CT 744 & 36RT 12631 [special instruction that there is no burden of proof except in regards to criminal activity]; 3CT 772-773 & 36RT 12644-46 [CALJIC No. 8.88].) All this was consistent with this Court's previous interpretations of California's statute. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 ["neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors"].)

This approach is no longer valid in light of the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter "*Apprendi*"]; *Ring v. Arizona* (2002) 536 U.S. 584 ["*Ring*"]; *Blakely v. Washington* (2004) 542 U.S. 296 ["*Blakely*"]; and *Cunningham v. California* (2007) 549 U.S. 270 ["*Cunningham*"].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. 466, 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring, supra,* 536 U.S. 554, 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, not elements of the offense. (*Ring, supra,* at p. 598.) The court found that, in light of *Apprendi, Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Blakely considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence, beyond the normal range, upon finding "substantial and compelling reasons." (*Blakely, supra*, 542 U.S. 296, 299.) Washington propounded illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.) In reaching this holding, *Blakley* stated that the governing rule since *Apprendi* is that, other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at pp. 303-304, italics in original.)

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

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California*, *supra*, 549 U.S. 270, 274.) In so doing, it explicitly rejected this Court's reasoning that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (*Id.* at p. 282.)

a. Any Factual Finding Necessary to the Imposition of Death Must Be Found True By a Unanimous Jury Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except to prove prior criminality as an aggravating circumstance – and even there the finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1255.) This Court reasons that penalty phase determinations are "moral and ... not factual," and therefore not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. Penal Code section 190.3 requires the "trier of fact" to find that (1) one or more aggravating factors exist and (2) the aggravating factors substantially outweigh any and all mitigating factors.[142] As stated in CALJIC No. 8.88,

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[142] This Court has acknowledged that a sentencing jury must engage in fact-finding before rendering an "individualized, normative determination" about

California's "principal sentencing instruction," which was read to appellant's jury (*People v. Farnam* (2002) 28 Cal.4th 107, 177; 36RT 12644-46; 3CT 772-773), an "aggravating factor is any fact, condition or event, attending the commission of a crime which increases it[s] guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (36RT 12644.)

Thus, before jurors can begin weighing aggravating factors against mitigating factors, they must first find the existence of one or more aggravating factors. And before jurors can decide whether to impose death, they must find that aggravating factors substantially outweigh mitigating factors.[143] These factual determinations are essential prerequisites to death-eligibility but do not mean that death is the inevitable verdict; the jurors can still reject a death sentence despite these factual findings.[144]

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the appropriate penalty for the particular defendant. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[143] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' [fn. omitted] we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d 450, 460.)

[144] Despite the "shall impose" language of section 190.3, even if jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

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

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

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[145] There, the principle that any fact exposing a defendant to a greater potential sentence must be found true by a jury beyond a reasonable

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[145] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black*: "Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Cunningham, supra,* 549 U.S. 270, 289, citing *Black, supra,* 35 Cal.4th 1238, 1253.)

doubt was applied to California's DSL. The high court determined that circumstances in aggravation which sentencing judges had to find before imposing an upper term sentence under the DSL were factual in nature. (*Cunningham, supra,* 549 U.S. 270, 276-279.) That was the end of the matter. *Black's* interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [Citation.]" (*Id.* at pp. 290-291.)

Cunningham examined this Court's extensive development of why an interpretation of the DSL allowing for continued judge-based fact-finding and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Cunningham, supra,* 549 U.S. 270, 293.) It states (*id.* at p. 291):

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

In light of *Cunningham*, it is crystal-clear that in determining whether *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether there is a requirement that any factual findings be made before the

death penalty can be imposed.

In its resistance to *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code, § 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th 226, 263.)

This is simply wrong. As Penal Code section 190(a)[146] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge *without further factual findings*: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. 270, 279.)

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[146] Penal Code section 190(a) provides: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Arizona advanced precisely the same argument in *Ring*. It noted that a finding of first degree murder in Arizona (like a finding of one or more special circumstances in California) leads to only two sentencing options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected the claim (*Ring, supra,* 536 U.S. 584, 604):

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d at 1151.

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. 584, 604.) Penal Code section 190(a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (Pen. Code, § 190.2) and also finds that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; 36RT 12644-46 & 3CT 772-773 [CALJIC No. 8.88]). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact

– no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. 584, 604.) In *Blakely*, the high court made clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely, supra,* 542 U.S. 296, 328 (Breyer, J., dissenting), emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."[147] That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require that requisite penalty phase fact-finding be done by a unanimous jury under the beyond a reasonable doubt standard violates the Sixth Amendment right to jury trial, Fourteenth Amendment right to proof beyond a reasonable doubt and Eighth Amendment requirement of reliability in capital sentencing.

b. The Ultimate Decision to Impose Death Must Be Resolved Beyond a Reasonable Doubt.

As noted, a California penalty-phase jury must first decide whether any aggravating circumstances, as defined by Penal Code section 190.3 and standard instructions, exist in the case before it. If so, the jury then weighs the

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147 See Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 [all features deemed significant in *Ring* apply to both findings that are essential predicates for a death sentence, i.e., that (1) an aggravating circumstance is present and (2) whether aggravating circumstances substantially outweigh mitigating circumstances].

aggravating factors against the proffered mitigation. As shown, jurors must unanimously make these factual determinations beyond a reasonable doubt. (§ C.1.a, *ante.*)

The last step of California's capital sentencing procedure is the decision about whether to impose life or death. This ultimate decision about the ultimate penalty implicates the greatest interest conceivable, human life itself. The decision is a moral and normative one. Because "the death penalty is unique in its severity and its finality" (*Monge v. California* (1998) 524 U2.S. 721, 732), the ultimate decision about whether to impose it must also be made by a unanimous jury beyond a reasonable doubt. This is necessary to ensure the decision's accuracy and reliability and to allocate the risk of error on society, not on the sentenced defendant. Appellant's jurors were not required to unanimously find beyond a reasonable doubt that the appropriate penalty was death. This violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments.

2. California's Death Penalty Scheme Does Not Require Jurors to Be Instructed on the Beyond a Reasonable Doubt Standard as the Applicable Burden of Proof; Accordingly, Appellant's Death Verdict Is Invalid.

"[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard of the criminal justice system concerning fact assessment is the allocation and degree of the burden of proof. The burden of proof imposes a duty on a party to establish the contention sought to be proved to a particular degree of certainty. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) The burden of proof for factual and value determinations during the penalty phase of a capital trial, when life is at stake, must be the stringent burden of proof beyond a reasonable doubt, and this burden must be carried by the prosecution. (*Winship, supra.*)

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. 358, 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.) In *Santosky v. Kramer, supra*, the U.S. Supreme Court reasoned (*id.* at p. 755):

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation.] The stringency

> of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

No interest is greater than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt. (See *Winship, supra,* 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

Like the child neglect proceedings addressed in *Santosky*, penalty phase proceedings involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra,* 455 U.S. 743, 763.) Imposition of a burden of proof beyond a reasonable doubt reduces the risk of error. (*Winship, supra*, 397 U.S. 358, 363 [beyond reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error"].) The U.S. Supreme Court has expressly applied the *Santosky* rationale to use of the beyond-a-reasonable-doubt burden of proof in capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. 721, 732, quoting

Bullington v. Missouri, supra, 451 U.S. 430, 441 and *Addington v. Texas, supra,* 441 U.S. 418, 423-424.)

Requiring the prosecution to prove beyond a reasonable doubt the factual and value judgments necessary to warrant a death sentence would not deprive the State of the power to impose capital punishment. It would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The only risk to be borne is one society must willingly impose on itself when human life is at stake – the risk that a defendant, otherwise deserving of death, would instead be confined to prison for life without possibility of parole.

Thus, under the Eighth and Fourteenth Amendments, before the sentencer in a capital case may impose the death penalty, it must be convinced that the prosecution has prove beyond a reasonable doubt of the factual determinations and value judgments necessary for imposition of the ultimate punishment: that one or more aggravating circumstances exist, that the aggravating circumstances outweigh the mitigating circumstances, and that death is the appropriate punishment. Because these requirements were not met before appellant was sentenced to death, his death sentence violates the constitution.

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3. Because California's Death Penalty Scheme Does Not Require Written Findings Regarding Aggravating Factors, It is Unconstitutional and Appellant's Death Sentence Must Be Vacated.

The failure to require written or other specific findings by the sentencing jury regarding aggravating factors deprived appellant of his federal constitutional rights to meaningful appellate review under the Sixth, Eighth and Fourteenth Amendments. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Since California juries have total discretion about how to weigh aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who seeks to challenge denial of parole must file a writ of habeas corpus alleging with particularity the circumstances constituting the state's wrongful conduct and resulting prejudice. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations

with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.)[148] The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170(c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring, supra*; § D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal.4th 43, 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require

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148 A determination of parole suitability shares similarities with the decision of whether to impose the death penalty. In both, the subject has already been convicted of a crime and the decision-maker must consider, *inter alia,* questions such as future dangerousness, the presence of remorse and the nature

them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to jury trial. (See § C.1, *ante*.)

There are no other procedural protections in California's death penalty system which compensate for the unreliability produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. 163, 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional given presence of other procedural protections in state's capital system].) The failure to require written findings thus violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments.

4. Inter-case Proportionality Review Is Necessary to Protect Against Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty; Because California Law Does Not Allow for It, the California Death Penalty Scheme Is Unconstitutional and Appellant's Death Sentence Must Be Vacated.

The Eighth Amendment forbids cruel and unusual punishment. Jurisprudence applying this ban in the death penalty context requires that death judgments be proportionate and reliable. One commonly utilized mechanism for ensuring reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is essential, noted the possibility that

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of the crime. (See Title 15, California Code of Regulations, § 2280 et seq.)

"there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris* contrasted the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review, and it observed that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris, supra,* 465 U.S. 37, 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of Penal Code section 190.2's lying-in-wait special circumstance have made first degree murders that cannot be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See § A, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see § C, *ante*), [149] and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see § B, *ante*). Moreover, there are no standards by which to judge or oversight imposed on prosecutorial discretion in seeking the death penalty. This allows for completely arbitrary and irrelevant considerations (such as the size of a

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[149] Reviewing courts often find it useful to refer to the current practices of other states in determining if a state has framed its statutes consistent with the requirements of due process. (*Schad v. Arizona* (1991) 501 U.S. 624, 640.)

county's budget, or the race of the victim and/or defendant) to influence what is literally a life or death decision. This violates the rights to due process, guaranteed by the Fourteenth Amendment, and reliability in capital sentencing, guaranteed by the Eighth Amendment. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*, 548 U.S. 163, 177-178), this absence renders that scheme unconstitutional.

Penal Code section 190.3 does not require that the trial court or this Court compare this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) But the statute does not forbid it. The prohibition against considering evidence showing that similarly situated defendants are being treated differently in how they are charged and sentenced in capital cases is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If This Were Constitutionally Permissible, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found True Beyond a Reasonable Doubt by a Unanimous Jury; These Defects Require Reversal of Appellant's Death Sentence.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under Penal Code section 190.3(b) violates due process and the

Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant: the Zeke Moten threat and shooting at John F. Kennedy High School (33RT 11658-11665, 11747-11799, 11803-11817); the Hernandez bicycle theft (32RT 11543, 11580, 11635-11657, 33RT 11752); and the Land Park Bowl incident (33RT 11678-11704, 11706-11729). The prosecutor focused a considerable portion of its closing argument on these alleged offenses. (35RT 12434-12435, 12462-12475, 12487.)

The U.S. Supreme Court's recent decisions in *Booker, Blakely, Ring* and *Apprendi* (see discussion at § C.1, *ante*) confirm that Fourteenth Amendment due process and the Sixth Amendment jury trial guarantee require the findings prerequisite to a sentence of death to be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. Appellant's Death Sentence Is Invalid Because the Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

Jurors were instructed in CALJIC No. 8.85 on aggravating and

mitigating factors as a guide to their sentencing determination. (3CT 742-743, 36RT 12629-12631; see Pen. Code, § 190.3.) The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators and That Aggravating Factors Were Limited to Those Statutorily Specified Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction; Consequently, Appellant's Death Verdict Cannot Stand.

As noted above, jurors were instructed on the factors to guide their sentencing determination in CALJIC No. 8.85. (3CT 742-743, 36RT 12629-12631; see Pen. Code, § 190.3.) As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" factors could establish an aggravating circumstance. It was thus invited to aggravate the sentence based on non-existent and/or irrational aggravating factors. This precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson, supra,* 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence based on an

affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence. This violated the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a death sentence. For example, *People v. Morrison* (2004) 34 Cal.4th 698 provides (*id.* at p. 730, parallel citations omitted):

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias, supra*, 13 Cal.4th at p. 188.)

Morrison itself proves false that no reasonable juror could mistake mitigating factors as aggravating ones under the language of section 190.3. In *Morrison,* the trial judge mistakenly believed that Penal Code section 190.3, factors (e) and (j), constituted aggravation instead of mitigation. (*Id.* at pp. 727-729.) If a seasoned judge could be misled by the language at issue, how can lay jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been similarly misled. (See Argument XXX *ante*; see also *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

Additionally, the jury was not told that it had to limit its consideration of aggravating factors to those specified in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775.) This, too, precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson, supra,* 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Further, the very real possibility that appellant's jury aggravated his sentence based on nonstatutory aggravation deprived appellant of an important state-law procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*ibid.*) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington]).

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because nothing limits determination of what is an aggravating factor and different juries will differently construe the pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. However, "[c]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot

be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants; Consequently, Appellant's Death Sentence Must Be Vacated.

As noted above, procedural fairness and accuracy in fact-finding are essential in the capital context because greater reliability is required when death is imposed. (See, e.g., *Monge v. California, supra*, 524 U.S. 721, 731-732.) Nevertheless, California's death penalty scheme provides significantly fewer procedural protections for persons facing the ultimate penalty than afforded to persons charged with non-capital crimes. This differential treatment violates Fourteenth Amendment's guarantee of equal protection of the laws.

"Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) When an interest is "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that it has a compelling interest justifying the classification and that the distinctions drawn are necessary to further that purpose. (*Olivas, supra*; *Skinner v. Oklahoma* (1942)

316 U.S. 535, 541.)

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

Reasoning that "the penalty phase determination in California is normative, not factual," this Court has analogized the decision about whether to impose death "to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra,* 30 Cal.4th 226, 275; see also *People v. Snow, supra,* 30 Cal.4th 43, 126, fn. 3 [same]; *People v. Demetrulias, supra,* 39 Cal.4th 1, 41 [same].) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than persons being sentenced to prison for receiving stolen property, or possessing cocaine.

In a non-capital case, an enhancing allegation must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Pen. Code, §§ 1158, 1158a.) Also, when a judge makes a discretionary sentencing choice, the court must state for the record its reasons, i.e., "the primary factor or factors that support the exercise of discretion...." (Cal. Rules of Court, rule 4.406(a).) This includes the need to state reasons for selecting the upper, lower or mid-term from among a triad of possible sentencing choices. (*Id.,* Rules 4.406(b)(4) & 4.420(e).)

In capital sentencing, by contrast, there is no burden of proof except as to other-crime aggravators, and jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See §§ C.1-C.2, *ante*.) Unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See § C.3, *ante*.) Because these discrepancies are skewed against persons subject to loss of life, they are unconstitutional.[150] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Myers v. Ylst, supra,* 897 F.2d 417, 421; *Ring, supra,* 536 U.S. 584.)

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[150] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. ... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra*, 536 U.S. 584, 609.)

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency; Imposition Of The Death Penalty Now Violates The Federal Constitution; Accordingly, The Death Judgment Must Be Vacated.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa – with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

Although administration of our criminal justice system is not bound by the laws of any other sovereignty, our country has always relied on the customs and practices of other nations to inform its practices. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11

Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].) Use of the death penalty as a regular form of punishment violates international norms of humanity and decency in violation of the Eighth Amendment.

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. 304, 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights [limiting the death penalty to only "the most serious crimes"][151].) Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

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

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

XXXII.

REVERSAL OF THE GUILT AND PENALTY VERDICTS IS NECESSARY DUE TO CUMULATIVE ERROR.

As shown, each claim of error raised above requires reversal. Even if any single error was not by itself cause for reversal, the cumulative effect of the errors rendered appellant's trial, both guilt and penalty phases, fundamentally unfair in violation of due process. (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Chambers v. Mississippi, supra,* 410 U.S. 284, 289-290, fn. 3; *Taylor v. Kentucky, supra,* 436 U.S. 478, 487 & fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; see also *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 285-288 [multiple state law errors may violate federal due process due to their cumulative effect].)

At the guilt phase, numerous errors made it easier for the prosecution to carry its burden of proof by encouraging or allowing jurors to draw inferences adverse to appellant (Arguments I, XII-XV) and to see appellant as criminally predisposed (Arguments VII-IX), by inflaming jurors' emotions (Arguments VII-X, XX), and by exposing jurors to harmful, extrinsic publicity and unsworn evidence (Arguments XX & XXI). The damaging effect of these errors was augmented because they occurred in the context of the dual jury trial, which was itself grossly unfair. (Argument III.) At the same time, multiple errors thwarted appellant's ability to mount a defense (Argument VI) or minimize his culpability (Arguments XVI-XVIII) before a receptive trier of fact (Argument V).

The cumulative, prejudicial effect of the errors also violated appellant's

right under the Eighth Amendment to heightened reliability in both the guilt and penalty determinations. (*Beck v. Alabama, supra,* 447 U.S. 625, 638.) This right may be violated even if due process is not. (E.g., *id.* at pp. 636-638 [8th Amend. need for reliability requires lesser included offense instructions even if due process does not]; *Sawyer v. Smith* (1990) 497 U.S. 227, 235 [distinguishing between due process protections and the "more particular guarantees of sentencing reliability based on the Eighth Amendment"].) Even if the errors demonstrated above did not alone, or in combination, violate due process, they violated the "heightened need for reliability" in capital cases.

At the penalty phase, numerous errors deprived appellant of his rights to due process and to a fair, reliable determination of penalty, as well as his right not to be deprived of his life except in accordance with the rules set forth in California's death penalty scheme. Numerous errors prevented the jury from carrying out its duty to determine the appropriate sentence under California law by (1) encouraging or allowing the jurors to see appellant as criminally disposed (Arguments XXIV, XXV, and XXIX), (2) improperly appealing to the jury's emotions and prejudices (Arguments XXIV, XXV, and XXVI), (3) exposing the jurors to harmful publicity (Argument XXII), and (4) encouraging the jurors to impose a sentence of death on the basis of improper considerations. (Arguments XXIV, XXV, XXVI, and XXVII.) At the same time, multiple errors thwarted appellant from presenting evidence necessary to mitigate a sentence of life without possibility of parole (Argument XXIII), prevented the jury from considering mitigating evidence (Arguments XXVIII and XXIX), and denigrated the mitigating evidence presented at the penalty phase. (Argument XXIV). The trial court's error in denying the application

for modification of sentence deprived appellant of one of the primary safeguards of California's death penalty scheme (Argument XXX) and that scheme, itself, as interpreted and applied at appellant's trial, contains insufficient safeguards to ensure that appellant's sentence of death meets constitutional standards under the Eighth and Fourteenth Amendments. (Argument XXXI).

Therefore, reversal of the guilt and penalty determinations is required.

CONCLUSION

For all of the reasons stated above, this Court should reverse both the convictions and sentence of death in this case.

DATED: March 31, 2011

Respectfully submitted,

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California Supreme Ct. No. S043520

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.630(b)(2)

I hereby certify that the foregoing brief contains 183,265 words, based on the computer word count, and uses a 13-point Times New Roman font. An application for leave to file an over-length brief is being filed simultaneously with this brief pursuant to California Rules of Court, rule 8.630(b)(5). (The record in this case was filed before January 1, 2008.)

DATED: April 1, 2011

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States and a resident of Alameda County, California. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 2633, Berkeley, CA 94702.

On April 1, 2011, I served the attached **APPELLANT POWELL'S OPENING BRIEF** on the interested parties in said action by causing to be placed a true copy thereof, in a sealed envelope, with first-class postage thereon fully prepaid, in a United States Post Office Box, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 1, 2011, at Berkeley, California.

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