SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	S050102
v.	San Joaquin County Superior Court
PAUL LOYDE HENSLEY, Defendant and Appellant.	No. SC054773A)

APPELLANT'S OPENING BRIEF

VOLUME II

(Pages 129-328)

Automatic Appeal from the
Superior Court of the State of California
In and for the County of San Joaquin
Honorable Frank A. Grande, Judge

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GUILT/INNOCENCE PHASE ISSUES

III. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENTS TO THE POLICE

The trial court erred in denying appellant's motion to suppress his statements to the police and prosecutor Dunlap. The Miranda[14] decision was violated by Faust asking appellant, "Can I talk to you about that?" referring to the crimes (1 ACT-B 1-2), rather than properly asking appellant if, bearing his Miranda rights in mind, he was willing to talk to Faust, and by the officers' subsequent disregard of appellant's clear invocation of his right to consult a lawyer. Appellant's statements were also involuntary, the product of misconduct by the officers by way of a false representation of leniency in exchange for appellant's confessions to the crimes, taking advantage of appellant's drugged, sleep-deprived and medically-weakened condition, and their employment of deceit and prolonged relentless interrogation to pressure appellant to confess to the various crimes.

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[14] Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

A. Facts Relating to This Issue

In connection with appellant's motion to suppress, the court reviewed videotapes of the police interviews of appellant and corresponding transcripts of the interviews.[15]

The parties also relied upon testimony which had been provided at appellant's preliminary hearing. This included Sacramento County Detective Faust's testimony regarding the interrogation and events preceding it. Detective Faust testified that he began interrogating appellant at 9:41 a.m. on October 18, 1992. (1 ACT 11-12.) Appellant had been arrested at about 7:53 a.m. that morning after being found asleep in a station wagon parked in front of the H Street police station. (1 ACT 57-59.) Prior to the interrogation, Faust had been told by the arresting officers, Gish and Sweeney, that appellant had attempted to escape and the officers had thrown him to the ground, causing a injury to appellant's upper forehead. (1 ACT 60.)

Appellant was dressed in jail clothes and held in the homicide office on the second floor of the police annex building, beginning at about 8:00

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[15] Transcripts of the interviews are contained in the "Clerk's Augmented Transcript on Appeal - B," filed on July 14, 2004. (Hereinafter "ACT-B".)

a.m. on October 18. (1 ACT 60-61, 91.) Appellant was placed in an interview room which was subject to clandestine video and audio taping, as well as a monitoring screen. (1 ACT 12-13, 63-64.)

At the beginning of the interview, Detective Faust was aware that the blue station wagon in which appellant was found at the time of his arrest had belonged to Shockley. (1 ACT 62-63.) Faust also knew that police had found appellant in possession of a loaded handgun and illegal drugs. Faust informed appellant at the beginning of the interview that he was under arrest for murder. (1 ACT 83, 150.)

The injury to appellant's forehead is clearly visible on the videotape of the interview. Faust noted that injury, as well as abrasions on appellant's hands also resulting from being thrown to the ground at the time of his arrest. (1 ACT 15-16, 60.) At various points during the interview, appellant complained about his head injury, but he did not receive any medical attention for it until over seven and a half hours after his arrest. (1 ACT 15-16, 67; 2 ACT 414.)

Detective Faust was aware that appellant possessed a statutory right to make phone calls within three hours following his arrest. (1 ACT 88; see § 851.5, subd. (a).) However, Faust did not allow appellant to make any phone calls, notwithstanding that there were telephones in the homicide

office of the police annex where they were. (1 ACT 90-91.)

During the interview, appellant repeatedly told Faust that he was using drugs. Faust testified that, notwithstanding his 23 years of experience as a police officer, he had no training or expertise in recognizing symptoms that someone is under the influence of heroin, cocaine or similar drugs. (1 ACT 11, 16.) Faust did not personally request that any blood or urine sample be taken, although he testified that normal procedures would have included appellant providing a blood sample upon arrest for a felony.[16] (1 ACT 67.)

Faust considered appellant to be "coherent" and "lucid" during the interview, although he also acknowledged that appellant appeared "tired" and "sleepy." (1 ACT 16, 68, 70.)

The interview of Detective Faust began as follows:

> FAUST: Paul, Paul I want you to listen to me because this is important to you, okay?

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[16] Per the trial testimony, at the time of his arrest, appellant's blood test revealed .08 milligrams of methamphetamine per liter and 0.3 milligrams of amphetamine, which signified that the drug had been in appellant's system for at least two hours. (51 RT 14753-14754, 14790.) Based on these results, the level of the drug originally taken would have been about 75 percent higher or about .14 milligrams, assuming that the drug was taken eight hours prior to when the sample was obtained. The blood level 20 hours prior to obtaining the sample would be roughly .24 milligrams per liter. Whether that should be considered an unusually high amount depends upon the individual user, but even among addicts this may be considered on the high side. (51 RT 14757-14578, 14792.)

HENSLEY: Um hum.

FAUST: Look at me, okay? You're under arrest uh, currently on a murder charge that happened down in the area of Stockton. I don't know anything about it, okay? Bu since you are under arrest, I have to advise you of your rights, okay?

HENSLEY: Um hum.

FAUST: Listen . . . look at me, okay. You have the right to remain silent. Do you understand that?

HENSLEY: Um hum.

FAUST: You're nodding your head yes?

HENSLEY: Yes.

FAUST: Okay. Anything you say can and will be used against you in a court of law, do you understand that? You're nodding your head yes.

HENSLEY: Yes.

FAUST: You have the right to talk to an attorney and to have an attorney present before and during questioning. Do you understand that?

HENSLEY: Um hum.

FAUST: If you can not [sic] afford an attorney, one will be appointed free of charge to represent you before and during questioning, if you so desire. Do you understand that?

HENSLEY: Um hum.

FAUST: Okay. Understanding those rights, I want to talk to you about, stay with me . . . I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?

HENSLEY: Yeah.

(1 ACT-B 1-2 [emphasis added].)

Detective Faust testified that in advising appellant about his Miranda rights he read from a pre-printed card, but that he varied from what was on the card by saying "Understanding those rights, . . . I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?" (1 ACT-B 2 [emphasis added].) The card stated: "Having those rights in mind, do you wish to talk to us now." (1 ACT 70-71, 88, 116-117, 142-143 [emphasis added].)

During the initial interview, appellant told Faust that he was unable to recall anything since he had used heroin three days before with a woman named "Donzelle." Appellant claimed that he could not remember how he obtained the jacket he was wearing when arrested or the gun which he had had. (1 ACT 5-14.)

At about 10:08 a.m., appellant indicated that he wanted an attorney:

HENSLEY: . . . . I'm being set up, I want to see my lawyer!

FAUST: No, you're not being set up.

HENSLEY: Um hum.

FAUST: Okay? We're not setting you up.

HENSLEY: No, I didn't say you were.

FAUST: Oh, okay.

(1 ACT-B 15 [emphasis added].)

Detective Faust then left the interview room and appellant slept for a while. Between 10:08 a.m. and 1:24 p.m. Faust, by his own admission, made no effort to obtain an attorney for appellant. (1 ACT 95-96.) Although he had sufficient cause to book appellant at that time, Faust refrained from booking appellant because he wanted to facilitate appellant's being contacted by San Joaquin County law enforcement officers whom Faust understood to be en route to where Faust and appellant were. (1 ACT 95, 103, 121-123, 149-151.)

At 1:24 p.m., Faust returned to the interview room and directed appellant to remove his shirt so photos could be taken. Seeing blood on appellant's arms and hands, Faust asked appellant, "Where did you get all this here, this red in here?" (Hensley Police Interview tape – vol. I, Oct. 18, at about 1:24 p.m.; see 1 ACT 106.) Faust also asked, "Scratch here?" seeking an explanation for a scratch which appeared on appellant's hand. (Hensley Police Interview tape – vol. I, Oct. 18, at about 1:24 p.m.; 1 ACT-

B 16; 1 ACT 106.) Faust was concerned about blood and injuries on appellant's person which might be evidence relating to a homicide. (1 ACT 106-107.)

At 1:28 p.m., appellant asked Detective Faust, "When am I gunna uh [sic], get to see a lawyer or get a phone call or something . . . ?" Faust replied: "Once you're booked into the county jail, you'll get that and you'll get your phone calls." (1 ACT-B 18.) Appellant asked, "All day huh?" and Detective Faust replied, "As soon as we get through here." (1 ACT-B 18.) Appellant's question about phone calls and an attorney came more than five-and-a-half hours after his arrest and two-and-half hours past the expiration of the three-hour deadline for phone calls set by section 851.5.

Faust then told appellant to put his shirt back on, saying, "you'll being going over, okay?", but not saying when this would happen. (1 ACT-B 18.)

Appellant then asked Faust, "Can I talk to you for a minute?" Faust said, "Sure." (1 ACT-B 18.) The following conversation then took place:

> HENSLEY: Why are you guys trying to work me so hard[?] I told you I didn't do anything.
>
> FAUST: Well, uh, unfortunately there was a man killed here in Sacramento and you have his checkbook, uh you have casings in your car, you have a gun on you, um you have a check in his name. It's a payroll check. It's kind of hard to explain, you know?

HENSLEY: Hey, well, hey . . . I understand . . . .

FAUST: Why, why wouldn't we work you hard?

HENSLEY: I, I understand that but . . .

FAUST: Put yourself in my position.

HENSLEY: I know but uh . . .

FAUST: And I can't really talk to you because you want an attorney okay? You told me that earlier.

HENSLEY: No, I just . . . all I said was you know, you can't put it all on me. Only cause you caught me you know what I mean?

FAUST: Well, that's what we've tried, we've tried . . . .

HENSLEY: But what I see happen . . .

FAUST: [A]sking you, we was asking you questions this morning, but I can't talk to you because you want to talk to an attorney.

HENSLEY: Well, you've gotta find Donzelle, Donzelle.

FAUST: Was she with . . . .

HENSLEY: I don't want to get myself in trouble, that's all.

FAUST: I understand that, I wouldn't want to get myself in trouble either. Okay? Is Donzelle well . . . . you wanna, you wanna

talk or or you want an attorney?

HENSLEY: No, man. I, I didn't do any . . . . I didn't fucken do shit! But fucken accept some fucken stuff you know?

FAUST: Accept what?

HENSLEY: An i.d. and some checks.

FAUST: Who did you get that from?

HENSLEY: Probably from Donzelle or or um . . . . that dude.

FAUST: What dude?

HENSLEY: That dude.

FAUST: Who's that? I mean you've gotta understand where I'm coming from guy is that uh . . . . you don't know Donzelle's last name, you've been . . . . you take dope with her you know? She's on a mission to go to Lodi to find this guy, but you don't know his name, but you were with him you know? You're in a vehicle that belongs to your uh . . .

HENSLEY: Kyle.

FAUST: Kyle? What's Kyle's last name?

HENSLEY: Mooney.

FAUST: Kyle Mooney?

HENSLEY: Um hum.

FAUST: Where does he live?

HENSLEY: Come on. I didn't get facts and figures on these guys!

FAUST: No, I don't expect you too [sic] but I mean . . .

HENSLEY: He probably don't have a place to live. He probably floats around or something. I don't know.

FAUST: Did you pick him up uh, in L.A.?

HENSLEY: No, she found him in um, Sacramento.

FAUST: In Sacramento?

HENSLEY: [unintelligible] found him in Sacramento.

FAUST: What about . . . .

HENSLEY: And then went to Sacramento.

FAUST: And what's Donzelle's last name?

HENSLEY: I don't know her last name.

FAUST: And where does she live though?

HENSLEY: See, most of the time she gets a free room at the Fremont Inn.

FAUST: And that's where?

HENSLEY: In

FAUST: Describe her.

HENSLEY: She's a real hard . . . hardened Mexican chick. . . . black hair, brown eyes.

FAUST: How old?

HENSLEY: Um . . . late thirties.

FAUST: How tall?

HENSLEY: 5"5", 6".

FAUST: Can you describe, describe the size of that Mooney. Describe him. He's male, White, Black Hispanic?

HENSLEY: 6' 1" um . . . .

FAUST: Male White . . . .

HENSLEY: White male.

FAUST: Oh.

HENSLEY: Early thirties.

FAUST: How tall" 6'1"?

HENSLEY: 6'1", 6'2".

FAUST: How much does he weigh?

HENSLEY: About the same as me.

FAUST: How much do you weigh?

HENSLEY: About 2, 220. Is that good enough?

FAUST: Who, who else came to

Sacramento?

HENSLEY: Just him, and her and me.

FAUST: Okay, so he came to Sacramento with you, right?

HENSLEY: Um hum.

FAUST: So Donzelle didn't find him in Sacramento, she find [sic] him in . . .

HENSLEY: No, she got him in Lodi. We were gunna go to Sacramento to go find him, and she found . . .

FAUST: Why, why were you coming to Sacramento?

HENSLEY: To find him cause she wanted . . . .

FAUST: You found, you found him. You found him in Lodi. Why did you come to Sacramento?

HENSLEY: At the last minute we she . . . went um . . . . went to Galt not Lo . . . it's the same fucken thing. Galt. We were you know, getting ready to go up the freeway. . . .

FAUST: I'm gunna have to you know, I want to talk to you, but I've got to clarify something um as long as, so I can understand okay, because I don't want to violate your rights. Do you understand where I'm coming from?

HENSLEY: Uh huh.

FAUST: Okay. You had initially told me

in my first interview with you that you, that you wanted an attorney. Okay, that you thought you were being set up, and you wanted an attorney.

HENSLEY: Not by you, I . . . .

FAUST: Oh, no.

HENSLEY: I mean Donzelle and her fucken buddy tried to set me up for what they did. I don't, I don't go for that!

FAUST: Okay, so that's something we need to clarify too is that you[.] You think that Donzelle and Mooney are setting you up?

HENSLEY: Well hell, he parked me out in front of the fucken police station! Hey, I didn't do nothing but steal my fucken father-in-laws [sic] car. That's all I did. I had possession of some stolen property.

FAUST: Well, can I continue to talk to you without an attorney?

HENSLEY: Yeah, I don't give a fuck! I'm going to jail anyway.

FAUST: Well. You're gunna have to, you're gunna have to . . . .

HENSLEY: You guys are gunna fucken book me in and I didn't, I didn't do . . .

FAUST: Okay, you're gonna have to . . . . .

HENSLEY: I didn't fucken . . .

FAUST: You're gunna have to . . .

HENSLEY: I didn't conspire to do nothing with nobody.

FAUST: Listen, listen to me Paul.

HENSLEY: Yeah.

FAUST: I'm gunna ask some questions, you gotta, you gotta respond to them.

(1 ACT-B 18-24 [emphasis added].)

Detectives Larry Ferrari and Xavier Ordez of San Joaquin County arrived at about 12:00 p.m., having previously been informed of appellant's arrest. Faust told them that appellant had invoked his rights and requested a lawyer. (1 ACT 134, 156, 158; 2 ACT 355.)

At about 2:00 p.m. Detectives Ferrari and Ordez began interrogating appellant, without readvising him of his Miranda rights. Meanwhile, Detective Faust watched this conversation surreptitiously from the monitoring room. (1 ACT 51; 2 ACT 366-367.) Ferrari testified that, after having watched the conversation (quoted above) in which appellant had agreed to speak to Faust without a lawyer, he believed that there was no need for Faust to readvise appellant regarding his Miranda rights. (1 ACT 161; 2 ACT 360-361.)

Detective Ferrari told appellant, "There are two sides to every story, okay? And we're real anxious to get your side of what happened okay?" (1

ACT-B 37-38.) Appellant told the detectives that he was doing "okay," but wanted a cigarette. (1 ACT-B 61.) Appellant complained that he had been kept in the interrogation room all day without anything to eat. He wanted some water, which Ferrari then provided to him. Appellant said that his head hurt and that he had used heroin and cocaine prior to his arrest. At 3:31 p.m., after giving Detective Ferrari permission to return with a district attorney, appellant asked for something to eat. To that point, he had not received any phone call or food. (2 ACT 373.)

Appellant told the detectives that he had gone to Shockley's house, accompanied by Donzelle and Kyle Mooney. Appellant had handcuffed Shockley and taken some of his property. Then appellant, Mooney and Donzelle drove Shockley to a remote area where Mooney shot Shockley in the head. Afterwards, they had sold the stolen property. (1 ACT-B 43, 59-61, 70, 77, 83-88, 102.)

At 3:32 p.m., appellant was removed from the interview room and booked. Thereafter he was given some food. (1 ACT 53, 135, 140-141.)

The next interview of appellant was conducted by Detective Ferrari and San Joaquin County Deputy District Attorney Dunlap (who subsequently prosecuted this case). It began at 7:04 p.m., October 18. (1 ACT 54-55.) Appellant complained that his head hurt, but he agreed to be interviewed. (1

ACT-B 121-122.) Ferrari reminded appellant that previously "we talked about the importance of uh there being two sides to a story . . . ." (1 ACT-B 120.) Ferrari then read appellant his Miranda rights and appellant agreed to speak to them. (1 ACT-B 122.) Appellant complained that he could not see very well and there was ringing in his ears. He said his jailers had not allowed him to see a nurse. (1 ACT-B 121.)

In this interview appellant again attributed Shockley's death and the taking of his property to Donzelle and Kyle Mooney. (1 ACT-B 126-161.)

At about 9:05 p.m., following a break, appellant attempted unsuccessfully to terminate the interview:

> FERRARI: Paul we're finished up here. We're almost done. Are you with us?
>
> HENSLEY: Huh uh.
>
> FERRARI: No? Can you hang in there for a little bit more or do you wanna go home?
>
> HENSLEY: I could go home but I'm never going there again.
>
> FERRARI: Why do you say that?
>
> HENSLEY: [Unintelligible] back to jail.
>
> FERRARI: O.K.
>
> DUNLAP: You got, you got something you wanna say to us?

HENSLEY: Yeah after I'm given a cell and eight hours of sleep.

DUNLAP: So, do you mind going a few more minutes or do you wanna stop now and continue tomorrow after you've had some time to sleep.

HENSLEY: Well if you can get them to put me in a cell that has a bed.

FERRARI: I'll tell you what . . .

DUNLAP: Uh, I'm, I'm gonna ask about that. See what's going on. I, I know you're gonna get a cell with a bed, so I'll answer it for you. Yes, you're not gonna be kept up. You're gonna get a cell with a bed.

HENSLEY: No, they're keeping me in a holding cell.

FERRARI: Kay let, Paul let me just say this.

HENSLEY: And they're gonna keep keeping me in a holding cell with no blanket and fucking with me until you guys are done with me. It's bullshit.

FERRARI: Allright Paul, how bout if we do this. Now you understand or I want you to understand that we're not in a position to make you any promises or anything like that O.K.

HENSLEY: I don't want any promises. What I want . . .

FERRARI: Allright. What, what I'm gonna do is I'm gonna . . .

HENSLEY: Is just, is to be housed so I can get some sleep . . .

FERRARI: O.K.

HENSLEY: So that I can think clearly and tell you exactly what happened.

FERRARI: O.K. How bout if I go out and talk to this deputy sheriff and find out what arrangements, arrangements are gonna be made after you leave here and go back to jail? O.K?

(Ferrari Leaves)

HENSLEY: Sure. (knocking sound) Just Mr. D.A. man.

DUNLAP: I'm sorry Mr. Hensley did you ask for me as I was walking out?

HENSLEY: Uh huh.

DUNLAP: I thought I heard you say . . .

HENSLEY: Yeah, did you wanna talk to me while he's not here please?

DUNLAP: Would you like me to talk . . .

HENSLEY: Uh huh.

DUNLAP: With you alone? Sure.

HENSLEY: You don't mind do you I mean?

DUNLAP: No, I don't mind.

HENSLEY: You know, I'm kinda tired of this bullshit. You and I both know that I'm never getting out of here. Matter of fact.

DUNLAP: Well you know, to be honest with you Mr. Hensley, I don't know all the facts.

HENSLEY: Just straight up.

DUNLAP: Straight up, I don't know all the facts of the case.

HENSLEY: You think you know what's up so you tell me.

DUNLAP: Well, you're the one that wanted to talk with me and you're the one that wanted to tell me the truth.

HENSLEY: Uh huh.

DUNLAP: Have you told me the truth Mr. Hensley.

HENSLEY: No, not exactly.

DUNLAP: And you think I suspect that.

HENSLEY: Uh huh.

DUNLAP: It is because of some of the questions I've asked you?

HENSLEY: Uh huh.

DUNLAP: Do you wanna tell me the truth Mr. Hensley?

HENSLEY: Uh huh. Is it legal for you to make a deal with me that I don't do life?

DUNLAP: Mr. Hensley, the District Attorney . . .

HENSLEY: No, no, did you hear what I'm saying?

DUNLAP: It is legal for me . . .

HENSLEY: Is it legal for you to plea bargain me that I get the death penalty?

DUNLAP: It is legal for me to make a plea bargain so you get the death penalty.

HENSLEY: Right. Can you do that?

DUNLAP: No, I can not do that. And, and, and Mr. Hensley, and you know you- . . .

HENSLEY: If I done something to do that.

DUNLAP: You called me in here and I'm being up front with you.

HENSLEY: Uh huh.

DUNLAP: O.K. And, and [unintelligible] this is a serious matter. O.K? Now, I've sat here for two hours with you and I've been fair with ya and I've listened to your story and you're holding back a lot. You know you're holding back a lot and you know there's a lot of people working on this kind of case. There's a lot of different agencies involved.

HENSLEY: Uh huh.

DUNLAP: You don't get a Homicide District Attorney to appear on a Sunday night

unless it's serious.

HENSLEY: Well I never seen anybody take pictures of me either before.

DUNLAP: O.K. Now what I am telling you is that no, I can't make you any type of plea agreement tonight.

HENSLEY: No, I asked if it was . . .

DUNLAP: I am, I am telling you . . .

HENSLEY: Legal for you that being part of our agreement . . .

DUNLAP: That you get the death penalty.

HENSLEY: That I would, instead of not, instead of not getting it that I would get it.

DUNLAP: That you would get the death penalty. Yeah that's a, that's a question I've never encountered and, Mr. Hensley um, just to be consistent with ya, I don't wanna screw with ya and tell ya an answer that's incorrect. Kay. But what I am gonna tell ya is that uh I don't believe that I could ever make that type of offer. Now we're here, it's Sunday night, it's 9:00 and I see you're thinking about what we've talked about. Do you wanna tell me the truth?

HENSLEY: I gotta sleep.

DUNLAP: Mr. Hensley, you called me back in here. Do you wanna tell me the truth?

HENSLEY: I just want a cell with a bed. All I want. To go to sleep. Can't think straight.

(Deputy Ferrari enters.)

DUNLAP: Larry would you just hang outside the door for just one moment. There was something I wanna . . .

FERRARI: I was gonna tell you that I talked to Deputy Costanza and he told me that once you get back in the jail, that once they have you positively I.D.'d, that you'll be given a bunk uh, in the cell.

HENSLEY: They took my prints hours ago.

FERRARI: Right but they need, they need to . . .

HENSLEY: I know how this thing works.

FERRARI: Check it through.

HENSLEY: I know how the machine works.

FERRARI: You weren't the only person that was booked in though either Paul.

HENSLEY: Yeah I know but still. I was the only one booked in there for three murders today huh?

FERRARI: Well anyway, I'm just telling you what the deputies told me.

DUNLAP: I just, we were [unintelligible] just one minute please.

HENSLEY: See, I'm tired of this fuckin shit.

DUNLAP: Hey Mr. Hensley, I'm tired of it too. And I'm not gonna screw with your . . .

HENSLEY: I just wanna go to sleep man.

DUNLAP: And you're gonna go to sleep. If you wanna talk with me now, now's your chance to talk with the District Attorney. If you don't wanna talk with me right now and tell me the truth, you're lookin at me right now saying Mr. D.A., I wanna talk with ya and I'm sitting here listening to ya.

HENSLEY: I don't wanna be stuck in jail forever and I know I'm not gonna get that chance to get out . . .

DUNLAP: Did you kill Mr. Shockley?

HENSLEY: No.

DUNLAP: Were you in Stockton and pull the trigger on a female Saturday? And did you kill the individual that was here in Sacramento?

HENSLEY: Huh uh.

DUNLAP: What haven't you told me the truth about?

HENSLEY: I'm telling you I don't, I'm not gonna do life in the pen. Let me start it out with the I was talking to the family, let em know [unintelligible] and I seen the news where these guys get dragged out for months going to court, even if they tell you, tell em straight up they did it, and cause they'd be dragged forever.

DUNLAP: Mr. Hensley, you're telling me you didn't do it.

HENSLEY: I'm telling you what I seen on the news.

DUNLAP: O.K. Let's, as I was leaving here, you said Mr. D.A., I'd like to talk with you.

HENSLEY. Uh huh.

DUNLAP: I asked ya, and, and you had a little grin on your face and you said that I know you're not telling me the whole story. The reason you said I know that is cause of the questions I've asked ya don't add up.

HENSLEY: But I want . . .

DUNLAP: Now my question . . .

HENSLEY: I want a bed and I want a cigarette and I want some sleep and if I get those, then I will tell you everything.

DUNLAP: Do you want me to come back tomorrow at, say after breakfast?

HENSLEY: If you don't mind. Cause I'd like to have some sleep.

DUNLAP: O.K.

HENSLEY: And I, I promise you, I'll tell you the whole truth and nothing but the truth.

DUNLAP: You haven't been up front with me? Have you tonight?

HENSLEY: Huh uh huh uh.

DUNLAP: I'm sorry, I couldn't hear you.

HENSLEY: No.

DUNLAP: And you're not going to tell me the story until you have some sleep?

HENSLEY: Uh huh.

DUNLAP: Is that what you're telling me?

HENSLEY: Yep.

DUNLAP: Are you gonna tell me at least a little bit, a brief synopsis so that I know what, whether it's worth [it] to drive all the way back up here for? I mean you're, you're telling me . . .

HENSLEY: I . . .

DUNLAP: Let you go to bed . . .

HENSLEY: I shot Larry. I sh, I shot Larry.

DUNLAP: And no one was with you were they?

HENSLEY: Huh uh.

DUNLAP: You did it by yourself didn't you?

HENSLEY: Uh huh.

DUNLAP: He drove from the shack to the Chevron station to pick you up, didn't he?

HENSLEY: Something like that.

DUNLAP: That is what happened. Is that

correct?

HENSLEY: Something like that.

DUNLAP: He met you somewhere?

HENSLEY: There's a brief synopsis. Can I have some sleep and a cigarette now? I mean it'd save you and me time and the taxpayers money.

DUNLAP: Mr. Hensley . . .

HENSLEY: And me a lot of . I just wanna sleep and a cigarette. That's all I'm gonna get outta this whole situation.

DUNLAP: Mr. Hensley.

HENSLEY: Huh?

DUNLAP: I told ya that if ya gave me a synopsis, I'd let you go to bed O.K. And that I'll come up tomorrow morning. You're asking me to drive all, a long ways and that's what I asked for. Uh I've been fair with you. I think I can continue to be fair with ya. If you don't think I'm being fair with ya, tell me please. O.K. I'll be right back. Mr. Hensley, you'll be taken right away to bed and uh processed. The only thing I can't do for you . . .

HENSLEY: They've already processed me. What else do they gotta do to get . . .

DUNLAP: No, Mr. Hensley, you're gonna be taken right away to bed as you requested like I told you you would be. O.K? I told you that synopsis and, and you go to bed. I mean that's what you asked for. That's what you

got. I'm being fair with ya. O.K. And I'll see you tomorrow morning.

(1 ACT-B 218-227 [emphasis added].)

This was the first time that appellant said that he had personally shot Shockley.

Ferrari and Dunlap returned the next morning, on October 19, and resumed interviewing appellant at 9:44 a.m. Dunlap reminded appellant that they had "talked for about two hours last night" and that appellant had asked him to return this morning. (1 ACT-B 228.) There was no new Miranda advisement. During this interview appellant cried and sobbed; he asked what was going to happen to him and he reiterated that he wanted the death penalty. (Hensley Police Interview tape – vol. II, Oct. 19; 2 ACT-B 311.)

Appellant said that he shot Shockley because Shockley reneged on his agreement to pay appellant for killing Shockley's stepdaughter Sheree. (1 ACT-B 233-237.) Appellant said that he burglarized Shockley's house twice, once before and once after the shooting. Appellant had acted alone. (1 ACT-B 233, 238-239.)

Appellant also admitted that he shot Stacy Copeland, then took her drugs and money. Appellant said that he had not meant to shoot her, but that he became excited and pulled the trigger. (1 ACT-B 249-252.)

Appellant stated that he met Renouf at a pornography shop called

Goldies. Renouf solicited appellant for a homosexual act and they agreed to meet in an abandoned warehouse district. Initially appellant had planned only to rob Renouf, but en route he decided that because Renouf was a large man he would have to shoot him. It was not appellant's intention to kill Renouf. (1 ACT-B 261-264, 269.) When they arrived at the location, appellant displayed his gun. Renouf grabbed the gun and appellant started shooting. Renouf ran away and appellant continued to shoot at him. (1 ACT-B 264.)

Appellant agreed with a description of his October 18 account of events as being "B.S." (1 ACT-B 274.) Appellant said that he was experiencing drug withdrawal, want to "get on detox," and that it was "hard to think." (1 ACT-B 274.) Dunlap responded that he would talk to someone about detoxification after another hour of interview. (1 ACT-B 275.)

The October 19 interrogation halted at 11:39 a.m. for a lunch break. It then continued from 1:12 p.m. to 1:24 p.m. (Hensley Police Interview tape – vol. II, Oct. 19.)

B. Procedural Background

On March 18, 1994, defense counsel filed moving papers asking the

court to suppress all of appellant's statements to the police. (3 CT 537-542; see also defense briefing at 1 CT 76-91 and 3 CT 546-585.) On April 21, 1994, the prosecution filed opposition papers. (3 CT 593-604.)

Hearing on this issue were held on April 11, May 9 and June 10, 1994. (3 CT 544, 674; 4 CT 862.) In connection with this issue, the court reviewed the transcripts and videotapes of appellant's police interrogation, as well as the preliminary hearing testimonies of Sacramento police detective Keith Faust, San Joaquin County detective Larry Ferrari; and San Joaquin County prosecutor George Dunlap.

Defense counsel asserted that appellant's statements should be suppressed for a number of reasons: The Miranda admonition which Detective Faust provided to appellant was deficient, in that Faust concluded his recitation by saying that he wanted to "talk to [appellant] about what you've been doing over that last couple of days. Can I talk to you about that?" (1 ACT-B 2 [emphasis added]), rather than properly asking appellant whether, having his rights in mind, he was willing to answer the officer's questions.[17] (3 CT 569-571; 2 RT 117-118, 151-152.) Appellant's recent drug use, physical injuries and lack of sleep and food precluded his statements from being deemed voluntary. (3 CT 567-569; 2 RT 118-121,

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[17] See Miranda v. Arizona, supra, 384 U.S. at 475.

153-154; 4 RT 599.) Early on in the interview, appellant invoked his rights by demanding to see an attorney (at 1 ACT-B 15), but the officers failed to honor Miranda and Edwards v. Arizona (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880] by engaging in further interrogation by way of seeking to convince appellant that the police were not trying to "set him up" and asking about marks on appellant's body. (3 CT 571-578; 4 RT 600-603.) The police denied appellant his statutory right to make phone calls within three hours following his arrest (per § 851.5). (3 CT 578-581; 4 RT 599-600.) The officers deceived appellant regarding his statutory right to make phone calls and whether he could chose to speak to the officers after he had first consulted an attorney. (3 CT 579-583; 4 RT 599, 601-602, 614.) Detective Ferrari conveyed a false promise of leniency in exchange for cooperation with interrogation by repeatedly telling appellant that there were "two sides to every story." (3 CT 588-589; see 1 ACT-B 37-38, 120.) Prosecutor Dunlap violated appellant's right to discontinue questioning by disregarding appellant's repeated requests, on the evening of October 18, to be taken to a cell and permitted to sleep. (3 CT 584-585; 2 RT 155-156.)

The prosecutor countered that the Miranda admonition provided by Detective Faust was sufficient to comply with the law. (3 CT 593-594; 2 RT 125.) The prosecutor acknowledged that early on in the October 18

interview appellant invoked his rights by asking for a lawyer; however, he further maintained that a few hours later appellant voluntarily reinitiated the interview by asking Detective Faust if he could talk to him for "a minute" and asking questions about his case. (3 CT 596-597; 2 RT 125, 129-131; 3 RT 605.) The prosecutor denied that Faust engaged in interrogation, or the functional equivalent when, following appellant's request for counsel, Faust proceeded to examine appellant's body and ask questions about injuries and marks. (3 CT 595.) The prosecutor denied that the interrogating officers improperly used deception or unfair interrogation tactics. He pointed out that, although appellant did not have access to a bed in the interview room, he appeared to sleep for about two-and-a-half hours while sitting in a chair in between visits from the officers. (2 RT 126, 129-132.) The prosecutor denied that appellant's mental state at the time of the interrogation was significantly impaired by his recent drug use or injuries. (3 CT 599-603; 3 RT 606.)

Shortly after reviewing the videotapes, the judge commented that "the real question I have in my mind is the nature and extent of the capacity of the defendant to understand what he was being told and his ability to give an informed consent and give a proper waiver." (3 RT 432.) While acknowledging that appellant had previously been subjected to police

interrogation in past cases, and was thus not "a novice" in being given his Miranda rights, the court noted that it was "obvious . . . that he was sleepy, that he was probably having some difficulty staying awake. His senses were somewhat addled." The court was accordingly concerned with the extent of appellant's intoxication and "the chemical analysis" of his blood. (3 RT 432.)

On June 10, 1994, the court denied appellant's motion to suppress. In its ruling, the court cited reliance upon Edwards v. Arizona, supra, 451 U.S. 477. The court noted that, under Edwards, "once the accused expresses desire to deal with the police only through [c]ounsel, Edwards . . . holds that he's not subject to further interrogation by authorities until [c]ounsel has been made available to him unless . . . by himself he initiated further communications or exchanges with the police." (5 RT 1051.) The court then proceeded to make a series of three factual findings leading to its ultimate conclusion that appellant's statement was admissible.

First, the court found that appellant had, in fact, invoked his right to counsel and remain silent at the point when he said, "I'm being set up. I want to see my lawyer! (See 1 ACT-B 15.) The court stated "there's no question in my mind the defendant clearly invoked his rights for the Miranda protection when he said the words that he said that no one disputes he said

on the tape. [¶.] It's clear that he wanted [c]ounsel at that particular time. All further questioning at that time should cease and come to a stop." (5 RT 1052.)

Second, the court found that Detective Faust had violated Miranda protocols by continuing to question appellant, particularly concerning injuries and marks on appellant's body. (See 1 ACT-B 15-18.) In this regard the court stated:

> The reinitiation of questioning by Detective Faust was wrong and it was a violation of Miranda rights at that time. And you can not reconcile or justify Detective Faust['s] discussions with the defendant in questions of the defendant about where he got the wounds based upon his quest for information regarding the civil case.
>
> Detective Ferrari was there, photographs were taken, the photographs were actually taken for the case in question here. So although I suppose one can say that probably part of what he did was as a stop-gap measure to do some investigation on the civil aspects of the case of how the defendant received the injuries outside of the police department, the bulk of it was for the purposes of prosecution of this case. However, the defendant didn't answer any questions at that time. But it's clear [to] the court after playing and replaying the tape that the matter came to a conclusion and based upon the statements made by, where's my phone calls? It's been all day. You're going to go over. Once you go to the county jail, you'll get those things. And the final statement to the defendant's

question was, you're going over. Okay. You're going over, okay, is what he said.

And this is in direct response to questions regarding the seeking of a phone call.

(5 RT 1052-1053.)

The court then made a third finding, to the effect that appellant, on his own initiative, restarted the interview by asking Faust if he could talk to him (at 1 ACT-B 18), and that this validated the further interrogation:

> At that point the court knows that the tape was turned off and Detective Faust was exiting when the defendant asked. "Can I talk to you for a minute?" Detective Faust comes back into the room. At that point in time everything was terminated. It was clear that he was going to be taken to the county jail whereupon he'd be booked, he'd be given a chance to make his phone call and that would be the end of it.
>
> And Detective Faust says, yes, where he re-enters the interview room, video comes back on. At that point the defendant with full knowledge of his rights launches into an attempt to pass the blame on others and exculpate himself from responsibility. And the court's not unmindful of the fact that the defendant did appear to have a great sleep deprivation as a result of either alcohol and/or drug binge. But he did have some sleep in the car in front of the police department and he also slept off and on from around 8:30 to around 1:30 in the afternoon. There were times when he was not asleep but he did get some sleep in during that period of time. Also, the court's not unmindful of the fact where he did have prior cases where

he was advised of his Miranda rights and the institution of the questioning. The court concedes that the advisement by Detective Faust was awkward, it wasn't in the form it would prefer that he ask about the rights or which explain about the rights.

But it was sufficiently clear that the defendant understood what rights he had based upon both the exposition then and also upon the prior exposition of his rights. He clearly knew that he didn't have to say anything without counsel present. And that's what he was told when the reinitiation of the discussion took place.

I can't talk to you. There was no Counsel present so you couldn't ask him any questions but the defendant persisted and made the exculpating statement.

So the advisement of rights is adequate, the invocation is clear, the reinitiation was based not upon the police misconduct, which did take place but upon the defendant's own free will in reinitiating the discussions.

Also, the court finds that it was not necessary to continue to readvise him of his rights each time the new interview was had, although it seems like later on the next day his rights were given to him again.

That's the court's ruling. Quite honestly, as I say, it is a close question, no question in my mind about it. That's the court's ruling.

(5 RT 1053-1055 [emphasis added].)

C. The Court's Ruling Was Erroneous as a Matter of Law

In People v. Hogan (1982) 31 Cal.3d 815[18], the California Supreme Court set forth the standard of review regarding denial of a defendant's motion to suppress his statements as involuntary or obtained in violation of Miranda:

> This court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] With respect to the conflicting testimony, the court must "accept that version of events which is more favorable to the People, to the extent that it is supported by the record." [Citation.]
>
> (People v. Hogan, supra, 31 Cal.3d at 835.)

The burden of proof is on the prosecution to demonstrate by a preponderance of the evidence that defendant's statement was voluntary and obtained in compliance with Miranda. (People v. Kelly (1990) 51 Cal.3d 931, 947; People v. Markham (1989) 49 Cal.3d 63, 71.)

In evaluating a claim of psychological coercion, the "question posed .

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[18] People v. Hogan, supra, was overruled on other grounds in People v. Cooper (1991) 52 Cal.3d 836.

. . is whether the influences brought to bear upon the accused were such as to overbear [defendant's] will to resist and bring about confessions not freely self-determined . . . ." (People v. Kelly, supra, 51 Cal.3d at 952; People v. Hogan, supra, 31 Cal.3d at 841.) This requires an inquiry into "'all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" (People v. Hogan, supra, 31 Cal.3d at 841 [quoting Schneckloth v. Bustamonte (1973) 412 U.S. 218, 226 [36 L.Ed.2d 853, 93 S.Ct. 2041]].)

1. Appellant Clearly Invoked His Right to Counsel

The trial court seriously misanalyzed the present situation as involving little more than appellant being given Miranda admonitions, shortly thereafter invoking his right to counsel, and then later reinitiating discussion with Detective Faust ("Can I talk to you for a minute?" (1 ACT-B 18)) for purposes of talking about his case further and ultimately confessing. The court below acknowledged that Detective Faust committed misconduct by continuing to engage in interrogation, or the functional equivalent, by denying that the police were seeking to "set up" appellant and by questioning appellant about injuries and marks on his body (see 1 ACT-B 15-17);

however, the court felt that this misconduct had no effect on appellant's decision to continue the police interview. In this regard, the court stated towards the end of its analysis:

> So the advisement of rights is adequate, the invocation is clear, the reinitiation was based not upon the police misconduct, which did take place but upon the defendant's own free will in reinitiating the discussions.
>
> (5 RT 1055.)

To begin with, the court was clearly correct in concluding that appellant invoked his right to counsel when he told Faust "I'm being set up. I want to see my lawyer!" (1 ACT-B 15). This certainly amounted to an invocation of the right to counsel. (Miranda v. Arizona, supra, 384 U.S. at 444-445; People v. Crittenden (1994) 9 Cal.4th 83, 128-129, cert. den. (1995) 516 U.S. 849.) And, in fact, Detective Faust acknowledged that appellant had thereby invoked his right to counsel and that the interrogation should have ceased at that point. (1 ACT-B 18-19.) Faust accordingly stated: "And I can't really talk to you because you want an attorney okay? You told me that earlier." (1 ACT-B 19.)

As explained below, appellant's subsequent statements and ultimate confessions to the crimes he was accused of resulted from a wide range of misconduct on the part of the authorities. The evidence presented in

connection with the suppression motion supports the conclusion that Faust and the other interrogating officers violated Miranda protocols, and that appellant's will was overborne by psychologically coercive police tactics, which included the officers' taking unfair advantage of appellant's drugged, pained, sleep-deprived and medically weakened-condition, their use of deception and their engaging in relentless interrogation.

2. Detective Faust Improperly Diluted the Required Miranda Warnings By Improperly Asking Appellant "Can I Talk to You About That?" – Rather Than Properly Asking Appellant if He Was Willing to Answer the Officers' Questions

In Miranda, the Supreme Court indicated that a police officer, after informing an in-custody defendant of his rights to counsel and to remain silent, is expected to affirmatively ask the defendant if, having heard those explanations, he is now willing to answer the officer's questions in the absence of counsel. The Miranda court stated:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or

> appointed counsel . . . . An express declaration that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.
>
> (Miranda v. Arizona, supra, 384 U.S. at 475 [emphasis added].)

In this case, there was far less than an "express declaration" that appellant was "willing to make a statement" without counsel. That is because Detective Faust deviated significantly from both the letter and spirit of Miranda, to appellant's disadvantage, by merely asking appellant if Faust could "talk to" him about the events of the last few days, rather than properly asking if appellant was willing to answer Faust's questions. This occurred as follows:

> FAUST: If you can not afford an attorney, one will be appointed free of charge to represent you before and during questioning, if you so desire. Do you understand that?
>
> HENSLEY: Um hum.
>
> FAUST: Okay. Understanding those rights, I want to talk to you about, stay with me . . . I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?
>
> HENSLEY: Yeah.

(1 ACT-B 1-2 [emphasis added].)

Detective Faust testified that in advising appellant about his Miranda rights he read from a pre-printed card, but that he varied from what was said on the card by saying "Understanding those rights, . . . I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?" The card stated: "Having those rights in mind, do you wish to talk to us now?" (1 ACT 70-71, 88, 116-117, 142-143 [emphasis added].)

Detective Faust's deviation from proper Miranda protocol was significant. Faust's inquiry to appellant – "I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?" – was clearly directed towards conveying that Faust would be doing the talking and appellant would merely be listening, rather than properly alerting appellant that Faust wanted to interrogate him and appellant was the one being asked to "talk," i.e., to answer the questions which Faust propounded. In fact, Faust never asked appellant if appellant was willing to speak or answer Faust's questions.

Even if this deceptive tactic, standing alone, was insufficient to render the interrogation improper, it serves as one more aspect of the totality of circumstances weighing in favor of appellant's resulting statement being

deemed involuntary and inadmissible. (Schneckloth v. Bustamonte, supra, 412 U.S. at 226.)

3. Detective Faust Violated the No-recontact Rule of Edwards v. Arizona (1981) 451 U.S. 477 By Interrogating Appellant After Appellant Had Invoked His Right to Counsel

In Edwards v. Arizona (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880], the United States Supreme Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." (Edwards v. Arizona, supra, 451 U.S. at 484 [fn. omitted].) Once a suspect in custody invokes his right under Miranda, his subsequent statements to police are presumed involuntary and inadmissible if obtained pursuant to an "encounter [initiated by the police] in the absence of counsel (assuming there has been no break in custody)." (McNeil v. Wisconsin (1991) 501 U.S. 171, 177 [115 L.Ed.2d 158, 111 S.Ct. 2204].) This is referred to as "the Edwards no-recontact rule." (People v. Storm (2002) 28 Cal.4th 1007, 1023.) There can be no question that Detective Faust violated the Edwards no-recontact rule by continuing to question appellant after he had invoked his right to counsel by saying, "I want to see

my lawyer!" (at 1 ACT-B 15).

Shortly after Faust began questioning appellant on the morning of October 18, 1992, appellant invoked his right to counsel. (1 ACT-B 15.) Nevertheless, Faust continued to speak to appellant in a manner equivalent to police interrogation. First, there was the following exchange:

> HENSLEY: Cause I didn't know what the fuck was going on! I woke up in front of the police station fucken . . . I'm being set up. I want to see my lawyer!
>
> FAUST: No, you're not being set up.
>
> HENSLEY: Um hum.
>
> FAUST: Okay? We're not setting you up.
>
> HENSLEY: No, I didn't say you were.
>
> FAUST: Oh, okay.
>
> (1 ACT-B 15 [emphasis added].)

Faust's statements – "No, you're not being set up." and "Okay, we're not setting you up." – were clearly directed toward encouraging appellant to trust the police and, accordingly, to continue to talk to Faust without counsel. Faust's remarks were thus the functional equivalent of continued interrogation. (People v. Sims (1993) 5 Cal.4th 405, 440, 443-444; People v. Boyer (1989) 48 Cal.3d. 247, 272-275.)

> [T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
>
> (Rhode Island v. Innis (1980) 446 U.S. 291, 301 [64 L.Ed.2d 297, 100 S.Ct. 1682]; People v. Sims, supra, 5 Cal.4th at 440.)

Faust violated the Edwards no-recontact rule again when he returned to the interview room at 1:24 p.m., after a three hour absence. At that point Faust directed appellant to remove his shirt so photos could be taken. Seeing blood on appellant's arms and hands, Faust asked appellant, "Where did you get all this here, this red in here?" (Hensley Police Interview tape – vol. I, Oct. 18, at about 1:24 p.m.; see 1 ACT 106.) Faust also asked, "Scratch here?" seeking an explanation for a scratch which appeared on appellant hand. (Hensley Police Interview tape – vol. I, Oct. 18, at about 1:24 p.m.; 1 ACT-B 16.) Faust testified that at the time he was concerned about blood and injuries on appellant's body which might connect him to one of the homicides. (1 ACT 106-107.)

Confronting appellant about his injuries and potential evidence on parts of his body, and questioning him about them certainly amounts to police interrogation on Faust's part. Detective Faust's behavior is very

similar to that recently condemned by this Court in People v. Davis (2005) 36 Cal.4th 510. Davis was given Miranda warnings and invoked his right to silence. Subsequently, in speaking to Davis, a police officer elicited an incriminating statement by telling Davis that he should think about his fingerprint which had been found on an Uzi assault rifle. (Id. at 552-553.) This Court found that the officer's remark, which indirectly accused Davis of having shot a victim, "was likely to elicit an incriminating response and thus was the functional equivalent of interrogation." (Id. at 555.) Accordingly, Davis' response was inadmissible due to the officer's Miranda violation. (Ibid.)

People v. Boyer, supra, 48 Cal.3d 247, is also instructive. In Boyer, the defendant was interviewed at the police station, read his Miranda rights and agreed to waive them. However, prior to admitting guilt, Boyer asserted his right to remain silent. (Id. at 271.) The questioning police officer nonetheless "continued the interrogation." (Id. at 265.) Finally, at a point where Boyer had still not incriminated himself, the officer ceased his questioning. However, shortly afterwards, the officer informed Boyer of new evidence against him. Defendant then admitted, "I did it." Upon being re-Mirandized, Boyer gave a full confession. (Id. at 266-267.) The Boyer court found that defendant's confession had been obtained in violation of

Miranda:

> We therefore concluded, under [Edwards v. Arizona (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880]] and [Rhode Island v. Innis (1980) 446 U.S. 291 [64 L.Ed.2d 297, 100 S.Ct. 1682]], that defendant's statement was the result of the authorities' improper resumption of contact and questioning. The Edwards rule renders a statement invalid if the authorities initiate any "communication, exchanges, or conversations" relating to the case, other than those routinely necessary for custodial purposes. [Citations.] The record discloses no custodial reason why, once defendant had invoked his Miranda right to counsel, it was necessary to approach him again to "tell him a couple of things" about the investigation. On this basis alone, we must find that defendant's statement contravened the requirements of Miranda.
>
> But Detective Lewis did more. His aggressive, prolonged interrogation earlier in the evening was calculated to convince defendant that the police believed him a guilty liar. . . . Though defendant may finally have been advised he was not under arrest, neither had he been released. The pressures to confess, or to appear innocently cooperative, were thus very strong. Under these circumstances, by confronting defendant once again with a discrepancy in his story, Lewis effectively invited defendant to make an "incriminating response" in violation of Innis.
>
> (People v. Boyer, supra, 48 Cal.3d at 274-275 [emphasis added; original emphasis and fn. omitted].)

Similarly, there was "no custodial reason" for Detective Faust to confront

appellant with possible blood and injuries on his body, and then challenge appellant to explain those things.

On each of the occasions discussed above, Detective Faust engaged in continued interrogation, or the functional equivalent, in the face of appellant's clear indication that he wanted to speak to an attorney. In the Miranda decision the United States Supreme Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.
>
> (Miranda v. Arizona, supra, 384 U.S. at 473-474 [emphasis added].)

Detective Faust's repeated violations of Miranda protocols served to taint appellant's ultimate confession notwithstanding that Detective Ferrari provided appellant with a new set of Miranda admonitions at about 7:04 p.m. on October 18 (at 1 ACT-B 122) before appellant confessed. Collazo v. Estelle (9th Cir. 1991) 940 F.2d 411, cert. den. (1992) 502 U.S. 1031 is

instructive in this regard. Collazo, following his arrest, indicated that he wished to talk to a lawyer. In response, a police officer told him that once he obtained an attorney that attorney would advise him not to talk to the police and then "it might be worse for you." (Id. at 414.) Collazo was then permitted to visit with his wife. Three hours after his initial exchange with the police, Collazo reinitiated contact with the officers he had originally spoken with. After again receiving Miranda warnings, he proceeded to confess to the crimes he had been arrested for. (Ibid.)

The Ninth Circuit found that the police officer's statement that consulting a lawyer might prove to Collazo's disadvantage constituted a violation of Miranda safeguards. (Id. at 416-417.) The court further found that the passage of three hours time and the rereading of Miranda warnings did not dissipate the taint of the preceding violation:

> . . . California argues that the totality of the relevant circumstances and the characteristics of the confessor demonstrate that when Collazo asked to see Officers Destro and Rolen he was acting voluntarily, knowingly and intelligently, not because of any previous compulsion . . . .
>
> In making this argument, California assumes that following a Miranda violation the appropriate question is the same as it is if no such violation has previously occurred -- that is, did Collazo initiate the communication that led to the incriminating statements? We need not decide whether the state's view is correct,

> because even assuming for the sake of argument that it is, we find as explained below that Collazo's initiation of the communication leading to the second interrogation was the product of the coercive statements made by the police during the first, illegal interrogation.
>
> California's argument fails to appreciate the evident linkage between the coercion and the confession, and it fails to accord appropriate weight to the rules that govern this inquiry.
>
> (Id. at 420 [emphasis added].)

In sum, it is clearly wrong to conclude, as did the court below (see 5 RT 1055), that this is simply a case of a defendant invoking his right to counsel and then changing his mind a few hours afterwards and reinitiating discussion with the police. Rather, in this case Detective Faust violated Miranda by continuing to seek incriminating statements from appellant after he had demanded to speak to an attorney. Appellant's ultimate change of mind, and the confessions which ultimately followed, were the by-product of Detective Faust's earlier functionally-equivalent-to-interrogation statements made in blatant disregard of appellant' invocation of his right to counsel. (Collazo v. Estelle, supra, 940 F.2d at 420; People v. Boyer, supra, 48 Cal.3d at 271-275.) Accordingly, on this ground alone appellant's confession should be suppressed.

4. The Interrogation Was Improper Because the Police Detectives Acted in Disregard of Appellant's Sleep-Deprived, Medical-Weakened and Drug-Impaired State

The evidence was undisputed that, at the time of the interview, appellant was a heavy user of hard drugs, including methamphetamine, cocaine and heroin. A blood sample taken shortly following appellant's arrest showed a high level of methamphetamine in his system. (See 51 RT 14753-14754, 14757-14578, 14790, 14792.) In the course of the police interrogation there are several references to appellant's binging on those drugs over the past few days. (1 ACT-B 20, 41, 260, 252, 263.) Appellant said he had been "shooting speedballs" – a mixture of one gram heroin and one gram methamphetamine. (1 ACT-B 260.) On October 19, appellant requested and received detoxification treatment at the jail. (1 ACT-B 274-275.)

At the time of his arrest, police officers had thrown appellant to the ground, injuring his forehead. (1 ACT 60.) The injury to appellant's upper forehead is clearly visible on the videotape of the interview. (Hensley Police Interview tape – vol. I, Oct. 18.) At various points during the interview, appellant complained about his head injury, but he did not receive any medical attention for it until sometime after 3:30 p.m., over seven and a half

hours following his arrest. (1 ACT 15-16, 67; 2 ACT 414.)

Appellant was not offered any food until 3:32 p.m., seven-and-a-half hours after his arrest. (1 ACT 53, 135, 140-141.)

Appellant's desperate need for sleep is readily apparent from the videotape of his interrogation on the day of his arrest. (Hensley Police Interview tape – vol. I, Oct. 18.) Appellant is constantly sitting with his head resting flat on his arms, which are folded on the table. His words are slurred. Appellant is seen falling asleep whenever he is left alone in the room. Detective Faust interrupted his recitation of Miranda warnings, at the beginning of the interview, to caution appellant to "look at me" and "stay with me." (1 ACT-B 1-2.)

The court below noted concern with appellant's sleepy appearance, as seen on the videotape, stating that it was "obvious . . . that [appellant] was sleepy, that he was probably having some difficulty staying awake. His senses were somewhat addled." (3 RT 432.) The court also expressed concern regarding the extent of appellant's intoxication impairment. (3 RT 432.)

Towards the end of the first day of interrogation, at about 9:00 p.m., prosecutor Dunlap demanded of appellant, "you got something you want to say to us?" (1 ACT-B 219.) Appellant replied, "Yeah, after I'm given a cell

and eight hours of sleep." (1 ACT-B 219.) Nonetheless, the interrogation continued. Dunlap asked appellant, "Do you wanna tell me the truth?" (1 ACT-B 222.) Appellant, crying, replied, "I gotta sleep." (1 ACT-B 222; Hensley Police Interview tape – vol. I, Oct. 18, at about 9:10 p.m.)

Dunlap then said, "Mr. Hensley, you called me back in here. Do you wanna tell me the truth?" Appellant said, "I just want a cell with a bed. All I want. To go to sleep. Can't think straight." (1 ACT-B 222-223.) Dunlap repeatedly demanded that appellant give him a synopsis of the next day's interview before Dunlap would leave appellant alone, notwithstanding appellant's repeated requests to simply be allowed to sleep. (See 1 ACT-B 225-226.) It was only after this badgering by Dunlap that appellant finally admitted, for the first time, that he had killed Shockley. (1 ACT-B 226.)

Pain, sleep deprivation, drug intoxication and hunger are all factors weighing against voluntariness. (Greenwood v. Wisconsin (1968) 390 U.S. 519 [20 L.Ed.2d 77, 88 S.CT. 1152]; In re Cameron (1968) 68 Cal.2d 487, 500-503.) The combination of appellant's drug-impaired, sleep-deprived and medically-weakened condition weighs heavily in favor of a finding that appellant's statements to the officers were involuntary and, thus, inadmissible.

In In re Cameron, supra, 68 Cal.2d 487, the defendant was

interrogated by the police while he was under the influence of alcohol and doctor-administered Thorazine. The California Supreme Court concluded that the statements provided by Cameron after he had been given the Thorazine were involuntary and inadmissible. (Id. at 497, 502-503.) In analyzing this situation, this Court stated:

> A confession is involuntary unless it is "the product of a rational intellect and a free will." (Blackburn v. Alabama (1960) 361 U.S. 199, 208 [4 L.Ed.2d 242, 249, 80 S.Ct. 274]; Davis v. North Carolina (1966) 384 U.S. 737, 739 [16 L.Ed.2d 895, 897, 86 S.Ct. 1761].) It is not the product of a rational intellect and a free will if the petitioner's will to resist confessing is overborne. (Rogers v. Richmond (1961) 365 U.S. 534, 544 [5 L.Ed.2d 760, 768, 81 S.Ct. 745]; People v. Ketchel (1963) 59 Cal.2d 503, 520-521 []; People v. Lopez (1963) 60 Cal.2d 223, 248 [].) An accused's will can be overborne by pressures engineered by physical or psychological coercion on the part of law enforcement officers (Rogers v. Richmond, supra; People v. Lopez, supra), or by the influence of a drug (Townsend v. Sain (1963) 372 U.S. 293, 308-309 [9 L.Ed.2d 770, 782-783, 83 S.Ct. 745]) . . . that impairs his ability to exercise his rational intellect and free will. If an accused's will is overborne because of impairment of his ability to exercise his rational intellect and free will, it is immaterial whether that impairment was caused by the police, third persons, the accused himself, or circumstances beyond anyone's control. (Townsend v. Sain, supra .)

(In re Cameron, supra, 68 Cal.2d at 498 [emphasis added].)

The combination of appellant's pained, drug-impaired and medically-weakened condition weighs heavily in favor of a finding that appellant's statements to the officers were involuntary and inadmissible.

5. Detective Ferrari Falsely Indicated that Appellant Would Receive Leniency if He Confessed to the Police

Beginning at about 2:00 p.m. on October 18, Detectives Ferrari and Ordez began questioning appellant. When Detective Ferrari started this interview he did not provide a Miranda admonition. Instead, Ferrari started by telling appellant, "There are two sides to every story, okay?" (1 ACT-B 37-38.) Such "two sides to every story" language has been held to strongly imply that cooperation with authorities will serve to mitigate the defendant's punishment. (Collazo v. Estelle, supra, 940 F.2d at 422.)

About five hours later, at the start of the 7:00 p.m. interview conducted by Ferrari and Dunlap, Ferrari began by reminding appellant that they had previously "talked about the importance of uh there being two sides to a story." (1 ACT-B 120.)

It is well settled that a defendant's statement to the police is involuntary and thus inadmissible if it is elicited by any promise of benefit or

leniency, whether expressed or implied. (People v. Jiminez (1978) 21 Cal.3d 595, 611-613; People v. McClary (1977) 20 Cal.3d 218, 227-230[19]; People v. Visila (1995) 38 Cal.App.4th 865, 873-874; United States v. Rogers (5th Cir. 1990) 906 F.2d 189, 192; United States v. Tingle (9th Cir. 1981) 658 F.2d 1332, 1335-1337.) In People v. Ray (1996) 13 Cal.4th 313, this Court stated:

> In general, "'any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law.'"
>
> (Id. at 339 [citations omitted].)

Furthermore, it makes no difference whether the officers' representations of leniency were merely implicit, rather than express:

> [A]ny suggestion that only express promises of a benefit render a confession involuntary must be rejected. Both the case law and common sense are to the contrary. Implied promises of leniency render a confession inadmissible. And for good reason. To hold otherwise would simply permit police to do indirectly what they could not do directly.

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[19] People v. Jiminez, supra, 21 Cal.3d 595 and People v. McClary, supra, 20 Cal.3d 218 were overruled on other grounds in People v. Cahill (1993) 5 Cal.4th 478, 509-510, fn. 17.

(In re Shawn D. (1993) 20 Cal.App.4th 200, 216 [emphasis added; citing People v. Jiminez, supra, 21 Cal.3d at 611-612, and People v. Sultana (1988) 204 Cal.App.3d 511, 522].)

6. The Interrogation Was Tainted By Deception

The record indicates that Detective Faust deceived appellant in two important respects: first, Faust told appellant that he would not be allowed a telephone call until he was booked into the jail; and, second, Faust informed appellant that if he invoked his right to speak to an attorney he would thereafter not be permitted to speak to the police officers, even if he wanted to do so.

With regard to the first point, not only was appellant held for far more than three hours without being allowed a phone call, but when he specifically requested an attorney or phone call, at 1:28 p.m. on October 18, 1992 (five and a half hours following his arrest), he was told he would not get a phone call until he was booked into the jail. (1 ACT-B 18.) Detective Faust testified that he was aware of the law requiring that an arrestee be allowed phone calls within three hours of his arrest. (1 ACT-B 91.) Nonetheless, Faust also testified that, per the policy of his police department, appellant would not have been permitted access to a telephone until he was

removed from the second floor of the police annex building where the series of interviews were taking place. (1 ACT 91.) Thus, the record shows that the earliest that appellant could have been permitted any phone calls was at about 3:49 p.m., seven and half hours after he was arrested. (See 1 ACT 134-135.) This police conduct amounted to a violation of section 851.5, which states in subdivision (a): "Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls . . . ."

Moreover, the police officers' illicit tactics of not allowing appellant to make any phone calls until long after the three hours permitted by section 851.5, subdivision (a), and their unjustified delay in booking appellant, acted in combination to frustrate appellant's ability to effectuate his invocation of his right to counsel by obtaining an attorney. This interference and obstruction with appellant's right to counsel also serves as cause for suppression. (See Alvarez v. Gomez (9th Cir 1999) 185 F.3d 995 [Miranda violation where police officer misled suspect regarding availability of counsel]; United States v. Anderson (2nd Cir. 1991) 929 F.2d 96, 98-102 [police indicated that obtaining counsel would be to defendant's disadvantage]; Collazo v. Estrelle, supra, 940 F.2d at 414, 416-419.)

Detective Faust also provided a misleading and inaccurate response to appellant's expressed desire to speak to an attorney while also maintaining his prerogative to talk to the police officers. Shortly into appellant's first police interview, on the morning of October 18, appellant told Faust, "I'm being set up, I want to see my lawyer!" (1 ACT-B 15.) About three hours later, Faust ordered appellant to remove his shirt and directed questions to appellant as he examined his body. (1 ACT-B 16-18.) Appellant asked Faust when he would "get to see a lawyer or get a phone call." (1 ACT-B 18.) Faust replied that appellant would get these things after he was booked into the county jail. (1 ACT-B 18.) Appellant then asked if he could "talk to [Faust] for a minute" and proceeded to ask why the police were "trying to work me so hard?" (1 ACT-B 18.) In the immediately following exchange, Faust made three statements directed towards presenting a false choice to appellant between speaking to Faust or talking to an attorney: "And I can't really talk to you because you want an attorney okay? You told me that earlier." (1 ACT-B 19.) "[W]e was [sic] asking you questions this morning, but I can't talk to you because you want to talk to an attorney." (1 ACT-B 19.) "Is Donzell well . . . you wanna, you wanna talk or you want an attorney?" (1 ACT-B 19.) When appellant then indicated a willingness to talk, Faust replied, "I'm gunna ask some questions, you gotta,

you gotta respond to them." (1 ACT-B 24.)

Effectively, Faust forced appellant to make a choice between talking to the officers and receiving an attorney. This false choice, between having counsel and cooperating with the police by answering their questions has been condemned. (United States v. Anderson, supra, 929 F.2d at 98-102; Collazo v. Estelle, supra, 940 F.2d at 414, 416-419.)

Faust gave a misleading and inaccurate response to appellant's expressed desire to speak to a lawyer while maintaining his option to also speak to the police officers. In fact, if appellant consulted an attorney, the attorney could have advised appellant regarding his making a statement to the police officers or the district attorney's office. The attorney could also have accompanied appellant to any such meeting. The attorney could not prevent appellant from giving a statement to the police if appellant chose to do so. (See People v. Thompson (1990) 50 Cal.3d 134, 164 [defendant remained free, after invoking right to counsel and receiving counsel's advice not to speak to the police, to give a statement to the police if he chose to do so]; see also Collazo v. Estelle, supra, 940 F.2d at 416-420; People v. Harris (1987) 191 Cal.App.3d 819, 825.) Therefore, what Detective Faust indicated to appellant was untrue and misleading. Appellant's decision to talk to a lawyer before talking to Faust would not prevent appellant from

talking to Faust if appellant instructed his attorney that this was what he wanted to do; appellant's speaking to an attorney beforehand would only have ensured that appellant would be in a position to make a fully informed decision regarding whether to give a statement to the police.

Even if Detective Faust's deceptive tactics regarding appellant's rights to make phone calls and to consult an attorney do not, standing alone, render the interrogation improper, they serve as another aspect of the totality of circumstances weighing in favor of appellant's subsequent statements being deemed involuntary. (People v. Hogan, supra, 31 Cal.3d at 840-841; In re Shawn D. (1993) 20 Cal.App.4th 200, 214.)

7. Relentless Interrogation

Furthermore, the police officers and prosecutor Dunlap engaged in illicitly coercive and relentless interrogation.

Appellant was arrested at 7:53 a.m. on October 18, after being found asleep in a vehicle parked in front of the police station. (1 ACT 57-59.) During his arrest he had been thrown him to the ground, causing a injury to his forehead. (1 ACT 60.) Shortly following this, appellant was dressed in jail clothes and taken to the homicide interrogation room on the second floor

of the police annex building. (1 ACT 60-61, 91.) Detective Faust's initial interview began at about 9:41 a.m. (1 ACT 11-12.) Notwithstanding appellant's obvious drug-impaired and sleep-deprived state, the interrogation of appellant continued, off and on, until about 9:30 p.m. that evening. (Hensley Police Interview tape – vol. I, Oct. 18.) The next day appellant was further interrogated from 9:44 a.m. to 1:24 p.m. (Hensley Police Interview tape – vol. I, Oct. 19.)

In total, appellant was subjected to approximately 5 hours of interrogation over 12 hours on October 18, and another 2 hours the following morning. This amounts to 342 pages of appellate record. (1 ACT-B and 2 ACT-B.) During the interviews, appellant repeatedly cried. He also complained several times about the ongoing pain he was experiencing. (Hensley Police Interview tape – vol. I, Oct. 18; 1 ACT 15-16; 1 ACT-B 121.)

Faust's first interview of appellant lasted from about 9:41 to 10:08 a.m., at which point appellant asked for a lawyer. (1 ACT 11-12; 1 ACT-B 15.) It is significant that after appellant invoked his right to counsel, Detective Faust proceeded to leave him alone for three hours, until 1:24 p.m., in a windowless interrogation room without food, a bed or toilet facilities. This was done in clear disregard of appellant's physical needs,

particularly his desperate need for sleep, which would have been as readily apparent to Detective Faust at the time as it subsequently was to Judge Grande when he viewed appellant's condition on videotape. (See 3 RT 432.) Holding appellant incommunicado in this manner also violated appellant's statutory right to make three phone calls within three hours of his arrest; a right which Detective Faust was admittedly aware of. (1 ACT-B 91.)

Faust's second interview of appellant began at about 1:24 p.m. and continued until about 1:49 p.m. Shortly after that, Detectives Ferrari and Ordez of San Joaquin county began their interview, which continued until about 3:32 p.m., after which appellant was finally taken to be booked. (Hensley Police Interview tape – vol. I, Oct. 18.)

The next interview of appellant began at about 7:04 p.m. and was conducted by Detective Ferrari and prosecutor Dunlap. The fact that appellant was not provided with a second Miranda admonition until this late interview (1 ACT-B 122) is also a factor weighing against the voluntariness of his ultimate confession. (People v. Mickle (1991) 54 Cal.3d 140, 169-170; People v. Riva (2003) 112 Cal.App.4th 981, 993-994.) And it must be kept in mind that the 7:04 p.m. Miranda admonition represents the very first time that appellant was properly asked if, having his Miranda rights in mind, he was willing to talk to a police officer. (See subpart C.2., above.)

The interview by Ferrari and Dunlap continued to about 9:30 p.m. (Hensley Police Interview tape – vol. I, Oct. 18.) During the last portion of this interview, we see appellant crying and begging to be allowed to sleep while Dunlap hammers away at him to get him to admit that he shot Copeland and killed Shockley and Renouf. (1 ACT-B 224-227; see description of this part of interview at subpart C.4., above.) Prosecutor Dunlap's behavior clearly constituted coercive interrogation. "Any words or conduct which reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely at that time must be held to be an invocation of the Fifth Amendment privilege." (In re Joe R. (1980) 27 Cal.3d 496, 515; People v. Burton (1971) 6 Cal.3d 372, 382.)

The behavior of Dunlap and appellant's other interrogators, in hammering away at appellant, ignoring his clearly impaired condition, was clearly meant to and did effectively convey that the interrogation would not cease until appellant conformed his story to what they clearly wanted to hear. All this was plainly intended to communicate to appellant, in his pained and sleep-deprived state, that time meant nothing to his interrogators and that questioning would continue until they got what they wanted from him.

Review of past cases barring a defendant's statements to police as

involuntary compels the conclusion that appellant's admissions in the present case were likewise involuntary in violation of appellant's rights under the Fifth, Sixth and Fourteenth Amendments. (People v. Hogan, supra, 31 Cal.3d at 839-844; People v. Hinds[20] (1984) 154 Cal.App.3d 222, 238 [lengthy interrogations, threats coupled with suggestions of leniency if defendant confessed]; People v. Flores (1983) 144 Cal.App.3d 459, 470-472 [interrogation for over an hour, overcoming appellant's repeated denials]; People v. Nicholas (1980) 112 Cal.App.3d 249, 264-266 [lengthy and relentless questioning in response to defendant's various versions of events]; People v. Alfieri (1979) 95 Cal.App.3d 533, 545 [similar].)

In Hinds the court particularly condemned a situation, like the present, where police officers continued to hammer away at a suspect's claim of innocence until he broke down and told them the story they obviously wanted to hear:

> Thereafter, with no break in the interrogation, the detectives hammered away at appellant's claim of accident for over an hour. They used psychologically coercive tactics to wear down his will to resist, inducing him to incriminate himself further. The officers repeatedly suggested appellant's refusal to admit he intentionally killed the victim was cowardly,

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[20] People v. Hinds was disapproved on other grounds in People v. Cahill (1993) 5 Cal.4th 478, 504-505, fn. 16.

> and would make things worse for appellant, as well as harder on his friends and his mother. . . . [T]he pressures employed here are similar to those condemned in People v. Johnson (1969) 70 Cal.2d 469, 479 [], and People v. Hogan [(1982)] 31 Cal. 3d 815. The pressures plainly were a motivating cause of appellant's confession and the record cannot support a finding beyond a reasonable doubt that the confession was voluntary. (Hogan, supra, at 843.)
>
> (People v. Hinds, supra, 154 Cal.App.3d at 238-239 [emphasis added].)

8. Suppression Should Have Been Granted

In sum, for the reasons stated above, appellant's statements to his various interrogators should have been suppressed. Miranda safeguards were violated in that: 1) Detective Faust deceptively asked appellant if Faust could "talk to" him about recent events instead of properly inquiring whether appellant was willing to answer Faust's questions; 2) Faust continued to engage in interrogation or the functional equivalent after appellant invoked his right to counsel; and 3) prosecutor Dunlap similarly disregarded appellant's repeated efforts to terminate the conversation. Appellant's statements were also involuntary, obtained in violation of the due process clauses of the Fifth and Fourteenth Amendments, because: 1) the officers took unfair advantage of appellant's drug-impaired, sleep-deprived and

medically-weakened condition; 2) Detective Ferrari made a false representation that appellant might secure some leniency by providing a truthful account to the officers, by way of twice telling appellant that there were "two sides to every story"; 3) Detective Faust deceived appellant and illicitly obstructed his right to counsel by falsely telling him that he was not immediately entitled to make at least three phone calls and that appellant would forever lose the right to speak to the police officers if he chose to speak to a lawyer first; and 4) the officers engaged in prolonged and relentless interrogation of appellant.

Considering the totality of circumstances, the court below erred in denying the defense motion to exclude appellant's statements to the police officers as involuntary. (Schneckloth v. Bustamonte, supra, 412 U.S. at 226; People v. Hogan, supra, 31 Cal.3d at 841.)

D. Prejudice

In People v. Cahill, supra, 5 Cal.4th 478, this Court held that the wrongful admission of a defendant's confession requires reversal unless the error is found to be harmless under the Chapman[21] standard – i.e., the State

[21] Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].

is able to establish beyond a reasonable doubt that this error did not affect the verdict. The State cannot meet that heavy burden in this case.

Appellant's videotaped confession to the police detectives was the centerpiece of the prosecutor's guilt-phase case against appellant. In his closing argument, the prosecutor spoke repeatedly and at length about the incriminating statements which appellant had made during the course of his police interrogation. (See 26 RT 7189-7192, 7203, 7207-7210, 7301-7304, 7316.) The prosecutor argued that appellant's videotaped statements demonstrated that he killed Shockley for the very purpose of robbing him, and that appellant's taking of Shockley's property was not merely an afterthought to a homicide committed in anger. (26 RT 7190-7191, 7208-7209, 7301-7304.) In his rebuttal argument, the prosecutor played an edited four-and-a-half minute video made up of six separate segments of appellant's police interview spliced together. As composed, the first part of this tape related to the Shockley charges, the second to the Copeland charges, the third to the Renouf charges and the fourth part was aimed at defeating the defense claim that appellant's mental states were in any way impaired by intoxication. (26 RT 7302-7304; see 26 RT 7286-7290.) Stopping this replay of his four-and-a-half minute videotape at various points, the prosecutor argued that appellant's own words established that

robbery was the motive for killing Shockley, that appellant clearly intended to kill Renouf as well as Copeland, and that appellant's drug use did not impair his possession of the specific mental states required for the various charged offenses. (26 RT 7302-7304.) (See People v. Minifie (1996) 13 Cal.4th 1055, 1071-1072 [prejudice shown where prosecutor's closing argument takes advantage of court's error].)

This was a close case. Appellant's statements to the police detectives were particularly useful to the prosecution in establishing that appellant possessed a preexisting intent to rob Shockley for purposes of proving that Shockley's death was a first degree felony murder, by way of robbery, and that the robbery special circumstance attached to the Shockley murder count was true. (See appellant's statements to police at 1 ACT-B 234, 236-237 [appellant talks about killing Shockley and decision to take his property].) And appellant's statements regarding Renouf served the same purposes in showing that count 8 was a first degree felony (robbery) murder and that the corresponding robbery special circumstance allegation was true. (See appellant's statements to police at 1 ACT-B 263 [appellant states that prior to shooting Renouf he formed intent to "shoot him . . . , disable him and take his wallet".)

Appellant's jury clearly had problems with the charges. During

deliberations the jury made several requests to the court, by way of requesting clarification of count 11 (jail escape), a list of exhibits, copies of the various stipulations, and an explanation of the special finding attached to count 4 (Shockley burglary). (6 CT 1429-1430, 1473-1474; 26 RT 7419-7422; 27 RT 7430-7434.) Especially telling is that the jury asked for a replay of the prosecutor's four-and-a-half minute abridgement of appellant's videotaped police interview (6 CT 1430; 26 RT 7421-7422), a request which the trial court refused to accommodate (26 RT 7424-7426; 27 RT 7429). Such communications to the court by a deliberating jury are indicative that it had difficulty deciding this case, and the jury's request for the prosecutor's videotape abridgement of the interrogation shows that the jury was particularly focused on appellant's police interview. (See People v. Markus (1978) 82 Cal.App.3d 477, 480; People v. Williams (1971) 22 Cal.App.3d 34, 40.)

Moreover, appellant's guilt-phase jury deliberated for a little over a day, which indicates that it had difficulty reaching a verdict as to the overall case. (See 26 RT 7407, 7419, 7424; 27 RT 7437.) In People v. Woodard (1979) 23 Cal.3d 329, this Court stated that "nearly six hours of deliberation by the jury before they reached a verdict" indicated that a case was "far from open and shut." (Id. at 341.) This sentiment was repeated in People v.

Cardenas (1982) 31 Cal.3d 897: "Here, the jury deliberated [for 12 hours,] twice as long as the jury in Woodard, a graphic demonstration of the closeness of this case." (Id. at 907 [emphasis added].)

Appellant's convictions should be reversed, based upon the court's error in denying suppression of appellant's statements to the police.

IV. THE TRIAL COURT'S CALJIC NO. 2.15 INSTRUCTION, REGARDING THE PRESUMPTION FLOWING FROM APPELLANT'S POSSESSION OF RECENTLY STOLEN PROPERTY, UNCONSTITUTIONALLY REDUCED THE PROSECUTION'S BURDEN OF PROOF

Appellant asserts that the CALJIC No. 2.15 instruction given at his trial created an unconstitutional presumption of guilt. As explained below, the problem with this instruction is that it affirmatively instructed the jury – in a matter which undercut the proof-beyond-a-reasonable-doubt standard – that "slight" corroborating evidence beyond a factual finding that "defendant was in conscious possession of recently stolen property" was sufficient to prove appellant guilty of robbery or burglary.

A. Procedural Background

Prior to the court's instructing the jury, defense counsel objected to the court's giving CALJIC No. 2.15, as being unsupported by the evidence. (25 RT 7017, 7096.) The court overruled this objection (25 RT 7097) and instructed the jury as follows:

> If you find that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of robbery or burglary. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attribute of possession – time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, his false or contradictory statements, if any, and/or other statements he may have made with reference to the property[,] a false account of how he acquired possession of the stolen property [or] any other evidence which tends to connect the defendant with the crime charged.
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> (26 RT 7137-7138; 5 CT 1318 [emphasis added].)

B. This Error is Properly Preserved for Appeal

A trial court has a sua sponte duty to correctly instruct the jury on the general principles of law governing the case before it. (People v. Hernandez (1988) 47 Cal.3d. 315, 353; People v. Avalos (1984) 37 Cal.3d 216, 229.) A trial court's instructions should be correctly phrased and not affirmatively

misleading. (People v. Forte (1988) 204 Cal.App.3d 1317, 1323; People v. Satchell (1971) 6 Cal.3d 28, 33, fn. 10.) This was certainly not a case of invited error by defense counsel, which is a limited exception to this general rule. As stated above, defense counsel objected to CALJIC No. 2.15 and asked that it not be given. (25 RT 7017, 7096.) And, of course, section 1259 permits review of instructional error without an objection.

Appellant's federal constitutional claims regarding the CALJIC No. 2.15 instruction are adequately preserved for appeal because appellant's present constitutional objections rest upon the same factual and legal issues as defense counsel's stated objection. (People v. Partida, supra, 37 Cal.4th at 433-439; People v. Yeoman, supra, 31 Cal.4th at117-118.)

C. CALJIC No. 2.15 Creates an Unconstitutional Presumption of Guilt

The problem with this instruction is that it affirmatively instructed the jury – in a matter which undercut the proof-beyond-a-reasonable-doubt standard – that "slight" corroborating evidence beyond a factual finding that "defendant was in conscious possession of recently stolen property" was sufficient to prove appellant guilty of robbery or burglary. Appellant asserts that it should be the province of the jury alone – not the court – to determine

the weight to be given particular items of evidence and intermediate findings of fact[22] in assessing whether defendant's liability for a crime at-issue has ultimately been proven beyond a reasonable doubt. CALJIC No. 2.15 usurps the jury's role by virtue of the court's instructing the jurors regarding the weight they should assign to a finding of defendant's conscious possession of recently stolen property in assessing the ultimate issue of whether or not defendant's guilt for the crime of robbery or burglary has been established beyond a reasonable doubt.

This violated appellant's protection, under the due process clauses of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (In re Winship (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068]; People v. Valenzuela (1985) 175 Cal.App.3d 381, 392.) Due process requires that "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." (Sullivan v. Louisiana, supra, 508 U.S. at 278 [citations omitted].)

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[22] For purposes of this argument, appellant refers to his alleged conscious possession of recently stolen property as an "intermediate factual finding," as opposed to the "ultimate" factual finding of appellant's identity as a robber or burglar.

In Ulster County Court v. Allen (1979) 442 U.S. 140 [60 L.Ed.2d 777, 99 S.Ct. 2213] the Supreme Court emphasized that the Winship rule must be paramount in evaluating the constitutionality of instructions that direct the jurors on how they should make use of certain evidence or intermediate factual findings in determining the ultimate question of defendant's guilt:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime – that is, an "ultimate" or "elemental" fact – from the existence of one or more "evidentiary" or "basic" facts. [Citations.] The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. [Citing In re Winship, supra, 397 U.S at 364; Mullaney v. Wilbur (1975) 421 U.S. 684, 702-703, fn. 31 [44 L.Ed.2d 508, 95 S.Ct. 1881].]
>
> (Ulster County Court v. Allen, supra, 442 U.S. at 156 [emphasis added].)

By way of example, a juror in the present case could have reasoned as

follows: "I believe that the defendant was in possession of some of Larry Shockley's stolen property as found by the police at the time of defendant's arrest. However, based upon what defendant later told the police, it is possible that he may have killed Shockley concerning an argument over Shockley's desire to have Sheree Gledhill killed, and defendant decided afterwards to take Shockley's money and possessions. Therefore, I have difficulty in saying that it has been established beyond a reasonable doubt that the defendant committed a robbery. However, the judge also told us, by way of CALJIC No. 2.15, that we can convict the defendant of robbery if we find 'slight' corroborating evidence of this crime beyond the defendant's knowing possession of the stolen items." If some or all of the jurors followed this reasoning process, which is totally consistent with the CALJIC No. 2.15 instruction, then they could have made a finding of appellant's guilt which might not have occurred had the jurors used their independent judgment to weigh the fact of appellant's possession of stolen property in assessing whether he was guilty of robbery-murder and/or robbery as to Shockley, with respect to counts 1 and 2. As previously indicated, the United States Supreme Court has held that an instruction which significantly "curtails the factfinder's freedom to assess the evidence independently" violates due process. (Ulster County Court v. Allen, supra, 442 U.S. at 156

[emphasis added].)

The issue presented here is distinguishable from the instruction considered in Barnes v. United States (1973) 412 U.S. 837 [37 L.Ed.2d 380, 93 S.Ct. 2357]. Barnes involved an instruction which told the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." (Id. at 839-840 [emphasis added; fn. omitted].) The Supreme Court held that this instruction established only a permissible inference which did not offend due process. (Id. at 845.) CALJIC No. 2.15 is different from the instruction scrutinized in Barnes because the above-underscored language in the Barnes instruction is purely permissive in tone and does not inform the jury as to the manner in which the intermediate finding of defendant's possession of recently stolen property is to be weighed. CALJIC No. 2.15, on the other hand, goes outside these permissible bounds in telling the jury that only "slight" corroborating evidence beyond the finding of possession of recently stolen property is necessary to convict the defendant of robbery or burglary.

A second distinction is that in Barnes the crime at-issue was the

knowing possession of stolen property, such that the instruction only involved an inference from the non-intent elements of the offense toward establishing the missing intent element of the same offense.[23] Here, by contrast, CALJIC No. 2.15 goes much further: from an intermediate factual finding of a defendant's knowing possession of stolen property to an ultimate finding of defendant's identity as the robber or burglar who stole this property. Appellant asserts that it is impermissible for a court to instruct a jury how heavily it should weigh an intermediate finding that appellant has committed a lesser crime (possessing stolen property) in determining if he is guilty of a greater crime (robbery or burglary).

The "slight" corroboration language contained in CALJIC No. 2.15 has its origin in cases which predate Winship. (See People v. McFarland (1962) 58 Cal.2d 748, 754-755, and cases cited therein; see also People v. Anderson, supra, 210 Cal.App.3d at 420-421.) Moreover, McFarland and its

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[23] People v. Anderson (1989) 210 Cal.App.3d 414, which involved issues concerning CALJIC No. 2.15, is distinguishable for similar reasons. Anderson, like Barnes, involved a trial and conviction for receiving stolen property. (Id. at 418.) Thus, the question was limited to inferring the intent element where the non-intent elements of the same crime have been established. Furthermore, although the defendant in Anderson unsuccessfully argued that 1) the presumption flowing from CALJIC No. 2.15 was permissive and not mandatory (id. at 427-429) and 2) the instruction improperly lightened the prosecutor's burden of proof by stating that corroborating evidence by itself need not be sufficient to establish guilt (id. at 430), Anderson expressly did not address the present issue – CALJIC No.2.15's language that "this corroborating evidence need only be slight." (See Ibid.)

predecessors use the "slight" corroboration language in the context of discussing claims of insufficiency of the evidence on appeal, a context which calls for "review . . . in light most favorable to the judgment." (People v. Green (1980) 27 Cal.3d 1, 55.) This is quite a different perspective from how a jury should be instructed with regard to inferring guilt from the evidence before it. "[T]he fact that . . . language [is] substantially the same as that employed in a judicial opinion does not mean that it [is] adaptable to, or appropriate in, an instruction to a jury." (People v. Darnell (1951) 107 Cal. App.2d 541, 549; accord People v. Russell (1926) 80 Cal.App. 243, 245; People v. Adams (1926) 76 Cal.App. 188, 191.)

In sum,[24] the court's instructions permitted the jury to conclude that appellant was guilty on proof of less than beyond a reasonable doubt, in violation of his rights to due process under the Fifth, Sixth and Fourteenth Amendments. (In re Winship, supra, 397 U.S. at 364; Sandstrom v. Montana (1979) 442 U.S. 510, 524 [61 L.Ed.2d 39, 99 S.Ct. 2450].) It is

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[24] People v. Gamble (1994) 22 Cal.App.4th 446 rejected the defense argument that CALJIC No. 2.15 should not be given in a robbery case because it only shows the defendant's knowledge of the tainted nature of the property and because it violates due process by lessening the prosecution's burden of proof. (Id. at 453-455.) The defendant did not raise and the Gamble court did not address whether the "slight" corroboration requirement violates due process. Moreover, to the extent that Gamble could be interpreted as counter to appellant's present argument, appellant asserts, for the reasons stated above, that it was wrongly decided.

appropriate to review this error under the Chapman[25] standard to determine whether its effect was "harmless beyond a reasonable doubt." (Rose v. Clark (1986) 478 U.S. 570, 581-582 [92 L.Ed.2d 460, 106 S.Ct. 3101]; see People v. Odle (1988) 45 Cal.3d 386, 415.)

D. Prejudice

This was a close case, considering the state of the evidence, regarding whether appellant robbed Shockley or merely took his property after his death. In fact, during the post-arrest interrogation, when Deputy District Attorney Dunlap asked appellant whether he had decided to rob Shockley before he shot him, appellant replied: "No. After I shot him, I thought about and I figured I better get some money and get away from there." (1 ACT-B 237.) In closing argument, defense counsel strenuously asserted that appellant was not guilty of first degree robbery-murder with respect to Shockley's death because appellant had killed Shockley in anger, and it was far from clear that appellant intended to take Shockley's property at the moment of the slaying. (26 RT 7235-7242B, 7258-7260.)

In the prosecutor's closing argument, he repeatedly emphasized that

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[25] Chapman v. California, supra, 386 U.S. at 21.

appellant, at the time of his arrest, was in possession of Shockley's wallet and identification cards, and the prosecutor maintained this evidence strongly suggested that appellant had killed Shockley in order to rob him. (26 RT 7309-7310, 7187-7188.) At one point, in arguing that this was a first degree robbery murder, the prosecutor asked rhetorically: "No thought to rob Larry Shockley. Yet, his wallet, keys, pocket turned inside out, his car stolen. Does that sound like a heat of passion? Shoot someone and then go, oh, now I'm going to rob him." (26 RT 7309-7310.) (See People v. Minifie, supra, 13 Cal.4th at 1071-1072 [prejudice shown where prosecutor's closing argument takes advantage of court's error].) Thus, the presently-addressed error was prejudicial with regard to the jury's findings that the Shockley killing was a first degree felony (robbery) murder and that the robbery special circumstance attached to that count was true.

The prosecutor's closing argument also pointed to evidence that appellant possessed checks and identification belonging to Renouf (26 RT 7188, 7194), thereby implicitly exploiting the CALJIC No. 2.15 instruction with respect to the Renouf charges. Although it is true that the prosecutor also relied upon appellant's police interview to prove that appellant possessed an intent to rob Renouf prior to killing him, appellant has previously argued, in Argument III above, that it was error to admit

appellant's police interview as evidence. Thus, the presently-addressed error, in combination with the Argument III voluntariness/Miranda error, was prejudicial with regard to the jury's findings that the Renouf killing was a first degree felony (robbery) murder and that the robbery special circumstance attached to that count was true. (See Argument V, below.)

The improper CALJIC No. 2.15 instruction could very have well caused the jury to unduly weigh that appellant had been found in possession of property belonging to Shockley and Renouf. It is impossible to say, under Chapman, that this error was harmless beyond a reasonable doubt with respect to the jury's findings on count 1 (Shockley murder), count 2 (Shockley robbery), count 8 (Renouf murder), count 9 (Renouf robbery), and the robbery murder special circumstance findings attached to counts 1 and 8. Therefore all those jury findings must be reversed.

V. THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

As detailed above, appellant's guilt phase trial was tainted by the following errors: 1) the trial court's refusal to grant appellant's request for a change of venue; 2) the court's improper denial of appellant's Batson-Wheeler motion; 3) the trial court's error in denying appellant's motion to suppress his statements to Detectives Faust and Ferrari; and 4) the court's CALJIC No. 2.15 instruction, which improperly told the jury that it could conclude that appellant was guilty of robbery or burglary based upon his conscious possession of recently stolen property plus "slight" corroboration.

Appellant incorporates by reference his arguments as to why the case against him with respect to the charges was close. (See Arguments III.D. and IV.D., above.)

As explained in the preceding arguments, all of appellant's assignments of error involve violations of the federal constitution, and therefore – assuming that this Court does not conclude that they are subject to per se reversal – call for review under the Chapman[26] standard. (Crane v. Kentucky, supra, 476 U.S. at 690-691; Delaware v. Van Arsdall, supra, 475

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[26]Chapman v. California, supra, 386 U.S. at 24.

U.S. at 684.)

In a case where multiple errors have permeated a defendant's trial, the reviewing court must look to their cumulative impact. (People v. Hernandez (2003) 30 Cal.4th 835, 875-877; People v. Stritzinger (1983) 34 Cal.3d 505, 520-521; Parle v. Runnels (9th Cir. 2007) 505 F.3d 922, 932-933; Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622, cert. den. (1993) 507 U.S. 951.) Furthermore, when federal constitutional error is combined with other errors at trial, the appellate court must review their cumulative effect under the Chapman standard. The reviewing court is to consider the course of the defendant's trial as it would have been in the absence of all errors and then determine whether the combined errors which did occur were "harmless beyond a reasonable doubt." (People v. Stritzinger, supra, 34 Cal.3d at 520-521.) In the face of the record of errors below, respondent cannot meet this heavy burden. Furthermore, with respect to the murder charges which resulted in death sentences, these cumulative errors deprived appellant of his right under the Eighth and Fourteenth Amendments to be sentenced in accordance with procedures which are reliable, rather than arbitrary and capricious. (Johnson v. Mississippi (1988) 486 U.S. 578, 584 [100 L.Ed.2d 595, 108 S.Ct. 1981]; Beck v. Alabama (1980) 447 U.S. 635, 638 [65 L.Ed.2d 392, 100 S.Ct. 2382].)

The assigned errors served to deprive appellant of the impartial, unbiased jury to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Duncan v. Louisiana (1968) 391 U.S. 145 [20 L.Ed.2d 491, 88 S.Ct. 1444]; Irvin v. Dowd, supra, 366 U.S. at 722, 728-729.) Both the trial court's refusal to change venue and the wrongful denial of appellant's Batson-Wheeler motion served to violate appellant's federal constitutional right to a fair and unbiased jury. (Morgan v. Illinois (1992) 504 U.S. 719, 726 [119 L.Ed.2d 492, 112 S.Ct. 2222]; Duncan v. Louisiana, supra, 391 U.S. 145; Irvin v. Dowd, supra, 366 U.S. at 728-729.)

Exposure of the San Joaquin County jury pool to extensive pretrial publicity, which could have been countered by granting a change of venue, served to inflame the jurors and create an atmosphere of prejudice against appellant. As detailed in Argument I, this prejudicial publicity included appellant's being repeatedly described in local media as an "urban predator," as the "mastermind" of the jailbreak, and as the most dangerous of the six escapees. Prejudicial publicity also included the October 20, 1992 Lodi News Sentinel article "Murder victim friend to all," recounting the good deeds and favorable character of Larry Shockley (2 CT 470-471), and articles appearing in the Lodi News Sentinel on August 28 and September 1, 1993, containing detailed descriptions of appellant confessing to the police

that he had killed both Shockley and Renouf (2 CT 482-484). Where there is a likelihood that trial errors have caused the jury to convict a defendant for emotional reasons, rather than based upon an objective application of law to the evidence, reversal is called for. (See People v. Purvis (1963) 60 Cal.2d 323, 342 [prosecutor's warning of unfavorable reactions of neighbors in event of acquittal]; People v. Turner (1983) 145 Cal.App.3d 658, 674 [prosecutor's emotional appeal that only jurors have the power to enforce the law]; United States v. Solivan (6th Cir. 1991) 937 F.2d 1146, 1148, 1153, 1155 [urging the jury to "tell [defendant] and all of the other drug dealers like her that we don't want that stuff in Northern Kentucky" was "misleading, inflammatory and prejudiced defendant's right to a fair trial"].)

The strongest item of prosecution evidence was appellant's recorded statement to the police in which he confessed to committing most of the crimes for which he went on trial, including killing Shockley and Renouf. If appellant's police statement had been excluded then the prosecution case against appellant would have been very weak, particularly with respect to demonstrating that the Shockley and Renouf homicides were first degree felony (robbery) murders and that the robbery special circumstance allegations attached to the Shockley and Renouf murder counts were true. (See Argument III.D.)

Appellant's trial was additionally prejudiced by the CALJIC No. 2.15 instruction which permitted appellant to be found liable for first degree felony (robbery) murder of Shockley, first degree felony (robbery) murder of Renouf, the Shockley and Renouf robbery counts, and the Shockley and Renouf robbery special circumstance allegations, all based upon no more than "slight" corroboration evidence beyond appellant's conscious possession of recently stolen property – thus undermining the proof-beyond-a-reasonable doubt standard. (Sullivan v. Louisiana, supra, 508 U.S. at 278; Sandstrom v. Montana, supra, 442 U.S. at 524.)

Moreover, both the court's error in admitting appellant's statements to the police and the court's CALJIC No. 2.15 error acted in combination to detrimentally impact the jury's determinations on count 1 (Shockley murder), count 8 (Renouf murder), and the robbery murder special circumstance allegations attached to counts 1 and 8, thereby rendering those findings particularly unreliable.

Appellant also acknowledges that his trial counsel did not specifically cite federal constitutional provisions in voicing his objections to some of the matters set forth in the present argument. However, appellant's federal constitutional claims in this regard are adequately preserved for appeal because appellant's present constitutional arguments rest upon the same

factual and legal issues as the objections defense counsel did assert. (People v. Partida, supra, 37 Cal.4th at 433-439; People v. Yeoman, supra, 31 Cal.4th at 117-118.)

As previously explained (at Arguments III.D. and IV. D., above), this was a close case with regard to the guilt phase evidence against appellant. Accordingly, appellant's convictions must be reversed.

SPECIAL CIRCUMSTANCE/ DEATH-ELIGIBILITY ISSUES

VI. CALIFORNIA'S FELONY-MURDER SPECIAL CIRCUMSTANCE FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

In this case one of the two special circumstances alleged and found true was that the killing occurred during commission of a designated felony, by way of robbery. (§ 190.2, subd. (a)(17)(i).) (9 CT 2448-2450.) Appellant respectfully submits that this statutory special circumstance is unconstitutional because it fails to sufficiently narrow the class of first degree murderers eligible for the death penalty. Appellant further submits that the use of this unconstitutional special circumstance requires reversal of his death sentence.

When the United States Supreme Court reinstated the death penalty in 1976, it did so with the explicit understanding that capital punishment would only be applied to the most heinous first degree murderers. (Gregg v. Georgia (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909].) In his concurring opinion, Justice White stated that, in order to avoid violating the

Eighth Amendment, states would be required to narrow the class of first degree murderers eligible for the death penalty. (Id., 428 U.S. at 222 [White, J., conc.].) According to Justice White, when the class of death-eligible murderers is narrowed to that of the most serious offenders, the death penalty will be imposed in a substantial number of the cases so defined, and "it could no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device." (Ibid.) Since Gregg, the Supreme Court has consistently held that compliance with the narrowing requirement is essential for a state capital punishment scheme to be valid under the Eighth Amendment.[27] In Zant v. Stephens (1983) 462 U.S. 862 [77 L.Ed.2d 235, 103 S.Ct. 2733], the Supreme Court observed that approval of Georgia's capital sentencing scheme in Gregg was based in large part on the fact that the jury was required to find at least one valid statutory aggravating circumstance – this properly narrowed the class of death eligible first degree murderers to that of the most serious offenders. (Id., 462 U.S. at 876.) The Supreme Court explained:

To avoid this constitutional flaw [of arbitrary

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[27] Even if this Court should find that the California scheme satisfies Eighth Amendment standards, the Court should review the scheme under article I, section 17 of the California Constitution. (Cf. People v. Mincey (1992) 2 Cal.4th 408, 476.)

> and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.
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> (Ibid. [fn. omitted]; accord Lowenfield v. Phelps, (1988) 484 U.S. 231, 244 [98 L.Ed.2d 568, 108 S.Ct. 546] .)

A special circumstance must do so, furthermore, "in an objective, evenhanded and substantially rational way . . . ." (Zant v. Stephens, supra, 462 U.S. at 879.)

This Court has held that California's capital sentencing scheme must accomplish narrowing of the death-eligibility class by "providing a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" (People v. Edelbacher (1989) 47 Cal.3d 983, 1023 [quoting Furman v. Georgia (1972) 408 U.S. 238, 313 [33 L.Ed.2d 346, 92 S.Ct. 2826] [White, J., conc.].) Under the California scheme in which the special circumstances set forth in section 190.2, subdivision (a) are expected to satisfy this requirement (Edelbacher, supra, 47 Cal.3d at 1023; People v. Bacigalupo (1993) 6 Cal.4th 457, 467-468), "each special circumstance" – not just all the special circumstances considered in the aggregate – must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the

death penalty and those who do not." (People v. Green, supra, 27 Cal.3d at 61 [emphasis added].) A defendant may utilize a failure-to-narrow claim even if the relevant unfairness may not have occurred in his case. (United States v. Cheely, supra, 36 F.3d at 1446, fn. 11.)

Appellant was found to be death-eligible on the basis of the felony-murder special circumstance (§ 190.2, subd. (a)(17)). (9 CT 2448-2450.) This special circumstance fails to sufficiently narrow the class of defendants eligible for the death penalty because it uses an element of first degree murder to render felony-murder a capital crime. (Hereinafter "double counting.") The felony-murder special circumstance does not narrow the death-eligible class in a constitutionally acceptable manner because it does not give the trier of fact any additional basis upon which to restrict the broad class of defendants convicted of first degree felony murder to a much smaller class of the most serious first degree murderers deserving the death penalty. Furthermore, the felony-murder special circumstance renders a broad class of felony-murder defendants, other than those convicted as aiders and abettors, automatically death eligible, without taking into account the defendant's actual level of participation in the underlying felony and his or her level of intent at the time of the slaying, as required by Tison v. Arizona (1987) 481 U.S. 137, 157-158 [95 L.Ed.2d 127, 107 S.Ct. 1676].

Finally, this special circumstance is applicable to a wide category of murders and, therefore, is not a rational means to narrow death eligibility.

Admittedly, this Court has rejected failure to narrow challenges to California's felony-murder special circumstance. (See e.g., People v. Musselwhite (1998) 17 Cal.4th 1216, 1265-1266 [rejecting failure to narrow challenge to § 190.2, subd. (a)(17)]; People v. Marshall (1990) 50 Cal.3d 907, 945-946 [rejecting failure to narrow challenge based upon Lowenfield v. Phelps, supra, 484 U.S. 231]; People v. Gates (1987) 43 Cal.3d 1168, 1188-1190 [rejecting failure to narrow challenge on basis of multiple use of same robbery finding].) However, appellant respectfully submits that the present argument provides compelling reasons for this Court's reconsideration of this issue.

Lowenfield v. Phelps, supra, 484 U.S. 231, upon which this Court has relied to reject Eighth Amendment challenges to section 190, subdivision (a)(17), is inapposite to appellant's failure to narrow challenge. In Lowenfield, the defendant challenged the Louisiana felony-murder capital sentencing scheme on the ground that it automatically considered facts which constituted the elements of first degree murder as an aggravating circumstance within the penalty phase. (Lowenfield v. Phelps, supra, 484 U.S. at 241.) Lowenfield contended that the use of this aggravating special

circumstance alone to render him death eligible violated the Eighth Amendment. (Ibid.) The Supreme Court rejected his claim, holding that the narrowing requirements of the Eighth Amendment can be complied with either at the guilt stage, by providing a restrictive definition of what constitutes first degree murder, or at the sentencing stage, by imposing a requirement that a sentencing jury must find at least one statutorily defined aggravating circumstance to be true. (Id. at 246.) The Court reasoned that under Louisiana's capital sentencing scheme, the required narrowing was accomplished in the guilt phase by the jury's finding defendant guilty of first degree murder because Louisiana's first degree murder statute required a jury finding that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." (Ibid.)

However, the Louisiana capital sentencing scheme reviewed in Lowenfield differs significantly from California's felony-murder scheme because California's statutory definition of a death-eligible first degree murder is considerably broader, encompassing any killing in the perpetration of specified felonies absent any mens rea requirement for the actual killer. (See § 189[28]; § 190, subd. (a)(17); People v. Anderson (1987) 43 Cal.3d

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[28] Section 189 states in pertinent part: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful,

1104, 1149.) Alternately stated, California's section 190.2, subdivision (a)(17) double counts the felony element for a finding of first degree felony-murder and a finding of a special circumstance, automatically making the felon death-eligible, without taking into account the defendant's mens rea or level of participation in the underlying felony. California's felony-murder special circumstance thus casts a much wider net than the Louisiana capital scheme.

Furthermore, the felony-murder special circumstance, as interpreted by this Court in People v. Anderson, supra, 43 Cal.3d at 1149, is contrary to the United States Supreme Court's decision in Tison v. Arizona, supra, 481 U.S. 137. In Tison, the Supreme Court held that the Eighth Amendment does not bar imposition of the death penalty on a felony-murder defendant who is a major participant in the felony and possesses a reckless disregard for human life, even though he does not have a specific intent to kill. (Id. at 157-158.) While Tison allows states to make defendants death-eligible based solely on a special circumstance which duplicates an element of first degree murder, it also requires that a felony-murder special circumstance be limited to those defendants who are major participants in the underlying

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deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree."

felony and demonstrate, at the least, a reckless indifference to human life. (Ibid.) Notably, the Court did not hold that states could make felony-murder defendants who commit the actual killing automatically death-eligible without regard to their mens rea at the time of the homicide and their level of involvement in the underlying felony.[29] Indeed, as Justice O'Connor stated for the Court, being the actual killer does not automatically warrant the death penalty:

> Many who intend, and do, kill are not criminally liable at all – those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty.
>
> (Id., 481 U.S. at 157.)

California's felony-murder special circumstance, as interpreted by this Court in People v. Anderson, supra, 43 Cal.3d at 1149, does not sufficiently narrow the death-eligible class because it does not consider the actual killer's

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[29] In Enmund v. Florida, supra, 458 U.S. 782, the Supreme Court suggested that the death penalty might be imposed on a felony-murder defendant who killed, attempted to kill or intended to kill. (Id., 458 U.S. at 801.) However, the Court did not categorically pronounce that felony murder defendants who actually kill may be made automatically death-eligible based on that fact alone. Moreover, in light of the Court's discussion of the need to tailor the punishment to the individual culpability of each defendant (id., 458 U.S. at 798), the clear implication is that the punishment for even the actual killers in a felony-murder must take into account their mens rea at the time of the killing. (See Graham v. Collins (1993) 506 U.S. 461, 501 [122 L.Ed.2d 260, 113 S.Ct. 892] (Stevens, J., dis.) [death penalty is an impermissible punishment for an unintentional homicide].)

level of participation in the underlying felony and his level of intent at the time of the killing. Essentially, this special circumstance double counts the felony element of the felony-murder to render it a capital crime, without any narrowing of the death-eligible class.

Thus, a defendant can be death-eligible under widely varying circumstances. For example, each of the perpetrators in the following scenarios is eligible for the death penalty under section 190.2, subdivision (a)(17), even though their relative culpability is decidedly disparate:

Scenario 1: The victim of the intended underlying felony dies during the commission of the felony, but in a manner that was not contemplated by the defendant. In a superior court case cited in Shatz & Rivkind, The California Death Penalty Scheme: Requiem for Furman? (1997) 72 N.Y.U.L.Rev. 1283, a defendant yanked a purse out of a victim's hands in a parking lot and fled. The victim suffered a heart attack and died shortly after the incident. Because the defendant had used some force, however minimal, to remove the purse from the victim's hands, the crime was robbery and the defendant was rendered death-eligible by virtue of the felony-murder rule. (Id. at 1321-1322 and fns. 221-223.)

Scenario 2: Defendant accidentally kills an innocent bystander during defendant's flight from the underlying felony. In People v. Weddle (1991) 1

Cal.App.4th 1190, the defendant entered a store, took some clothes, fled in his car, and accidentally struck and killed a passenger in another car. Since entering the store with intent to steal made the defendant guilty of burglary and the killing occurred during defendant's flight from the burglary, the defendant was convicted of first degree murder and rendered death-eligible by way of the felony-murder special circumstance. (Id. at 1192-1193.)

Scenario 3: Similar facts to scenario 2, but here a driver waits for her friend, unaware that the friend has entered a store to steal some clothes. Upon the friend's return, the driver indicates that she is willing to assist in the getaway. She then accidentally strikes and kills a store guard who leapt into the path of her car. Because the robbery is not complete until the robbers reach a place of temporary safety (People v. Milan (1973) 9 Cal.3d 185, 195), the driver has committed the felony of robbery on an aiding and abetting basis (People v. Montoya (1994) 7 Cal.4th 1027, 1040-1041; People v. Cooper (1991) 53 Cal.3d 1158, 1165) and is the actual killer, thus making her liable for first degree murder and death-eligible.

In each of the above scenarios, the defendant's conduct is certainly criminal and, perhaps, warrants a murder conviction. However, none of the defendants acted with reckless disregard for human life in committing the act that caused the homicide. Under scenario 3, even a minor participant in

the underlying felony is death-eligible, despite the fact that the killing was purely accidental and only tangentially related to the underlying felony. Under Tison v. Arizona, supra, 481 U.S. 137, all three defendants should avoid the death penalty; however, under this Court's construction of the felony-murder special circumstance in People v. Anderson, supra, 43 Cal.3d 1104, all three defendants have an automatic special circumstance finding against them. As it currently stands, section 190.2, subdivision (a)(17) makes felony-murder defendants who actually kill death-eligible without taking into account their individual culpability in the underlying felony and their state of mind at the time of the killing. Appellant accordingly asserts that Anderson's construction of the felony-murder special circumstance violates Tison.

The Ninth Circuit's decision in Wade v. Calderon (9th Cir. 1993) 29 F.3d 1312 lends considerable support to appellant's assertion that California's felony-murder special circumstance fails to provide constitutionally adequate narrowing. In Wade, the Court of Appeal, relying on this Court's interpretation of section 190.2, subdivision (a)(18)[30], held that the murder-by-torture special circumstance violated the Eighth

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[30] In People v. Davenport, supra, 41 Cal.3d 247, this Court held that section 190.2, subdivision (a)(18) requires a jury finding that the defendant must have intended to cause extreme pain to the victim. (Id. at 271; see Wade v. Calderon, supra, 29 F.3d at 1320.)

Amendment.[31] The court observed that most murders are accomplished through infliction of extreme physical pain to the victim and, therefore, the torture special circumstance was applicable to almost all murders and did not aid in narrowing death eligibility as required by the federal constitution. (Id. at 1320.)

Much like section 190.2, subdivision (a)(18), which was found defective in Wade, the felony-murder special circumstance fails to sufficiently narrow the death eligibility class. It is applicable to a wide range of murders and does not provide the trier of fact with any additional information to limit death eligibility to the most serious murder offenders. (Wade v. Calderon, supra, 29 F.3d at 1320.)

Finally, several decisions from sister states support appellant's position. (See Tennessee v. Middlebrooks (Tenn. 1992) 840 S.W.2d 317, 341-344 [felony-murder defendants may not constitutionally become death eligible solely on the basis of a special circumstance that repeats an element of first degree felony-murder]; Engberg v. Meyer (Wyo. 1991) 820 P.2d 70, 90-92 [holding in dictum that felony-murder special circumstance, which double-counted the felony element of first degree murder, did not

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[31] Section 190.2, subdivision (a)(18) states: "The murder was intentional and involved the infliction of torture."

sufficiently narrow the death-eligible class, even when applied to defendants who actually killed]; North Carolina v. Cherry (N.C. 1979) 298 N.C. 86 [257 S.E.2d 551, 567-568][similar].)

California's felony-murder special circumstance does not possess an intent to kill element or, indeed, any mens rea requirement, for the actual killer. (§ 190.2, subd. (a)(17); People v. Anderson, supra, 43 Cal.3d at 1149.) Consequently, a wide class of California's first degree felony-murderers is rendered automatically death-eligible based upon double-counting the felony element of felony-murder (see Tennessee v. Middlebrooks, supra, 840 S.W.2d at 341-344) and without regard to their level of participation in the underlying felony and their state of mind at the time of the killing (Tison v. Arizona, supra, 481 U.S. at 157-158.)

Accordingly, the felony-murder special circumstance finding in this case must be reversed. Appellant may not constitutionally be found death-eligible on that basis.

Should this Court invalidate one of the two special circumstances (felony murder and multiple murder) found true in this case then appellant's death sentences on counts 1 and 8 must be reversed. In a weighing jurisdiction, such as California, infection of the sentencing process with an invalid aggravating factor requires invalidation of the overall death sentence.

(Stringer v. Black (1992) 503 U.S. 222, 229-230 [117 L.Ed.2d 367, 112 S.Ct. 1130]; see also Wade v. Calderon, supra, 29 F.3d at 1322-1323.) Consequently, invalidation of either of the two special circumstance findings against appellant requires per se reversal of his death sentence.

VII. THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE FAILS TO NARROW IN A CONSTITUTIONALLY ACCEPTABLE MANNER THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY[32]

"A capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'" (Lowenfield v. Phelphs, supra, 484 U.S. at 244 [quoting Zant v. Stephens, supra, 462 U.S. at 877]), and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not'" (People v. Edelbacher (1989) 47 Cal.3d 983, 1023 [quoting Furman v. Georgia, supra, 408 U.S. at 313 (conc. opn. of White, J.)]). It must do so, furthermore, "in an objective, evenhanded, and substantially rational way . . . ." (Zant v. Stephens, supra, 462 U.S. at 879.)

Under the California death penalty scheme – in which the circumstances set forth in section 190.2, subdivision (a) are intended to satisfy the foregoing requirement (People v. Edelbacher, supra, 47 Cal.3d at 1023; People v. Bacigalupo, supra, 6 Cal.4th at 467-468) – "each special

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[32] Appellant acknowledges that an argument that the multiple murder special circumstance fails to sufficiently narrow the California death penalty scheme was rejected in People v. Coddington (2000) 23 Cal.4th 529, 656, and People v. Vieira (2005) 35 Cal.4th 264, 294. Appellant asserts that this conclusion should be reconsidered for the reasons stated herein.

circumstance" – not just all of the special circumstances considered in the aggregate – must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (People v. Green, supra, 27 Cal.3d at 61 [emphasis added].)

In this case one of the two special circumstances alleged and found true was that of multiple murder. (§ 190.2, subd.(a)(3).) (9 CT 2448-2450.) As explained below, the narrowing principle reflected in the multiple murder special circumstance fails to distinguish "in an objective, evenhanded, and substantially rational way" (Zant v. Stephens, supra, 462 U.S. at 879) between those defendants who deserve death as a punishment and those who do not.

In determining whether a special circumstance is sufficiently narrow, a two-prong test must be satisfied. First, the narrowing factor must focus upon the defendant's mental state, not just the act which was committed, because relative culpability should be determined by consideration of mens rea as well as actus reus. (See People v. Steger (1976) 16 Cal.3d 539, 544-545.) If the narrowing factor only looks toward the act, the factor is not a rational means of distinguishing those cases in which the defendant is rendered death eligible from those cases in which he or she is not. (See United States v. Cheely (9th Cir. 1994) 36 F.3d 1439, 1444.) Second, the

narrowing factor must not be so overly broad as to permit death eligibility based upon the same factor for defendants whose crimes are of disparate levels of culpability. If the death eligibility factor encompasses different levels of culpability, the narrowing is not rational. (Ibid.)

When the above test is applied to the multiple murder special circumstance, authorized by section 190.2, subdivision (a)(3), the statute's constitutional infirmities are exposed.

First, the multiple murder special circumstance does not focus on the mental state of the perpetrator but only on the act committed. In other words, death eligibility is based entirely upon the fact that more than one murder has been committed without any consideration of whether the defendant's mental state is more culpable than had only one murder been committed. In fact, the culpability of a multiple murder defendant could actually be less than that of a defendant who kills only a single victim. As set forth below, in cases where the second murder is accidental or without express malice and the initial murder is based upon felony murder, the multiple murder defendant's mental state is unquestionably less culpable than the mental state of a single-victim defendant who kills in premeditated cold blood. Therefore, because culpability based upon mental state is not even considered in the multiple murder special circumstance narrowing

determination, this special circumstance does not provide a rational basis for infliction of the ultimate penalty and violates the Eighth Amendment. (Maynard v. Cartwright (1988) 486 U.S. 356, 362-363 [100 L.Ed.2d 372, 108 S.Ct. 1853]; Godfrey v. Georgia (1980) 446 U.S. 420, 428-429 [64 L.Ed.2d 398, 100 S.Ct. 1759]; Furman v. Georgia, supra, 408 U.S. 238.)

Second, the multiple murder special circumstance fails to constitutionally narrow the death eligible class of defendants. "Narrowing is not an end in itself, and not just any narrowing will suffice." (United States v. Cheely, supra, 36 F.3d at 1445.) To narrow in "an evenhanded . . . and substantially rational way," the special circumstance must define a subclass of persons of comparable culpability. (Ibid.) "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." (Ibid.)

Cheely addressed federal statutes involving the use of mail bombs. (18 U.S.C. § 844(d) & § 1716(a).) These statutes declared that anyone who, with the intent to injure property or life, causes a death by knowingly placing in the mail an explosive device, is eligible for the death penalty. The Ninth Circuit, in Cheely, held that these statutes were unconstitutional because "they create the potential for impermissibly disparate and irrational

sentencing because they encompass a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them." (Id. at 1444 [fn. omitted].) Under the federal statutes, the Cheely court observed, one jury could sentence to death a person who accidentally killed while intending to damage property[33], while a second jury could vote to spare a mail-bomber who deliberately assassinated an NAACP official. (Id. at 1444.) "The narrowing" principle on which the statutes rest thus failed to "foreclose . . . the prospect of . . . 'wanton or freakish' imposition of the death penalty." (Id. at 1445.)

This is equally true of the multiple murder special circumstance in the California death penalty statute. The latter applies to the white racist who deliberately fires into a crowd of black teenagers, killing several. It also applies to the black man who, in the course of a robbery, accidentally kills one white woman and her nine-week old fetus, which the defendant did not know the woman was carrying. (See People v. Davis (1994) 7 Cal.4th 797, 810 [defendant responsible for death of eight-week old fetus may be convicted of murder]; People v. Anderson, supra, 43 Cal.3d at 1149-1150

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[33] The Cheely court gave the example of a defendant who, intending "to blow a crater in the local college's football field, to protest the ascendancy of athletics over academics, . . . mails . . . an explosive substance [that] . . . accidentally explodes en route . . . ." (United States v. Cheely, supra, 36 F.3d at 1443.)

[intent to kill not required for multiple murder special circumstance].) Under the California statutory scheme, one jury could sentence the black defendant to death while another could spare the life of the white killer. "The prospect of such 'wanton and freakish' death sentencing is intolerable under Furman and the cases following it." (United States v. Cheely, supra, 36 F.3d at 1444.)

Appellant's case provides an illustration of the problem involved in rendering a multiple murderer death-eligible without regard to his mental state or circumstances. The evidence in this case demonstrated that appellant committed the multiple slayings because his judgment and rational thought process were significantly impaired due to his severe addiction to methamphetamine. (See Arguments X.E. and XXIV., below.) Appellant would submit that a defendant who participates in multiple murders when he is in the grip of severe drug addiction is less morally culpable than a defendant who cold-bloodedly and soberly kills one victim for his own pleasure. Yet, the former defendant is death-eligible under the California capital scheme while the later is not.[34]

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[34] Furthermore, appellant would have to challenge the constitutionality of the statutory scheme even if the particular unfairness described hereinabove may not have occurred in his case. (In re Grant (1976) 18 Cal.3d 1, 11-12, 18; In re Lynch (1972) 8 Cal.3d 410, 439; United States v. Cheely, supra, 36 F.3d at 1444 and fn. 11.) A scheme that permits for the sort of arbitrary sentencing described above also permits it in

Accordingly, the multiple murder special circumstance finding in this case must be reversed. Appellant may not constitutionally be found death-eligible on that basis.

Should this Court invalidate one of the two special circumstances (felony murder and multiple murder) found true in this case then appellant's death sentences on counts 1 and 8 must be reversed. In a weighing jurisdiction, such as California, infection of the sentencing process with an invalid aggravating factor requires invalidation of the overall death sentence. (Stringer v. Black, supra, 503 U.S. at 229-230; see also Wade v. Calderon, supra, 29 F.3d at 1322-1323.) Consequently, invalidation of either of the two special circumstance findings against appellant requires per se reversal of his death sentence.

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individual cases, albeit in more subtle forms that are not readily visible to those not participating in the jury's deliberation.

PENALTY PHASE ISSUES

VIII. JUROR MISCONDUCT, BY WAY OF A JUROR CONSULTING HIS MINISTER DURING PENALTY DELIBERATIONS, SERVED TO DENY APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

During deliberations, juror Y.M. consulted his minister regarding the relationship between his Christian beliefs and his role as a capital juror, and was told that he should "render . . . unto Caesar the things which are Caesar's; and unto God, the things which are God's" (Matthew 22:21) and "[i]f you live by the sword, you die by the sword." (60 RT 19224-19225.) Prior to this conversation, juror Y.M. had been a holdout against the death penalty and, through the jury forewoman, had asked the court for clarification regarding the application of sympathy and mercy to the jury's penalty decision. After receiving his minister's advice, juror Y.M. told the forewoman to withdraw his question without receiving an answer, and he immediately changed his vote to one for death. As explained below, this juror misconduct violated appellant's constitutional rights to due process of law and a fair jury trial.

A. Factual/ Procedural Background

1. Jury Deliberations and Misconduct

In appellant's second trial, which addressed only the issue of penalty, the jury received the case at 11:35 a.m. on May 16, 1995. (60 RT 19157A; 8 CT 2200-2201.) At the end of the day, the court dismissed the jurors with the standard admonition that they should "remember not to visit the scene, consult reference works or other people for information about the case." (60 RT 19174 [emphasis added].)

On the afternoon of May 17, 1995, at 2:58 p.m., the jury sent the following question to the court[35]:

> The Jury needs clarification on the final instructions regarding Mercy & Empathy as how to vote either for life without parole or death.
>
> Also explain p. 22 4th paragraph & 1st paragraph p. 23 also p. 36 Paragraph 4

(8 CT 2203.)

The fourth paragraph on page 22 of the written instructions given to the jury read: "Remember that the determination of factual issues in this

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[35] That afternoon, the jury also requested and received a copy of appellant's interview by the police. (8 CT 2205; 60 RT 19180-19181, 19188.)

trial must be made without regard to passion, pity, sympathy or prejudice towards any party, attorney or person. However, in the selection of the ultimate penalty in this case you may consider sympathy and pity in making that decision." (8 CT 2268-2269.) The first paragraph on page 23 then immediately followed: "That is, in this penalty trial the law permits you, if you so choose, to be influenced by mercy, sympathy, compassion or pity for the defendant or his family in arriving at a proper penalty in this case. Also, you may, if you so choose, consider mercy, sympathy, compassion or pity for either of the two murder victims in this case or members of their families in arriving at a proper penalty in this case." (8 CT 2269.) The fourth paragraph on page 36 read: "A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. Mitigating circumstances include any sympathetic or other aspect of defendant's character or record that the defendant offers as a basis for a sentence less than death." (8 CT 2269.)

After submitting this multipart question, the jurors were brought back to the courtroom and the forewoman was questioned by the court regarding the request for clarification. She said that not all of the jurors felt the need

for answers to the question posed, but "certain jurors" did. (60 RT 19185-19186.) The court indicated that it would provide further information the next morning and, at 4:52 p.m., proceeded to dismiss the jurors. (60 RT 19188-19189.) The court and counsel remained to consider how to answer the jury's question. (60 RT 19189-19194.)

When the jury reported to the courtroom the next morning, on May 18, the forewoman immediately informed the court that the jury no longer required any answers to the questions that it had submitted. She said, "The matter's been solved. We don't need clarification now." (60 RT 19197.) Some of the jurors reacted with audible surprise at the forewoman's announcement. (60 RT 19219; 8 CT 2271-2272, 2307.) The court then directed the jury to continue its deliberations – without providing any answers to the previously submitted question. This occurred at 9:12 a.m. (60 RT 19197.)

Less than a half hour later, at 9:40 a.m., the jury indicated it had reached a verdict. (8 CT 2209.) The jury then returned to the courtroom to announce that it had decided in favor of the death penalty. (60 RT 19206.)

After the jurors were polled, the court informed them: "Normally in a case, the Court would discharge you at this time. But the Court needs to make a further inquiry." (60 RT 19208.) The court instructed the jurors to

return that afternoon. (60 RT 19208.) After the jurors left, the judge told the attorneys that, given the chain of events, he was troubled that "there is a possibility there was deliberations outside of the jury room." (60 RT 19209-19210.)

That afternoon, after discussing the matter with counsel, the judge brought the forewoman in separately for questioning. In response to the court's questions, the forewoman indicated that the multipart question submitted to the court the previous day had been at the request of a single juror, Y.M. (60 RT 19217-19718, 19220.) She said, "This morning, he met me outside of the courthouse. He said, "Withdraw the question. I have answered it for myself. I have worked it through and answered it." She asked juror Y.M. if he was sure and he replied, "Yes, I am." (60 RT 19218-19219.) The forewoman said she then came into the courtroom with the full jury panel and announced that they no longer required an answer to the question; she noted that some of the jurors expressed audible surprise because the jury had not met in the jury room to discuss the matter prior to her announcement to the court. (60 RT 19219.)

The court then brought in juror Y.M. for separate questioning. This proceeded as follows:

> THE COURT: . . . . [D]id you talk to [the jury forewoman] this morning about [the

request for clarification] and tell her it wasn't necessary?

JUROR Y.M.: Yes, I did. Yes, I did.

THE COURT: Could you tell me in your own words what was said, please? Could you remember?

JUROR Y.M.: This morning, I – I – before we got ready to come into court, I told her that I had – it wasn't necessary for us to go forward with my request of yesterday, because I had talked to my minister about – my pastor about – so far as mercy – and I didn't talk to him about the trial, I just talked to him about mercy and sympathy and along those lines.

THE COURT: Okay. Could I beg you to tell me what discussion you had with the minister? Could you tell me that? Would that be all right?

JUROR Y.M.: Well, I asked him about, as a – along the lines of responsibilities as a citizen, and believing in mercy and grace.

And he said that if – he quoted – I asked him about – he quoted to me if you render the things that which are of Caesar, which is the law of the land, and render the things which are to God to God, and he said that we have a duty – when you have a job as a police officer or as a citizen – when you are chosen to be a part, if – if – if – a police officer, if that's your job, and you have to kill someone, in – in – in the duties of your job, then those – that is your job. Or if you are on a jury, that you have to go with the law of the land.

And that's when he told me about, you know, render the things which are Caesar to

Caesar, and the things which are God to God.

And he said something about the double-edged sword. If you live by the sword, you die by the sword.

And then what else did he say? That was basically the things that he said.

THE COURT: Did you discuss any of the facts of the case with him?

JUROR Y.M.: No, I did not discuss, because I knew I couldn't discuss anything –

THE COURT: Of course.

JUROR Y.M.: – about it, about the facts.

THE COURT: I would – I would interpret it to mean that it's somehow you were troubled, and you went to the minister to talk to him. Or –

JUROR Y.M.: Yeah.

THE COURT: – or did you happen to run into him?

JUROR Y.M.: No, I called him.

THE COURT: So you called him for spiritual advice –

JUROR Y.M.: Yes.

THE COURT: – in a sense, and you told him you were troubled about something regarding this trial?

THE COURT: Did you perceive his answers telling you not to use those factors?

JUROR Y.M.: No, I didn't.

THE COURT: So that he didn't tell you not to use mercy, sympathy and concern in making a decision?

JUROR Y.M.: No, he didn't tell me which way to go, no. He just told me just render the things, the law of the land, you know. Either I can go with the law of the land or I can go with mercy, sympathy and grace.

THE COURT: He didn't tell you which way to go?

JUROR Y.M.: No, I already knew that the decision was mine.

THE COURT: Okay. Could I beg your indulgence and ask you to just step outside the door just a moment, please? Thank you, Mr. [Y.M.].

(60 RT 19223-19226 [emphasis added].)

The court then sent juror Y.M. out of the courtroom and engaged in further discussions with counsel. Juror Y.M. was then called back for additional questioning, as follows:

THE COURT: . . . . The first question would be, how long have you known the pastor? You known him a long period of time?

JUROR Y.M.: Two years.

THE COURT: Two years. Pastor of your church, I would imagine.

JUROR Y.M.: Yes.

THE COURT: Did – do you feel the consultation you had with him helped you in resolving the issues that you were facing?

JUROR Y.M.: So far as making my final decision, yes.

THE COURT: Okay. I need – where I need to inquire is how did this clear up the ambiguity in the instructions, if indeed you had such a problem with the instructions?

JUROR Y.M.: Well –

THE COURT: In other words, did he tell you something that cleared up the – what you thought, what you perceived as being ambiguous in the instructions?

JUROR Y.M.: Well, in the instructions, it said that we are – we wasn't supposed to consider, if I remember correctly, sympathy, pity and – and mercy. Then – then again, it told us that we could consider it. It said two different things. And – and just about two different paragraphs.

THE COURT: Okay. Did you think that was ambiguous?

JUROR Y.M.: Yes.

THE COURT: Did – did something the minister tell you that helped you –

JUROR Y.M.: Well –

THE COURT: – helped you clear up the ambiguity?

Why didn't you think the Court ought to give you an instruction clearing it up today? In other words, you told [the forewoman] not to ask for the instruction.

JUROR Y.M.: Well, that was yesterday that I asked for that.

THE COURT: Oh, you –

JUROR Y.M.: And then I asked him this morning. And it just cleared it up. It made it a little bit more plainer to me when – to me, when he just said that the law of the land or of God. To – because I – that just cleared it up to me.

THE COURT: Okay.

JUROR Y.M.: Because I was having some real thoughts about, like I say, I was changing my mind, going both ways. But when he said that, you know, you go with the law of the land or –

THE COURT: As opposed to what?

JUROR Y.M.: Or – render the things which are Caesar's, which means, you know, the law of the land and the things of God, the things of God. And, to me, that – that just cleared it up, so far as – it just helped me make my decision more clearly.

THE COURT: Okay. Thank you. All right. Thank you so much for helping us out.

(60 RT 19230-19232 [emphasis added].)

Following juror Y.M.'s testimony, defense counsel stated that he was "object[ing] to the entry of the verdicts" and would be moving for a new trial based upon juror misconduct. (60 RT 19232-19233.) The court asked about the possibility of substituting an alternate juror at this point, in place of juror Y.M., and instructing the jury to begin deliberations anew. Defense counsel objected to that proposal as improper since the jurors had already announced their verdict. (60 RT 19233.) The prosecutor responded that no prejudice had occurred from Y.M.'s actions and the jury's death verdict ought to be accepted. (60 RT 19234-19235.) The judge asked the attorneys to research the issues and report back regarding the possibility of substituting an alternate in place of juror Y.M. (60 RT 19236.) He instructed the jurors to return on Monday and advised them that they were not discharged and were still bound by admonitions not to consult outside sources and to avoid media reports. (60 RT 19239-19241.)

On the afternoon of May 18, the court and counsel further discussed the court's earlier suggestion that an alternate juror be substituted in. Defense counsel objected that case law did not support that option after a verdict had been announced. (60 RT 19243-19246.) Defense counsel renewed his motion for a mistrial based on juror Y.M.'s misconduct. (60 RT 19244.) The court had the alternate jurors return to the courtroom, where he

advised them that they were not released and they should remain available on call. (60 RT 19249-19251.) The court directed counsel to return the following day for further consideration of whether to accept the verdict, declare a mistrial or substitute an alternate and restart deliberations. (60 RT 19247, 19251-19252.)

On May 19, 1995, the court reconvened to hear further argument. Defense counsel maintained that a mistrial should be declared because juror Y.M. had committed misconduct by seeking counsel from his minister on a moral issue which cut to the heart of his penalty decision in this case. Defense counsel argued that this misconduct resulted in a presumption of prejudice which could not be rebutted in light of the impact it had on juror Y.M.: it caused him to withdraw his request to the court for clarification and prompted his immediate decision to change his vote to one in favor of a death verdict. (60 RT 19255, 19259, 19263, 19273.) In response, the prosecutor cited In re Carpenter (1995) 9 Cal.4th 634 and maintained that any misconduct on juror Y.M.'s part was harmless because Y.M. ultimately "made his own decision" regarding penalty. (60 RT 19271, 19276-19277.)

The parties also renewed discussion of the court's proposal that an alternate be substituted and deliberations be recommenced. Defense counsel strenuously objected that such a step was legally impermissible after a jury

had announced a verdict. Furthermore, that situation would be highly coercive to any new juror who would be deliberating with 11 other jurors who had already reached the point of committing to a verdict in open court. (60 RT 19279-19287.)

The court expressed the idea that counsel had waived juror Y.M.'s misconduct because no one objected when the jury withdrew its pending question, notwithstanding that this indicated that some communication between jurors had taken place outside the jury room. (60 RT 19294-19295.)

The parties returned on May 22 for purposes of the court announcing its ruling, as follow:

> [THE COURT]: . . . . [T]he Court is going to make the following ruling:
>
> First of all, the Court does not find any misconduct. Counsel might be shocked to learn that, even though the prosecution seems to somewhat indicate that perhaps that should be conceded.
>
> You have to read the transcript carefully. You must first accept the fact the Court finds that the juror really feels he didn't do anything wrong. He says, "I wasn't doing anything wrong. I didn't discuss the case. I didn't discuss anything regarding the case. I don't think I did anything wrong, Judge," is what I think he's telling the Court.

Also, the second factor is the Court does not find any instructions pertaining to mercy to be ambiguous. The Court clearly indicated in the instructions that you may use sympathy and mercy in a given situation; and that the Court only prohibited the use of sympathy and mercy in situations involving factual findings.

So reading the instructions, I find absolutely no ambiguity in the instructions.

So, first of all, the Court finds that the juror sincerely believes he didn't do anything wrong.

Secondly, the instructions were not ambiguous.

Having those two findings in mind, when you read the transcript itself, what you really find [juror Y.M.] doing is asking the pastor something in a general fashion about Christian beliefs and the death penalty, which really have nothing to do with the case itself in terms of making a decision.

Again, he didn't involve himself in any way in any discussions of the facts of the case.

The information given to him did not result in any improper facts coming to the attention of the juror.

The discussion with the pastor did not involve the weighing of factors in aggravation or mitigation.

The pastor did not tell him how to balance, weigh or vote.

What I think the pastor simply told him is to follow the law. In some situations, a Christian may have to vote in favor of the death penalty, but follow the law. That's what he's telling him.

If you read the transcript, keeping in mind he thinks he did nothing wrong and the instructions are not ambiguous and you consider exactly what the pastor told him, the Court is forced to come to that conclusion.

It was simply a generalized discussion with a minister, how a Christian can square his beliefs with the death penalty. And the minister said, "Sometime you have to follow the law." And that's what he told him to do.

MR. FOX: Judge, he was told to disregard mercy.

THE COURT: The Court's ruling. The Court's ruling, Counsel. You can do whatever you want on appeal or motion for a new trial.

The Court finds that the materials covered in the discussion were not any more than something one would read, hear or see in a generalized discussion regarding the death penalty, or even matters pertaining to punishment.

Quotes in the Bible or – or religious works are frequently brought to a person's attention, either in a – in a church service or on the radio or television or books or other materials.

It's just impractical, it's impossible, and it's really unwise to think that any juror in a death penalty case can be placed in a sequestered

or isolated condition where they will not read, see or hear generalized statements or discussions regarding the penalty.

Now, the Court thought in a situation involving a burglary case, would it be unusual that jurors would hear reports about burglaries, not about the case in issue, but reports in general about burglaries or punishment pertaining to theft-type cases. That's not unusual. And it certainly isn't a violation of the juror's oath to do so.

The Court does not find that that is any misconduct. Even if by some stretch of the imagination you can construe what [juror Y.M.] did as misconduct, the Court finds that it's not prejudicial in that there is no substantial likelihood any Biblical passages or information given by the pastor resulted in anyone being influenced to vote one way or the other in regard to the death penalty.

The bottom line instruction was, "Follow the law."

Again, the Court harks back to the findings the Court's made:

Number one, Mr. [Y.M.] doesn't think he did anything wrong. He absolutely thinks what he did was proper.

And, number two, the instructions were not ambiguous. And nothing the pastor said cleared up any ambiguity in any instructions. It simply allowed the juror to weigh the aggravating, mitigating factors one way or the other.

The Court is concerned that perhaps Mr. [Y.M.] somehow thought that a Christian belief just prohibited the consideration of the death penalty at all. And the pastor I think perhaps brought him back to reality that he had to follow the law, consider both the aggravating, mitigating circumstances, and make a decision based upon those, weighing himself.

More importantly, the juror clearly said that he was not told how to vote. He knew it was his own decision. He knew he had to make up his own mind. And, in fact, made up his own mind. It just did not affect his partiality. Didn't lighten the burden of proof of the prosecution in any way, shape or form. It did not contradict or negate any asserted defense by the defendant. And it did not relieve the juror himself of any feeling of personal responsibility in making the decision on the penalty. He knew it was his decision. He made the penalty decision himself. And he did not push the responsibility on anybody else.

And the Court carefully read the excerpt from In re Carpenter. And the Court believes there's some good in the cases that are cited in that particular case. Pertaining to any extraneous materials received by a juror, you have to judge these things objectively. And the Court has. And the Court does not find any misconduct.

And even if you can call it misconduct, if you judge it objectively, it does not appear that there's any inherent likelihood to have any influence on any juror to vote either way. It's simply told the juror, "Follow the law."

Also, the Court finds that, looking at the nature of the minister's statements and surrounding circumstances, there's also not a substantial likelihood any juror actually based

anything the minister said – sorry – based anything in its decision, or their decisions, on something the minister said. It didn't affect how the votes came out.

And the Court's really concerned that Counsel would – either Counsel would allow the Court to make a – a reading of the verdict and then come back and complain later.

The Court really has a feeling that perhaps Counsel thought perhaps the verdict would go in their favor, and that somehow the Court then would not notice that something had taken place outside the purview of the jury room.

And the Court believes because of that, the Counsel should be estopped from even making this inquiry.

The – the attorneys knew that there was something, and they didn't inquire because of the fact they both hoped the verdict would go in their favor.

And that, in my instance – in my feeling, makes an estoppel against the attorneys and prevents them from complaining at this particular time. I think it's unnecessary to even reach the additional issues in the case.

So the Court at this time will deny the motion for mistrial. And the Court is going to enter the verdict that the jurors have rendered, and order the clerk to do so at this time.

The clerk will be given the verdict at this time. Ordered to enter it.

(60 RT 19304-19309.)

2. New Trial Motion – Testimony of Reverend Sutton

This issue was revisited as part of appellant's motion for a new trial, filed June 30, 1995. (8 CT 2268-2308.) Therein, defense counsel argued that juror Y.M. had committed highly prejudicial misconduct. Juror Y.M.'s minister, in telling Y.M. to "render . . . unto Caesar the things which are Caesar's; and unto God, the things that are God's" (Matthew 22:21) and "[i]f you live by the sword, you die by the sword" (60 RT 19224) effectively advised juror Y.M. not to apply mercy in making his penalty decision. (8 CT 2284-2285.) Counsel cited commentary showing that the Biblical invocation to render unto Caesar has historically been recognized as supporting the State's right to use capital punishment. (8 CT 2297-2298.) The minister's advice obviously influenced juror Y.M.: the very next morning he withdrew his unanswered multipart question to the court and immediately changed his vote to one in favor of the death penalty. (8 CT 2293-2294, 2305-2306.) Y.M.'s statement when questioned by the court – "Either I can go with the law of the land or I can go with mercy, sympathy and grace" (60 RT 19226) – clearly demonstrated that his conversation with his minister had misled him into believing that following the law in this case precluded his applying mercy and sympathy in arriving at his penalty verdict decision. (8 CT 2284.)

Defense counsel asserted that all this amounted to a clear violation of appellant's Sixth Amendment right to an unbiased and unprejudiced jury. (8 CT 2289, 2291-2292.)

The prosecutor countered that misconduct had not occurred because juror Y.M. "did not discuss the facts or issues of the case with his minister, nor did he receive from him any extraneous law which would influence his ultimate decision." (9 CT 2354.) The prosecutor further maintained that appellant suffered no prejudice, in any event, because juror Y.M.'s discussion with his minister "merely encompassed the common sense approach to the spiritual aspects of the death penalty and nothing more." (9 CT 2354.)

On its own motion, the court subpoenaed juror Y.M.'s minister, Reverend Sutton, to appear and be questioned by counsel at the hearing on the motion for a new trial. (60 RT 19367-19369.)

The motion for a new trial was heard on August 1 and September 11, 1995. Prior to hearing Sutton's testimony, the court issued a "tentative ruling" denying the new trial motion. With respect to the issue of juror misconduct, the Court emphasized the following points:

> 1) Juror Y.M. "himself feels that he did nothing wrong, nothing wrong pertaining to his discussions with the pastor" and the Court found Y.M. credible in expressing this "sincere belief."

(60 RT 19375.)

2) The Court's instructions were "clear" in telling the jurors that they "could use mercy and sympathy in making their moral decision as to the ultimate penalty in this particular case." (60 RT 19375.)

3) Juror Y.M.'s pastor did no more than tell him "that it's possible in Christian theology, and in the Bible itself, for a Christian who believes fervently in the Christian faith, to possibly vote for the death penalty. It's not an impediment." (60 RT 19377.)

4) Effectively, the pastor did no more than tell juror Y.M. "to follow the law." Since the given instructions told the jurors that they were permitted to consider "mercy, sympathy and compassion in deciding" the penalty verdict, "the Court assumes that [Y.M.] did the right thing and appl[ied] those factors to the case." (60 RT 19378.)

5) Even if misconduct actually occurred, it was "harmless" because "there is no substantial likelihood that what happened resulted in any influence to [Y.M.] in voting one way or the other regarding the death penalty." (60 RT 19378.)

After the court completed recitation of its "tentative ruling" on the other issues raised in the motion for a new trial, juror Y.M.'s minister, Reverend Sutton, was called as a witness. Sutton's account of events was quite similar to that provided by juror Y.M. Sutton was the pastor of a Baptist church in Manteca. Juror Y.M. was a very active member of this

church and served as a deacon. (60 RT 19387, 19408-19409.)

Juror Y.M. made a phone call to Sutton at his home at 7:30 p.m. on the night of May 17, 1995 (60 RT 19387-19388.) Juror Y.M. inquired of Sutton regarding the position the Bible and their Christian beliefs with respect to the death penalty. Juror Y.M. told Sutton that he was serving as a juror; Sutton surmised from his questions that the case involved the death penalty. (60 RT 19388-19389, 19391-19392.) Sutton sensed that Y.M. "was very troubled" about what he was calling about and "that it was really weighing heavy on his mind." (60 RT 19394.) Sutton did not recall discussing the topics of "mercy, sympathy [or] compassion." However, he could not say that those concepts did not come up in the phone call. (60 RT 19389, 19392, 19401.) There was no discussion regarding the specific details of appellant's case. (60 RT 19394, 19412-19413.)

In response to juror Y.M.'s concern about the death penalty, Sutton referred him to the two Biblical passages: that of rendering unto Caesar and he who lives by the sword shall die by the sword. (60 RT 19388, 19394.) Sutton and Y.M. both had copies of the Bible at hand and Sutton asked Y.M. to read these passages as Sutton directed his attention to them. (60 RT 19392, 19398, 19421.)

In Sutton's opinion, the passage about Caesar did not directly relate to

the death penalty, but it served as an admonition to follow the laws of the land when acting within the secular realm. (60 RT 19396, 19411.) Regarding the passage about living and dying by the sword, in Sutton's opinion that meant "if you are responsible for taking someone's life and . . . you are found guilty of it, then . . . the laws of the land are responsible for taking yours." (60 RT 19397.) Sutton said that, beyond directing juror Y.M. to the sword passage, he had not felt the need to explain it to Y.M. or explain why he had selected it in response to Y.M.'s question about the death penalty – those answers were self-evident. (60 RT 19397.) In Sutton's opinion the sword passage demonstrated Biblical support for the death penalty. (60 RT 19418-19419.)

At the end of the conversation juror Y.M. seemed to be more at ease and less troubled. The two closed their discussion by praying together. Their prayer was "basically that the Lord would give Y.M. the wisdom to make his decision." (60 RT 19395, 19417.) The entire phone call lasted about 15 to 20 minutes. (60 RT 19388.)

Sutton directed juror Y.M.'s attention to these two particular Biblical passages because he believed they came closest to answering Y.M.'s inquiry about the death penalty. Sutton's church took no official position with respect to capital punishment. (60 RT 19397-19399.)

Following Sutton's testimony, defense counsel renewed his motion for a mistrial, emphasizing that juror Y.M. had clearly committed misconduct by talking to Sutton about a matter relating to the case and this was prejudicial because Y.M. then proceeded to withdraw his question to the court, having received his answer from his pastor. (60 RT 19422-19423.)

The court indicated that it was affirming its prior tentative decision to deny a mistrial, stating:

> The Court would respectfully deny your request and would affirm the tentative decision.
>
> The Court just really feels it's not exactly as you say. You interpret it as you will, but the Court believes that [juror Y.M.] was struggling with whether or not to impose the death penalty, whether a Christian could ever vote for death penalty in asking a pastor, and was told there are places in the Bible that make it possible for a Christian to do that.
>
> He has to follow the law. The law allows for consideration of sympathy and mercy. And he followed the law and he made the decision. The decision was his. For that reason, the Court denies the motion.
>
> (60 RT 19423-19424.)

B. The Juror's Discussion With His Minister Was Prejudicial and Requires Reversal of the Death Judgment

Permitting the death judgment to stand notwithstanding the misconduct of juror Y.M. would violate appellant's right, under the California and federal constitutions, to due process of law and a fair jury trial by twelve impartial and unprejudiced jurors. (U.S. Const., Amends. V, VI, XIV; Cal. Const., art I, § 16.)

In People v. Holloway (1990) 50 Cal.3d 1098, this Court stated that a criminal defendant has a right "to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.'" (Id. at 1112 [citation omitted].) "A strict rule that one tainted juror compels reversal is necessary in criminal cases because under the California Constitution, the jury must unanimously agree that a defendant is guilty. The vote of one tainted juror obviously renders the required unanimous verdict unreliable." (Glage v. Hawes Firearms Co. (1990) 226 Cal.App.3d 314, 322 [fn. & citation omitted].)

The United States Supreme Court has likewise held that, under the Sixth and Fourteenth Amendments, a criminal defendant possesses a due

process right to an impartial jury on the issue of his guilt. (Ristaino v. Ross (1976) 424 U.S. 589, 595, fn. 6 [47 L.Ed.2d 258, 96 S.Ct. 1017]; see Morgan v. Illinois, supra, 504 U.S. at 725-728.) Under the Fourteenth Amendment's due process clause, the defendant also has a right to an impartial jury on any issue, including the penalty, if in fact he is tried by a jury thereon. (Morgan v. Illinois, supra, 504 U.S. at 725-728.) If even one juror is not impartial, that juror's participation in the trial process renders any guilt determination invalid under the due process clause of the Fourteenth Amendment. (Irvin v. Dowd (1961) 366 U.S. 717, 722 [6 L.Ed.2d 751, 81 S.Ct. 1639].) Such a juror's participation renders any penalty determination invalid under the latter federal constitutional provision. (Morgan v. Illinois, supra, 504 U.S. at 727-728.) Invalidation is required under the Fourteenth Amendment's due process clause because a juror's "verdict must be based upon the evidence developed at trial. [Citation.] This is true regardless of the heinousness of the crime charged" or "the apparent guilt" or blameworthiness of the offender. (Irvin v. Dowd, supra, 366 U.S. at 722; accord Morgan v. Illinois, supra, 504 U.S. at 725-726.)

"It is misconduct for a juror during the course of trial to discuss the

case with a nonjuror."[36] (People v. Danks (2004) 32 Cal.4th 269, 307.) A juror's receipt of information regarding the defendant or the case "gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut." (People v. Nesler (1997) 16 Cal.4th 561, 579.)

Because juror Y.M.'s consultation with his minister was clearly prejudicial, the death judgment herein must be reversed. Juror Y.M.'s minister, in response to his question regarding mercy and sympathy in the context of a capital trial, told Y.M. that one should "render . . . unto Caesar the things which are Caesar's," which Y.M. took to mean that one

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[36] The jurors herein had been repeatedly admonished by the court not to discuss this case with nonjurors. By way of examples, the court told the jurors:

> It is also improper for any juror to receive any information regarding this case or discuss this case with anyone from the date the jury was impaneled.
>
> (59 RT 19130-19131.)
>
> [R]emember not to visit the scene, consult reference works or other people for information about the case.
>
> (60 RT 19174.)

should "go with the land of the land" and completely disregard mercy and sympathy in deciding appellant's sentence. (60 RT 19223-19226.)

The passage which Minister Sutton referred juror Y.M. to is from the Book of Matthew, which reads: "Render, therefore, unto Caesar the things which are Caesar's; and unto God, the things that are God's." (Matthew 22:21.) As one commentator has pointed out with respect to this passage and its relation to capital punishment: "While specifically related to the payment of taxes, it . . . has been cited . . . as granting the secular government a legitimate realm of power that includes the right (if not the mandate) to use deadly force." (J. Gordon Melton, The Churches Speak On: Capital Punishment (1989) p. xix.)

The minister also told juror Y.M. "about the double-edged sword. If you live by the sword, you die by the sword." (60 RT 19224.) Clearly, this meant that any intentional killer deserved death, without any regard for the mitigating factors set forth in section 190.3, many of which were applicable in this case. (See Arguments X.E and XXIV, below.)

It should also be emphasized that juror Y.M. was very active in his church and served as a deacon. (60 RT 19408-19409.) Obviously, his minister's counsel carried great weight with him. Minister Sutton's advice that evening made all the difference to juror Y.M.: the next morning he

informed the jury forewoman that he wished to withdraw the written request for clarification which he had previously asked to be submitted to the court regarding the application of "mercy" and "sympathy" (8 CT 2203) and, moreover, juror Y.M. immediately indicated that he was now willing to change his vote to one for death. Later, the judge asked juror Y.M. if "the consultation" with his minister had "helped you in resolving the issues that you were facing?" and Y.M. readily replied, "So far as making my final decision, yes." (60 RT 19230.)

Furthermore, it is clear from the record that juror Y.M. left his conversation with his minister in possession of a critical misunderstanding of the law, as evidenced by the following exchange between Y.M. and the judge:

> THE COURT: So that he didn't tell you not to use mercy, sympathy and concern in making a decision?
>
> JUROR Y.M.: No, he didn't tell me which way to go, no. He just told me just render the things, the law of the land, you know. Either I can go with the law of the land or I can go with mercy, sympathy and grace.
>
> (60 RT 19226 [emphasis added].)

Juror Y.M.'s understanding was clearly wrong because applying "the law of the land" and applying "mercy" and "sympathy" did not present an "either

. . . or" situation. Applying "mercy, sympathy, compassion or pity for the defendant" was consistent with the law and the instructions the jury was given. (8 CT 2189; 59 RT 19138; see § 190.3, subd. (k).) This was something which juror Y.M. would have undoubtedly learned if he had only waited for the court to answer the multipart question which he had asked the forewoman to submit on his behalf. (See 8 CT 2203.) Unfortunately, juror Y.M.'s conversation with his minister either resulted in or reinforced an existing misconception on Y.M.'s part – namely, that applying mercy and sympathy was inconsistent with and alternative to applying "the law of the land." The fact that juror Y.M. asked the question which he did of the court clearly demonstrates that he was leaning against a death verdict, contingent on his being able to conclude that considering mercy and sympathy were consistent with the law and the jury instructions given in this case. Because Y.M.'s improper discussion led to his certitude in the incorrect belief that mercy and sympathy was inconsistent with the law in making his penalty phase decision – and, because Y.M.'s discussion with his pastor resulted in his withdrawal of his question to the court, which most likely would have resulted in the court's providing proper guidance on this question – juror Y.M.'s misconduct was clearly prejudicial.

Relevant case law supports the conclusion that the juror misconduct

which occurred herein fatally undermined the constitutional integrity of the death penalty process. In NeCamp v. Commonwealth (1949) 311 Ky. 676 [225 S.W.2d 109], the jury returned a death verdict. In the defendant's motion for a new trial, an affidavit was introduced by the state in support of the verdict which stated that, during the course of deliberations, a juror told other jurors that "she had confided in her priest and he had advised her it was all right" to impose the death penalty because "it would not be any sin." (Id., 225 S.W.2d at 111.) In reversing the death judgment, the NeCamp court stated:

> In the present case, . . . we have an affidavit filed by the Commonwealth [that] . . . does in fact reveal misconduct as measured by the law. It is a disclosure made by the Commonwealth itself that the juror during the trial had conferred with another and carried the advice into the jury room. Perhaps this interpretation of the affidavit as being in support of and not to impeach the verdict is not the perfection of logic. But with the life of a man at stake, and that life to be taken by processes of the law, the reality and the actuality of the situation ought, under such circumstances, to be recognized . . . . The appellant, NeCamp, is shown to be a confirmed criminal, an enemy of society. But society cannot ignore its legitimate concept of justice even for such an insubordinate member.
>
> (NeCamp v. Commonwealth, supra, 225 S.W.2d at 112.)

Also pertinent is Ex parte Troha (Ala. 1984) 462 So.2d 953. In

Troha, the Supreme Court of Alabama reversed a rape conviction based on juror misconduct where a juror stated in his declaration that he "felt compelled" during trial to ask his brother, a minister, "for guidance and scripture references so as to enable [him] to make a proper and just decision." (Id. at 953-954.) In reversing, the state supreme court noted: "It is a well settled principle of law and, further, it is fundamental to a fair trial, that jurors should consider only the evidence presented at trial." (Id. at 954.)

The juror misconduct addressed herein is analogous to situations where a prosecutor invokes Biblical passages to argue to the jury in favor of a death verdict. In People v. Wash (1993) 6 Cal.4th 215, the prosecutor included several references to the Bible in his closing argument, including that of rendering unto Caesar the things that are Caesar's. (Id. at 259, fn. 19.) This Court found the prosecutor's collective Biblical remarks "to be improper," (citing People v. Sandoval (1992) 4 Cal.4th 155, 193-194), but further found the issue of prosecutorial misconduct to be non-cognizable on appeal given defense counsel's failure to lodge an objection. (People v. Wash, supra, 6 Cal.4th at 259-260 [emphasis added].)

In People v. Sandoval, supra, 4 Cal.4th 155, where the prosecutor invoked a passage of the Bible to support his penalty phase argument this Court stated:

> Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. . . . The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." [Citation.] He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. [Citations.] The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination.
>
> Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. . . . What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. [Citation.]
>
> (Id. at 193-194 [emphasis added].)

In Sandoval v. Calderon (9th Cir. 2000) 231 F.3d 1140, the Ninth Circuit Court of Appeals reversed defendant Sandoval's death judgment based upon the prosecutor's improper invocation of religious authority in support of his argument for the death penalty. The Ninth Circuit found that "the prosecution's invocation of higher law or 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." (Id. at 1150.) Furthermore, "[a]rgument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty." (Id. at 1151.) The appeals court noted in addition that the establishment clause of the First Amendment requires courts to be "especially vigilant in guarding against religious argument." (Ibid.) After reviewing the "eloquent, powerful, and unmistakably Biblical" language utilized by the prosecutor, the appeals court found that Sandoval was prejudiced and reversal of his death judgment was therefore mandated. (Id. at 1152.)

In the present case, it was clearly improper for juror Y.M. to rely upon his minister's counsel or the Biblical passages which his minister directed him to, rather than the statutory factors enumerated in section 190.3, in determining whether a death verdict was warranted in appellant's individual case. (People v. Roybal (1998) 19 Cal.4th 481, 521; People v. Sandoval, supra, 4 Cal.4th at 193-194; Sandoval v. Calderon, supra, 231 F.2d at 1154.)

The court's assessment that defense counsel was estopped from complaining about juror Y.M.'s misconduct was clearly incorrect. (See 60 RT 19308.) An act amounting to an estoppel requires that a party acts "with

full knowledge of all the material facts and circumstances and with full knowledge of [his] rights." (In re Marriage of Burkle (2006) 139 Cal.App.4th 712, 753; Estate of Cover (1922) 188 Cal. 144, 146.) Once defense counsel learned the fact that juror Y.M. had consulted his minister, defense counsel never took any action indicative of acceptance of that situation. Instead, appellant's counsel immediately requested an investigation and, shortly afterwards, moved for a mistrial.

In sum, juror Y.M.'s consultation with his minister created a presumption of prejudice with respect to appellant's penalty trial. (People v. Holloway, supra, 50 Cal.3d at 1108.) Here, the State cannot meet its burden of rebutting this presumption of prejudice. The bias and impartiality of even a single juror results in an unfair trial and requires reversal under the Sixth and Fourteenth Amendments. (Irvin v. Dowd, supra, 366 U.S. at 722.) This error also deprived appellant of his Eighth Amendment right to be sentenced in accordance with procedures which are reliable, rather than arbitrary and capricious. (Johnson v. Mississippi (1988) 486 U.S. 578, 584 [100 L.Ed.2d 575, 108 S.Ct. 1981]; Beck v. Alabama, supra, 447 U.S. at 638.)

The occurrence of jury misconduct, whether deliberate or inadvertent, "creates a presumption of prejudice which, if not rebutted, requires a new trial." (People v. Zapien (1993) 4 Cal.4th 929, 994 [citing People v.

Holloway, supra, 50 Cal.3d at 1108].) In People v. Von Villas (1995) 36 Cal.App.4th 1425, the court summarized the standard for establishing reversible error based upon a juror's receiving information from an outside source concerning the defendant's case:

> While . . . receiving impressions from sources other than evidence received at trial raises a presumption of prejudice, this presumption of prejudice may be rebutted. (People v. Holloway (1990) 50 Cal.3d 1098, 1108 [].) "This presumption of prejudice '"may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct] . . . ."' [Citations.] (In re Hitchings (1993) 6 Cal.4th 97, 119 [].) Our Supreme Court in In re Carpenter (1995) 9 Cal.4th 634, 653 [], recently summarized that " . . . when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test."

(People v. Von Villas, supra, 36 Cal.App.4th at 1431.)

It is not possible for the State to rebut the presumption of prejudice brought about by the misconduct of juror Y.M. As will be discussed in detail in Argument X.E., below, this was a very close case on the question of penalty. Appellant' first penalty phase trial ended in 9-to-3 hung jury (7 CT 1785; 36 RT10100) and the second penalty phase jury had been unable to reach a penalty verdict for almost two days prior to juror Y.M.'s improper conversation with his pastor. (See 8 CT 2201, 2202, 2206-2207; 59 RT 1975, 19205-19206.) Juror Y.M.'s pastor explained to him the part mercy and sympathy should play in his verdict: none. And, in telling juror Y.M. that those who "live by the sword" should "die by the sword," juror Y.M.'s minister effectively instructed him that all intentional killers should be put to death regardless of any consideration of mitigating factors. The pastor's advice effectively overrode the court's penalty phase instructions, which told the jurors to be guided by the aggravating and mitigating factors set forth in section 190.3 and to make an individual, personal assessment (not a decision directed by a minister) regarding whether to be influenced by mercy or sympathy for the defendant. (8 CT 2189, 2191.) The effect of the consultation upon juror Y.M. was very powerful, in that he immediately withdrew his prior request for the judge to provide clarification regarding the

jury's consideration of mercy and sympathy. (60 RT 19197, 19217-19219, 19230-19232.) It was clearly juror Y.M.'s discussion with his minister that served as the critical determinate in Y.M.'s decision to cast his vote in favor of the death penalty and break the previously existing jury deadlock on the issue of penalty.

In sum, the misconduct of juror Y.M. created a presumption of prejudice with respect to appellant's trial. (People v. Holloway, supra, 50 Cal.3d at 1108.) Here, the State cannot meet its burden of rebutting this presumption of prejudice. The bias and impartiality of even a single juror results in an unfair trial and requires reversal under the Sixth and Fourteenth Amendments. (Irvin v. Dowd, supra, 366 U.S. at 722.) Accordingly, the death judgment must be reversed on this ground.

IX. THE COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE OF S.B., WHO SERVED AS A PENALTY PHASE JUROR

A. Introduction

The court below erred in denying defense counsel's challenge for cause of juror S.B. because his responses indicated that he would automatically vote for death in any case of multiple murder, murder for robbery or murder coupled with a conviction for jail escape. The court's ruling was prejudicial because defense counsel exhausted his peremptory challenges and S.B. sat on appellant's second penalty jury, which returned a death verdict.

B. Procedural Background

S.B. had been born in Spain and came to the United States when he was 22 years old. He was currently retired; previously he had worked for 33 years in the furniture industry. (41 RT 11697, 11780; 23 ACT 6713-6714.)

S.B.'s jury questionnaire was only partially filled out. Many questions had been left blank, particularly those which called for any type of

response beyond checking a box or circling a multiple-choice answer. (23 ACT 6713-6728.) His general feeling about the death penalty, expressed in his own words, was that it "should be enforced." (23 ACT 6724 [jury questionnaire, question 57].) He indicated that he "agree[d] somewhat" with each of the following propositions: 1) "[a]fter a fair trial and a finding of guilt, automatically and without consideration of any other factors, the State should execute everyone who unlawfully and intentionally murders another human being"; 2) "[a]fter a fair trial and a finding of guilt, automatically and without consideration of any other factors, the State should execute everyone who intentionally murders another human being during the commission of a dangerous crime"; 3) "[o]nce a defendant is found guilty of first degree murder and the issue to be decided is whether to choose the death penalty or life without the possibility of parole, a defendant who killed another impulsively, without planning to do so in advance, should receive the same penalty as one who murdered according to a careful plan"; and 4) "[o]nce a defendant is found guilty of first degree murder and the issue to be decided is whether to choose the death penalty or life without the possibility of parole, a defendant who had committed the murder while intoxicated on alcohol or illegal drugs deserves the exact same punishment as one who killed while sober." (23 ACT 6726 [jury questionnaire, questions 62-65;

original emphasis]].)

S.B. indicated on his questionnaire that he had recently been the victim of a violent crime. (23 ACT 6716.) In response to defense questioning, S.B. explained that two months before his being summoned to jury duty, he and his wife had been robbed at gunpoint in a shopping mall. (41 RT 11780-11781.)

As will be detailed in subpart C. below, when questioned by counsel and the court, S.B. indicated strong feelings about the death penalty and when it was warranted. S.B. expressed his belief that the death penalty was appropriate for a murderer who had escaped from jail (41 RT 11704-11705, 11783-11784), for a murder committed during a robbery (41 RT 11784-11785) and for multiple murder (41 RT 11783). However, he believed the situation might be "a little different" with regard to a killing committed during a fight or as a result of the defendant's "bad temper." (41 RT 11784-11785.)

Following voir dire of S.B., defense counsel orally asserted a challenge for cause against him (41 RT 11790), which the court denied as follows:

> The Court rules that this particular juror understands the concepts, and that the Court believes that under the oath a person took, despite views being a little bit strong, can

> conscientiously follow the oath in making a fair decision in this case voting one way or the other.
>
> There's a little bit of difficulty understanding, but we keep putting absolutes to the juror and the juror has some difficulties with English, but I think the juror can grasp the concepts and make a fair decision in the case and consider all the circumstances before voting one way or the other.

(41 RT 11793.)

With the court's permission (41 RT 11793), defense counsel subsequently renewed his challenge in writing. (7 CT 1935-1960.) Citing Wainwright v. Witt (1985) 469 U.S. 412 [83 L.Ed.2d 841, 105 S.Ct. 844], defense counsel argued that S.B. should be dismissed because his "attitudes towards the death penalty, even if not self-described as automatic, are such that they would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (7 CT 1939; quoting Wainwright v. Witt, supra, 469 U.S. at 424 .) Elaborating in court, defense counsel pointed out that S.B.'s answers indicated that he would automatically "vote for the death penalty in this case, or that he feels that a person who commits a murder and escapes gets the death penalty, or a person who commits two murders gets the death penalty. [¶.] He also stated negatively . . . that he did not feel that prison was enough punishment." (46 RT 13136.)

Denying the challenge a second time, the court stated:

> [S.B.], the Court denies the request to excuse him at this time, the challenge.
>
> The Court found it very difficult to make him understand that he had a job to do in deciding this case, based upon which penalty to pick out. Albeit, he did seem to grasp that at some point, I think he was very sincere in being able to make the decision based upon the factors. And, of course, many of his answers were based upon the synopsis in the Court's questionnaire, where there didn't appear to be any mitigating factors at all. Simply all aggravating factors. In that situation, of course, we would never impanel anybody to be a juror.
>
> The Court often wonders what would happen in a case where you have many, many aggravating factors, multiple homicides, many felony convictions on the person's record, and also a situation where there may be prior bad acts involving force and violence, or threats of force and violence, and very few mitigating items, and the case hang[s] up on the penalty and comes back for a retrial on the penalty only after all these convictions, it would be totally impossible to get a jury based upon the approach that the Court's taken if you do not explain there may be some mitigating matters.
>
> And if you tell the jurors what the mitigating things are, you have a situation where you never be able to get a juror or jury who would ever be able to say they keep an open mind in the case.
>
> I just wonder what would happen in such a situation. It's a frightening prospect.

> The Court looked at his answers to questions 62, 63, 64, 65, 66 and 67. And, also, considered the fact he could be easily led and confused because of his difficulties with English. I also considered his demeanor upon giving the answers. And the Court finds that he's a qualified juror for the reasons stated.
>
> (46 RT 13189-13191.)

In selecting the second penalty jury, defense counsel exhausted all of his peremptory challenges, complained about the jury's final composition and unsuccessfully requested that the court provide additional peremptory strikes. (46 RT 13332-13336.) S.B. was ultimately chosen for appellant's second penalty jury, which returned a death verdict. (See 60 RT 19207.)

C. The Trial Court Erred in Refusing to Dismiss this Juror

The trial court erred in refusing to dismiss S.B. because that juror's answers to questions posed by counsel and the court indicated that he would automatically vote for death based upon appellant's present convictions for multiple murder, robbery murder and/or murder plus a jail escape, without consideration of mitigating circumstances.

In a capital case, a juror is properly excused for cause if that juror would "automatically" vote for a certain penalty or if the juror's views on

capital punishment would prevent or substantially impair the performance of his or her duties in keeping with the juror's oath and the court's instructions. (Wainwright v. Witt, supra, 469 U.S. at 424; Witherspoon v. Illinois (1968) 391 U.S. 510, 522, fn. 21 [20 L.Ed.2d 776, 88 S.Ct. 1770]; People v. Alfaro (2007) 41 Cal.4th 1277, 1313.) "[T]his standard . . . does not require that a juror's bias be proved with 'unmistaken clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (Wainwright v. Witt, supra, 469 U.S. at 424.) "Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence." (Morgan v. Illinois, supra, 504 U.S. at 739].)

In People v. Kirkpatrick (1994) 7 Cal.4th 988, this Court stated: "A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document." (Id. at 1005 [citations omitted].) As set forth below, S.B. indicated that he would be inclined to automatically vote for the

death penalty based upon several situations which were presented in appellant's case:

a) Murder coupled with jail escape. S.B. told the judge, in response to a question regarding how he would decide between death and life without parole, "If [a murder defendant] got the death penalty, he got no chance to go again outside, he can't run away again." (41 RT 11704-11705.)

Following this, S.B. twice reaffirmed that the fact that a murder defendant had escaped from jail would constitute automatic grounds for his choosing the death penalty:

> [DEFENSE COUNSEL FOX]: Okay. You said another thing when you were talking to the judge. You said, "If he gets the death penalty, he can't run away again."
>
> A. Well, yes.
>
> Q. Were you – what were you referring to, were you referring –
>
> A. Well, if he got life in prison he can run again and gotta make another – another trial again.
>
> (41 RT 11783 [emphasis added].)
>
> THE COURT: Maybe I can ask it a little bit different so you'll understand.
>
> If it's a question of whether a person gets a life without parole in prison or death penalty is a – is a fact that someone has escaped on a prior occasion, is that a reason to give death penalty

and not life without parole or just a factor to be considered?

PROSPECTIVE JUROR [S.B.]: Er, I think the death penalty should be for the criminals doing for that kind of case.

(41 RT 11784 [emphasis added].)

b) Murder for purposes of robbery. S.B. also made it clear that, although he might be inclined to show mercy to someone who killed a single person during a fight or in the heat of passion, he would automatically vote for death for someone who killed during the course of a robbery:

[S.B.]: Sometimes you can kill one person and bad temper or something for fighting or something. That's a little bit different.

THE COURT: Uh-huh.

[S.B.]: But for stealing money or something kill the person, that's no right.

THE COURT: Well, there's no question it's not right, otherwise a person wouldn't be facing life without parole or death penalty. The question is choosing between the two.

See, what I have trouble with with all the jurors is they keep – they keep kind of thinking this is a case involving guilt. No, guilt. Forget it, it's out.

This is a case involving life or death, whether the person gets locked up for the rest of their life or put to death. That's the two – that's the only issues. So that if a person kills

somebody the question is not whether they should go free or not or get excused, the question is what penalty should they get, life without parole, never paroled again, or death penalty.

[S.B.]: I think the death penalty.

(41 RT 11784-11785 [emphasis added].)

c) Multiple murder. S.B. further indicated that he would always impose the death penalty on someone who was guilty of two murders:

[DEFENSE COUNSEL FOX]: – from the way you feel.

But do you – do you think – you've heard what the judge had to say, do you feel that in a case of double murder, person who has killed two people –

A. Yes.

Q. – that the life without parole is not enough punishment?

A. No, I don't think so.

Q. Okay. It's not enough?

A. For me, I like better give you the same.

Q. Okay. That is, to take the life of the murderer?

A. Uh-huh.

Q. Well, the – the – in – in a situation where you agree with the death penalty –

A. Yes.

(41 RT 11783 [emphasis added].)

As set forth above, S.B.'s responses indicated that he was inclined to automatically vote for death in any case involving murder plus a jail escape, murder for robbery or the murder of two persons. Each of these circumstances was presented in this case; in fact, appellant's first jury had made guilt phase findings establishing all of these circumstances to be true, such that appellant's second penalty trial jury began with all three of these circumstances established as unquestionably true. (See 47 RT 13381-13386 [opening instructions to second penalty jury].)

In People v. Cash (2002) 28 Cal.4th 703, this Court stated:

> Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (Wainwright v. Witt (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83 L.Ed.2d 841].) "The real question is ' " 'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror.' " ' " (People v. Ochoa (2001) 26 Cal.4th 398, 431 [] . . . . Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (Morgan v. Illinois (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 2228-2229, 119 L.Ed.2d 492], it is equally true that the "real question" is whether the juror's views about capital punishment would

> prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.
>
> A challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried. (People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005 [].)
>
> (People v. Cash, supra, 28 Cal.4th at 719-720 [emphasis added].)

Applying this standard, the court below clearly erred in denying defense counsel's motion to dismiss S.B. for cause. As indicated above, this juror's answers indicated that he would automatically vote for death in appellant's case, without regard to any circumstances presented in mitigation, based solely upon the circumstance that appellant stood convicted of multiple murders, robbery murder and/or murder plus jail escape.

D. This Error Compels Reversal of Appellant's Death Sentence

With respect to appellant's second penalty phase trial, defense counsel exhausted all of his peremptory challenges. Thereafter, he complained about the composition of the jury and made an unsuccessful

motion for additional peremptory challenges. (46 RT 13332-13336.) S.B. remained on appellant's jury and was one of the twelve jurors who returned the ultimate death verdict. (See 60 RT 19207.) Therefore appellant has met the requisites set down by this Court for reversal of a death sentence based upon improper denial of a defense challenge for cause. (People v. Alfaro, supra, 41 Cal.4th at 1314.)

The bias and impartiality of even a single juror, such as S.B., results in an unfair trial and requires reversal under the Sixth and Fourteenth Amendments. (Irvin v. Dowd, supra, 366 U.S. at 722; Dyer v. Calderon (1998) 151 F.3d 970, 973, cert. den. 523 U.S. 1033.) The present Witt - Witherspoon error is structural in nature and requires per se reversal of appellant's death sentence. (Arizona v. Fulminante (1991) 499 U.S. 279, 290, 310 [113 L.Ed.2d 302, 111 S.Ct. 1246] [denial of right to unbiased jury is structural error]; Witherspoon v. Illinois, supra, 391 U.S. at 521-523.)

X. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT UNFAIRLY PREJUDICED APPELLANT'S PENALTY PHASE TRIAL

A. The District Attorney Committed Misconduct in Closing Argument

The prosecutor in the present case engaged in several instances of misconduct in his penalty phase closing arguments which denied appellant a fair jury trial and violated his rights to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868]; Beck v. Alabama, supra, 447 U.S. at 638; People v. Bell (1989) 49 Cal.3d 502, 533-534.) This misconduct, described below, took six forms: 1) arguing facts not in evidence by way of the impact of Gregory Renouf's death upon his family members and friends (59 RT 18953-18954, 19080); 2) arguing that the jury should conclude that appellant's sister-in-law Denise Underdahl was adversely impacted by Larry Shockley's death and favored appellant's execution based upon imagined answers to questions which the prosecutor elected not to ask of her (59 RT 19079-19080); 3) arguing the alleged absence of remorse on appellant's part as a nonstatutory aggravating

factor; 4) arguing that the jury should show appellant the same mercy that he showed for the victims and their families; 5) disparaging a jury instruction concerning the consideration of mental or emotional disturbance; and 6) arguing that appellant deserved the death penalty because he was a neglectful parent and poor role model for his children. Each of these instances of misconduct is discussed in turn below.

B. The Court's May 9, 1995 Order

On October 11, 1994, defense counsel filed a motion in limine to restrict the scope of the prosecutor's penalty phase closing argument. (6 CT 1581-1608.) The purpose of this motion was to preclude the prosecutor from engaging in certain improper arguments which frequently occur in penalty phase arguments. The motion was discussed by the court and counsel on May 8 and 9, 1995 (58 RT 18720-18723, 18745-18758) and, as a consequence, the court signed an order on May 9, 1995 (hereinafter referred to as the "May 9, 1995 Order") listing certain kinds of penalty phase arguments which the prosecutor was directed to refrain from. (8 CT 2152-2157.) For purposes of the present argument, the significant directives of the May 9, 1995 Order included that the prosecutor refrain from arguing "[t]hat it is improper to permit mercy or sympathy to affect [a juror's] penalty

determination" (8 CT 2152), "[t]hat mental or emotional problems should not be considered unless they rise to the level of extreme mental or emotional disturbance" (8 CT 2152-2153), argument "regarding a victim's family member's characterizations or opinions about the crime, the defendant, or the appropriate sentence" (8 CT 2156), arguing "[t]hat the defendant's background and character are aggravating" (8 CT 2156) and arguing "[t]hat any non-statutory factors are aggravating, including the defendant's dishonesty, manipulativeness, lack of remorse, or future dangerousness" (8 CT 2156-2157).

C. Specific Instances of Misconduct

1. Arguing Facts Not in Evidence Concerning the Family and Friends of Gregory Renouf

As part of the court's May 9, 1995 Order, the prosecutor was precluded from engaging in "[a]rgument regarding a victim's family member's characterizations or opinions about the crime, the defendant, or the appropriate sentence." (8 CT 2156.) The prosecutor violated this directive by arguing in favor of a death verdict based on consideration of Renouf's

family members and friends. Even worse, the prosecutor compounded this misconduct by basing his argument on facts not in evidence regarding the impact of Renouf's death on his family and friends.

The first such instance of misconduct was the following, which took place during the prosecutor's initial penalty phase closing argument:

> [D.A. DUNLAP]: . . . . What about the family of Gregory Renouf?
>
> MR. FOX: I'm going to object to – I'm going to object to speculation about the affects on Mr. Renouf's family since there was no evidence of victim impact on Mr. Renouf's family.
>
> THE COURT: Overruled. [¶.] That, of course, is up to the jurors to decide what family he has, if any, and what the effect would have.
>
> MR. DUNLAP: Mr. Renouf isn't here by an egg, ladies and gentlemen. He's –
>
> THE COURT: I'm sorry. I didn't hear you counsel.
>
> MR. DUNLAP: Mr. Renouf wasn't born by an egg, ladies and gentlemen. He's a person. He has to be born just the same as anybody else. He has friends. Acquaintances. A life.
>
> MR. FOX: Judge, I renew the same objection. These are things that could have been brought in evidence and weren't.
>
> THE COURT: Overruled.
>
> (59 RT 18953-18954 [emphasis added].)

The prosecutor returned to this theme during his penalty phase rebuttal argument:

> [D.A. DUNLAP] . . . . Mr. Renouf, from his lifestyle, no children, does that mean his value is less? That he doesn't have parents? He doesn't have friends? Acquaintances? Co-workers? Does Mr. Renouf deserve less because he has no children?
>
> Do we treat someone who is from a wealthy background different from someone who is from a poor background? Sex? Race?
>
> (59 RT 19080 [emphasis added].)

The prosecutor's argument regarding Renouf's "parents," "family," "friends," "[a]cquaintances" and "[c]o-workers" was improper because there was no evidence before the jury regarding such persons. Defense counsel's objection to this line of argument should therefore have been sustained.

This type of prosecutorial misconduct was condemned in People v. Bolton (1979) 23 Cal.3d 208, 212-213, where the prosecutor hinted to the jury that, but for rules of evidence, he could show defendant had prior convictions or a propensity for wrongful acts. In Bolton, the court stated:

> There is no doubt that the prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally. In essence, the prosecutor invited the jury to

> speculate about – and possibly base a verdict upon – "evidence" never presented at trial. . . .
>
> Closing argument presents a legitimate opportunity to "argue all reasonable inferences from evidence in the record." [Citation.] However, this court has for a number of years repeatedly warned "that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." [Citations.]
>
> (People v. Bolton, supra, 23 Cal.3d at 212 [emphasis added].)

Likewise, in People v. Kirkes (1952) 39 Cal.2d 719, the prosecutor in closing argument sought to excuse the failure of the key prosecution witness to come forward to testify until defendant was indicted (eight years after the subject homicide), by stating that she had been afraid for her own life. There had been no trial testimony attesting to her fear. The Supreme Court stated:

> Equally well-settled is the rule that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct. [Citations.] Here, Mrs. Egan's long silence was excused by her asserted fear for her own safety if she testified against Kirkes. There is no evidence whatever upon which to base that statement.
>
> (Id. at 724 [emphasis added].)

The Kirkes court held this to be error notwithstanding the lack of a defense objection, stating that where prosecutorial misconduct by way of closing remarks is so damaging as to not be subject to cure by admonition then

reversal is called for. (Id. at 726.)

In Payne v. Tennessee (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597], the Supreme Court held that in a capital case the prosecutor may introduce "victim impact" evidence for purposes of showing the effects of a killing upon the family of the victim. However, that principle does not authorize argument to a jury that it should imagine and consider such evidence when none has, in fact, been presented.

The prosecutor's argument regarding the impact of Renouf's death upon his family, friends and co-workers was based upon pure conjecture; not upon any evidence actually presented to the jury. Therefore, this argument was totally improper.

2. Arguing Facts Not in Evidence Concerning the Impact of Larry Shockley's Death Upon His Stepdaughter

The prosecutor committed similar misconduct in arguing, without supporting evidence, that Larry Shockley's stepdaughter, Denise Underdahl, supported a death verdict. Again, this was in violation of the court's May 9, 1995 Order, which prohibited the prosecutor from arguing in favor of a death sentence based upon the opinions of a victim's family members. (See 8 CT

2156.)

In his rebuttal argument the prosecutor told the jury:

> [D.A. DUNLAP]: . . . . [Mr. Fox] chastised the District Attorney, myself, said, "Don't speculate about the victims having a family because they have the right to testify. They have the right to sit in that courtroom." That's what he said. [¶.] He says, "Anything else is speculation. No evidence that these people had family."
>
> All right. Denise Underdahl is family. What? Is she going to be called to the stand and asked if she missed her grandfather – her father? Grandfather to her children? And then have to go back home, have her children play with Amanda, deal with that pressure of testifying in court?
>
> Counsel had that same opportunity to talk about that. Counsel did not ask Denise Underhal if she felt Paul Hensley deserved the death penalty.
>
> Is that a fair thing to ask someone who has to go home and deal with her sister, nieces, and nephews?
>
> (59 RT 19079-19080 [emphasis added].)

Denise Underdahl, who was appellant's sister-in-law as well as Larry Shockley's stepdaughter, was called as a witness by both the prosecutor and defense counsel during the penalty retrial. As a prosecution witness she was questioned about appellant's relationship with Shockley and the burglary of Shockley's home. (48 RT 13781-13804.) The defense called her as a witness

mainly to discuss appellant's drug use. (55 RT 17962-17971.) She also testified that her daughter was a friend of appellant's daughter Amanda and that the two children played together. (55 RT 17967.) Underdahl did not testify regarding the effect of Shockley's death upon her; nor did she state that she favored the death penalty for appellant. Nonetheless, by way of the above-quoted remarks, the prosecutor effectively argued that Underdahl, due to family considerations, refrained from testifying that she was adversely affected by Shockley's death and likewise refrained from expressing her (imagined) support for appellant's execution. The prosecutor certainly had the opportunity to question Underdahl regarding her feelings about Shockley's death; he chose not to do so – quite possibly because he did not like the answers he anticipated he would receive. However, the prosecutor implied that he restrained himself from asking such questions out of decency:

> Denise Underdahl is family. What? Is she going to be called to the stand and asked if she missed her grandfather – her father? Grandfather to her children? And then have to go back home, have her children play with Amanda, deal with that pressure of testifying in court? [¶.] Counsel had that same opportunity to talk about that. Counsel did not ask Denise Underdahl if she felt Paul Hensley deserved the death penalty. [¶.] Is that a fair thing to ask someone who has to go home and deal with her sister, nieces, and nephews?
>
> (59 RT 19079-19080.)

Immediately after the jury left to begin deliberations, defense counsel lodged an objection that, in making this argument, the prosecutor had committed misconduct by arguing facts not in evidence by way of Underdahl's support for a death verdict. (60 RT 19165-19166, 19168-19169.) The judge instructed counsel to raise this by written motion. (60 RT 19170-19171.) Counsel complied by making this part of his motion for a new trial. (See subpart D, below.)

It was improper for the prosecutor to thus imply that he had personally refrained merely for reasons of decency from asking Underdahl questions about the effect of Shockley's death upon her and whether she favored appellant's execution; and to further argue that the jury should consider Underdahl's imaginary answers to these unasked questions as favoring a death verdict. Again, this was an instance of the prosecutor committing misconduct by arguing to the jury facts not in evidence. (People v. Bolton, supra, 23 Cal.3d at 212-213; People v. Kirkes, supra, 39 Cal.2d at 724.)

It was also improper for the prosecutor to indicate that defense counsel Fox had possessed the "opportunity" to ask Denise Underhal "if she felt Paul Hensley deserved the death penalty," but that Mr. Fox had chosen not to do so, and to thus imply that Mr. Fox had refrained from asking that question because he knew or believed that the answer would hurt his client. (59 RT

19079-19080.) In point of fact, both attorneys were legally barred from asking such a question because defense counsel, as well as the prosecutor, "may not elicit the views of a victim or victim's family as to the proper punishment" in a capital trial. (People v. Lancaster (2007) 41 Cal.4th 50, 97; People v. Smith (2003) 30 Cal.4th 581, 622.)

A prosecutor commits misconduct when he or she exploits a rule of evidence or an evidentiary ruling by the court to create a deception in the minds of the jurors. For example, it is misconduct for the prosecutor to clearly imply that a prosecution witness possesses no criminal record, when, in fact, the prosecutor knows that that the witness possesses a criminal conviction which was kept from the jury by court order. (See People v. Bittaker (1980) 48 Cal.3d 1046, 1104-1105; People v. Varona (1983) 143 Cal.App.3d 566, 570; see also People v. Martin (1983) 150 Cal.App.3d 148, 168-169.) In the present case, Mr. Dunlop committed such misconduct by effectively arguing that defense counsel Fox was legally in a position to ask Underhal whether she supported the death penalty for appellant, but that Mr. Fox strategically refrained from doing so because he knew or believed that Underhal would respond that she favored appellant's execution. This was deceptive because, in actuality, Mr. Fox was legally barred from asking such a question regardless of whether he wanted to do so.

It must be kept in mind that "prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (People v. Talle (1952) 111 Cal.App.2d 650, 677 [emphasis added].) Accordingly, there is every reason to believe that the jury accepted at face value the prosecutor's representations regarding what Underdahl's answers would be to questions never asked of her.

3. The Prosecutor Improperly Urged a Death Verdict on the Basis That Appellant Lacked Remorse

As part of the court's May 9, 1995 Order, the prosecutor was directed to refrain from arguing appellant's alleged "lack of remorse" as a "non-statutory factor" in aggravation. (8 CT 2152, 2156-2157.)

Nonetheless, the prosecutor repeatedly argued, as a factor in aggravation, that appellant had failed to demonstrate remorse for his crimes:

> [D.A.]: Ladies and gentlemen, you saw that tape [of defendant's statements to Detectives Faust and Ferrari]. . . . [W]atch it in that interview room. Contact Detective Faust.
>
> Why you fucking with me? I don't know what is going on. I'm asleep at the wheel. I don't know what's going on. Next thing I know I'm in here.

> Remorse? When you watch that videotape, what are you doing?
>
> Let's talk about Detective Faust. Saw his demeanor[,] his professionalism. He starts to question Mr. Hensley about a wallet in the car. Mr. Hensley invokes. I think that's enough. So then we watch several hours of him sleeping. Several hours.
>
> Didn't you see later in the afternoon Detective Faust and Detective Ferrari come in, take photographs of him. Told him he's going to be processed at the jail and Mr. Hensley reinitiates the interview.
>
> Why you working me so hard? I didn't do nothing.
>
> Remorse? Detective Faust interviews Mr. Hensley and he lies.
>
> (59 RT 18907-18908 [emphasis added].)

Shortly thereafter, the prosecutor returned to the theme of appellant's lack of remorse in his discussion of the Renouf and Copeland shootings:

> Ladies and gentlemen, when you look at that videotape you've already seen, there is no remorse for those victims. Not one time does he ask about the victims. The only thing he says about the victims is, I'm booked in for three murders today. He doesn't even know Stacey Copeland is alive.
>
> There is no remorse. No passion for the victims. The only sympathy you see is for Mr. Hensley himself[,] wondering what's going to happen to him.

(59 RT 18909-18910 [emphasis added].)

A prosecutor may not argue that a juror should use a defendant's lack of remorse as an aggravating circumstance favoring imposition of the death penalty. (People v. Crittenden, supra, 9 Cal.4th at 148.) Such an argument violates California's statutory scheme by allowing death to be based on a nonstatutory aggravating factor. (Ibid. [citing People v. Boyd (1985) 38 Cal.3d 762, 772-776]; accord, Bellmore v. State (Ind. 1992) 602 N.E.2d 111, 129 [trial court's reliance on lack of remorse as a nonstatutory aggravating factor violated Indiana death penalty statute].)

In Boyd, this Court held that evidence of bad conduct on the defendant's part which is not probative of any statutory penalty factor is irrelevant and inadmissible as to the prosecution case for aggravation. (People v. Boyd, supra, 38 Cal.3d at 774.) This important state procedural protection and liberty interest, i.e., the right not to be sentenced to death except upon the basis of statutory aggravating factors – is also protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300-1301, cert. den. (1994) 513 U.S. 914.)

While the presence of remorse is a mitigating factor and the prosecutor

may argue that no such mitigation has been shown, it is improper under the California statutory scheme to suggest to a jury that it may weigh the absence of a mitigating factor as though it were a factor in aggravation. (People v. Crittenden, supra, 9 Cal.4th at 148; People v. Davenport (1985) 41 Cal.3d 247, 288-290; see also, People v. Edelbacher, supra, 47 Cal.3d at 1032-1035 [reversal in part because prosecutor's argument violated Boyd and Davenport].)

Whether a prosecutor's argument regarding lack of remorse is improper thus "depends . . . on the inference [the prosecutor] . . . is asking the jury to draw . . . ." (People v. Cox (1991) 53 Cal.3d 618, 685.) If it is "reasonably likely" that a juror would construe a prosecutor's comments as suggesting the defendant's lack of remorse militated in favor of imposing the death penalty, then the argument violates state law. (People v. Payton (1992) 3 Cal.4th 1050, 1071 [effect of prosecutorial argument to be judged under reasonable likelihood standard]; see Boyde v. California (1990) 494 U.S. 370, 378-381, 386 [108 L.Ed.2d 316, 110 S.Ct. 1190].)

This Court has found no error where the prosecutor's argument was construed as merely pointing out to the jury that there was an "absence of evidence of remorse" and the jury therefore could not make "a finding of remorse as a mitigating factor." (People v. Crittenden, supra, 9 Cal.4th at 148

[original emphasis].) However, the prosecutor's argument in appellant's case cannot be so characterized. It was the prosecutor alone who propounded questions regarding remorse; this occurred during his examination of jail psychiatric technician Steven McElvain.[37] (See 58 RT 18588-18589, 18623-18625.) Likewise, it was the prosecutor who made the first reference to remorse during closing argument. (59 RT 18907-18908.)

It was also reasonably likely that a juror would have understood the prosecutor's argument as an adverse comment on appellant's failure to testify on his own behalf. (Cf. People v. Hardy (1992) 2 Cal.4th 86, 154 [construing prosecutor's statement, "Why doesn't the defendant just come out and say, 'I didn't do it'" as comment on failure to testify]; accord, People v. Vargas (1973) 9 Cal.3d 470, 474, 476 [similarly construing prosecutor's statement: "[t]here is no denial at all that they were there"]; Butler v. State (Miss. 1992) 608 So.2d 314, 318-319 [construing argument that the defendant "hasn't told you the whole truth yet" as an implied comment on defendant's failure to testify; capital conviction reversed on basis of Griffin[38] error].)

The Eighth Amendment requires that "capital sentencing procedures be unusually reliable." (Estelle v. Smith (1981) 451 U.S. 454, 468, fn. 11 [68

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[37] The prosecutor's examination of Steven McElvain regarding the subject of remorse, which took place over defense objection, is the subject of Augment XI, below.

[38] Griffin v. California (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229].

L.Ed.2d 359, 101 S.Ct. 1866]; accord, Johnson v. Mississippi (1988) 486 U.S. 486, 584 [100 L.Ed.2d 595, 108 S.Ct. 1981].) Lack of remorse is an unreliable basis on which to impose the death penalty. Among other things, the fact that appellant did not take the stand and express remorse does not reliably demonstrate appellant felt no remorse at the time of trial. The decision whether or not a defendant should testify is often a complex one. (See e.g., 3 Erwin, et al., California Criminal Defense Practice (1995) § 72.04[2], pp. 72-51 to 72-52.) The jury simply had no way of knowing why appellant did not take the stand. Also, it is possible that, as a result of psychological or mental impairment, appellant felt remorse, but had no way of expressing that feeling either at trial or to the witnesses referred to by the prosecutor.

To allow the jury to rely on lack of remorse as a reason for either imposing death or not choosing life imprisonment permitted the death verdict to rest on an impermissible and unreliable ground. For this reason, the prosecutor's argument additionally violated the Eighth and Fourteenth Amendments. (Cf. Johnson v. Mississippi, supra, 486 U.S. at 584-587 [jury's consideration of one invalid aggravating favor required reversal of death sentence].)

4. The Prosecutor Improperly Argued That the Jury Should Show Appellant the Same Mercy He Showed the Victims and their Families[39]

The prosecutor argued as follows to the jurors regarding their showing mercy towards appellant:

> Ask yourself, when you are asked to look at mercy for Paul Hensley's family, the mercy he showed these people's family.
>
> (59 RT 18928 [emphasis added].)
>
> This is where we're at, ladies and gentlemen, right here. Children. That's where we're at.
>
> You're going to see a big photograph of [appellant's] children. Like these victims this will most likely be taken down. You're going to see photographs of the children so that you feel sorry. Show mercy and spare the defendant's life.
>
> Remember the mercy he showed the victims when they were executed. Remember their terror and remember their families and explain to me how this justifies mitigation.
>
> (59 RT 18953 [emphasis added].)

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[39] Appellant acknowledges that an argument similar to the present was rejected by this Court in People v. Ochoa, supra, 19 Cal.4th at 464-465 and People v. Vieira, supra, 35 Cal.4th at 296. Appellant respectfully submits that those cases were incorrectly decided for the reasons set forth herein.

In Duvall v. Reynolds (10th Cir. 1998) 139 F.3d 768, cert. den. 525 U.S. 933, the prosecutor made a similar argument during the penalty phase of a capital trial, "that only those who show mercy shall seek mercy" and, therefore, the jury should "show [defendant] the same mercy that he showed" the victim at the time he murdered her. (Id. at 795.) The Duvall court condemned this argument, stating "[w]e do not condone comments encouraging the jury to allow sympathy, sentiment or prejudice to influence its decision." (Ibid.) Similarly, the Florida Supreme Court has stated, "we reiterate that asking a jury to show as much mercy to a defendant as he showed the victim is a clear example of improper prosecutorial misconduct, which constitutes error and will not be tolerated." (Thomas v. State (Fla. 1999) 748 So.2d 970, 985, fn. 10 [emphasis added; citing Urbin v. State (Fla. 1998) 714 So.2d 411, 421; Richardson v. State (Fla. 1992) 604 So.2d 1107, 1109; Rhodes v. State (Fla. 1989) 547 So.2d 1201, 1202].)

Accordingly, this Court should hold that this type of blatant appeal by a district attorney to emotionalism and vengeance constitutes impermissible misconduct which renders the resulting penalty decision unreliable in violation of the Eighth Amendment.

5. The Prosecutor Violated the Court's Order By Disparaging the Jury Instruction Regarding Consideration of Mental or Emotional Disturbance

The prosecutor also deliberately disparaged the jury instruction directing the jury to consider the influence of mental or emotional disturbance as mitigating evidence if found to be present. This violated the directive contained in the court's May 9, 1995 Order that the prosecutor refrain from arguing "[t]hat mental or emotional problems should not be considered unless they rise to the level of extreme mental or emotional distress." (8 CT 2152-2153.) In this regard, the prosecutor argued as follows:

> [D.A. DUNLAP]: Ladies and gentlemen, I'm going to show you [Jury Instruction] number 16. You're going to get an instruction, believe it or not.
>
> MR. FOX: Objection to believe it or not, Judge.
>
> THE COURT: I'm sorry?
>
> MR. FOX: Objection to "believe it or not."
>
> THE COURT: Believe it or not?
>
> MR. DUNLAP: You're going to get an instruction –
>
> THE COURT: Overruled. I didn't hear

the entire comment.

MR. DUNLAP: That's fine, Judge.

THE COURT: Would you repeat it back for me. Have the reporter –

MR. DUNLAP: Strike it.

THE COURT: Strike it. Counsel withdraw.

MR. DUNLAP: You're going to get an instruction that will talk about circumstances in mitigation.

You may – I'm going to underline that word – may include but are not necessarily limited to the following.

The key "may include." These are possible mitigation for you to decide in life or death. And what is the more appropriate sentence.

"Whether or not the offense was committed while the defendant was under the influence of any mental or emotional disturbance."

Well, we heard from Dr. Hart so . . .

MR. FOX: I'm going to object to that, Judge.

THE COURT: Object to what? One moment. Object to what?

MR. FOX: Dr. Hart didn't testify about the crimes. He testified about his contact with Paul

Hensley which didn't begin until '93.

THE COURT: You can argue that. You can argue any of the logic. Closing testimony. You can do the same thing. Thank you.

MR. DUNLAP: Dr. Hart testified and you've heard no evidence of any mental or emotional disturbance by any expert psychological or psychiatric presented by the defense.

So that doesn't apply. So when you read these instructions look at that first word where it says "May include."

(59 RT 18946-18947 [emphasis added].)

By sarcastically prefacing his discussion of the issue of mental or emotional disturbance with a statement that "you're going to get an instruction, believe it or not" (59 RT 18946 [emphasis added]), the prosecutor was clearly signaling to the jurors that, in his view, this instruction was not something that they should take seriously. A prosecutor commits misconduct when he encourages the jury to disregard the law to the defendant's detriment.

When a prosecutor "urge[s] an erroneous proposition of law in bad faith" he is guilty of misconduct. (People v. Calpito (1970) 9 Cal.App.3d 212, 222; accord People v. Meneley (1972) 29 Cal.App.3d 41, 61.) It is likewise misconduct for the prosecutor to urge the jury to disregard the law in

reaching a verdict. By way of analogy, this is comparable to defense counsel arguing for a defense verdict because drug laws are unwarranted or the death penalty should never be imposed; such arguments are not permitted. (See People v. Shipp (1963) 59 Cal.2d 845, 853-854; People v. Montoya (1936) 17 Cal.2d 547, 550.) There can be little question as to the prosecutor's bad faith in this matter. As previously indicated, the prosecutor acted in violation of the court's May 9, 1995 Order, which directed the prosecutor not to argue "[t]hat mental or emotional problems should not be considered unless they rise to the level of extreme mental or emotional disturbance." (8 CT 2152-2153.)

6. The Prosecutor Committed Boyd Misconduct By Arguing Appellant Deserved the Death Penalty Because He Was a Neglectful Parent and a Poor Role Model for His Children

The prosecutor improperly relied on character and background evidence offered in mitigation under section 190.3, subdivision (k) as a basis for imposing death. This violated the rule of People v. Boyd, supra, 38 Cal.3d at 775-776, as well as the court's May 9, 1995 Order, which instructed the prosecutor to refrain from arguing "the defendant's background and character are aggravating." (8 CT 2156.)

In People v. Edelbacher this Court summarized the Boyd rule:

> The prosecutor argued that defendant's "background and history, based on the fact that he's had all the breaks and then decides to kill for no reason at all, or no good reason, is an aggravating factor." Section 190.3 factor (k) provides that the jury may consider in determining penalty "[a]ny circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Evidence of a defendant's character and background is admissible under factor (k) only to extenuate the gravity of the crime; it cannot be used as a factor in aggravation. (People v. Boyd (1985) 38 Cal.3d 762, 775-776 [].) The prosecutor may rebut evidence of good character or childhood deprivation or hardship with evidence relating directly to the particular incidents or character traits on which the defendant seeks to rely [citation], and may argue that this mitigating factor is inapplicable, but factor (k) evidence may not be used affirmatively as a circumstance in aggravation. According, the prosecutor acted improperly in urging the jury to view defendant's background as an aggravating factor.
>
> (People v. Edelbacher, supra, 47 Cal.3d at 1033 [emphasis added; fn. omitted].)

The prosecutor below repeatedly violated this rule in his penalty phase argument to the jury.

In the following passages, the prosecutor seized upon the evidence which the defense had presented regarding appellant's relationship with his children, turning this evidence against appellant and arguing that appellant

was an abusive parent and that this should be used as aggravating:

> Is he responsible for his conscious decisions at the time he takes a wife and begins a family? [¶.] Is he responsible for his conscious decisions when he has a lifetime abuse of methamphetamine, brings children into this world?
>
> (59 RT 18883 [emphasis added].)

> [Anita Hensley] brought the kids to court for you to see, Ladies and Gentlemen. And that's what we are here about. Make no mistake. Because that's mitigation, under that factor (I). Okay. Fair enough.
>
> But when you consider those children, you consider the parent Paul Hensley has been to them. You consider that one of those children was consummated when he was a fugitive from custody. The third child, he's been incarcerated more than half the life. And almost the same with the other two.
>
> Consider the parent he had been when he abandoned them on his drug runs.
>
> Consider the parent he was as provider and as role model, consider that when you want to talk about those children, the effect of Paul Hensley on them.
>
> (59 RT 18927-18928 [emphasis added].)
>
> I mean, you look at that mitigation, as you sit there right now thinking of the mitigation, you expected a burning building. You expected heroic effort. You expected a history of being a

good parent. You expected conduct that you can look to and say, "This man deserves a break. He is given to society. And although he has taken, he has earned the right to be given a break."

In this case, there is nothing of that. His parenting has been abusive. His violence has been repeated. His history has been constant, and has graduated to, finally, multiple murder.

. . . . [¶.] [¶.]

It really comes down to one thing I told you about: And, that is, the defendant has children. [¶.] How much of a factor in mitigation is that to be weighed?

I want to remind you that there's victims in this case. That the victims, they had no choice. They didn't.

Mr. Renouf had no choice but to be shot and killed and left in a vacant lot. [¶.] Stacy Copeland had no choice when she was shot in the back and left for dead. None. [¶.] Larry Shockley was judged by the defendant, Paul Hensley, and executed.

But the defendant had a choice to subject his children to this. He had a choice not to do this, with the responsibilities that he has.

Counsel points out that Paul Hensley should have the right to be an anchor for his children. And you better look at that closely and how important is that, and is that fair? And, finally, is that good? Paul Hensley's children will make it in spite of Paul Hensley, not because of him.

Counsel says nurturing, guidance, protection. Paul Hensley is not going to offer those.

(59 RT 19081-19083 [emphasis added].)

Throughout the above-quoted passages, the prosecutor consistently twisted appellant's relationship with his children into an aggravating factor against him. The prosecutor argued that because appellant may have been a neglectful parent and a poor role-model to his children, that this constituted an aggravating factor favoring death. Again, "[e]vidence of a defendant's character and background is admissible under factor (k) only to extenuate the gravity of the crime; it cannot be used as a factor in aggravation." (People v. Edelbacher, supra, 47 Cal.3d at 1033 [original emphasis].) Because the prosecutor argued that appellant's family background, presented by the defense during the penalty phase,[40] constituted an aggravating factor favoring death, the prosecutor clearly committed Boyd misconduct.

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[40] The assignment of Boyd error herein is distinguishable from the claim which was rejected in People v. Millwee (1998) 18 Cal.4th 96. In Millwee, this Court found that the prosecutor acted permissibly in arguing defendant's character as aggravating because his argument was "based on evidence introduced in the prosecutor's case-in-chief under section 190.3, factors (a), (b) and (c)." (Id. at 151-152.) In the present case, on the other hand, the prosecutor seized upon appellant's own (k) mitigation evidence to turn this into aggravating circumstances against him.

D. The Trial Court Erred in Denying Appellant's Motion for a New Penalty Phase Trial Based upon Prosecutorial Misconduct

Following the penalty phase verdict, defense counsel brought a motion for a new trial asserting several grounds, including prosecutorial misconduct. In particular, defense counsel cited the prosecutor's arguing facts not in evidence about the impact of Gregory Renouf's death upon his family and friends and the impact of Larry Shockley's death upon his step-daughter Denise Underdahl, and misconduct by way of disparaging the jury instruction on consideration of mental or emotional disturbance. (9 CT 2323-2329; 60 RT 19354-19356.) (See subparts C.1, C.2 and C.5 above.) The prosecutor responded that the remarks cited by defense counsel did not amount to misconduct or, alternatively, that if misconduct occurred it was harmless. (9 CT 2357-2359; 60 RT 19357-19362.)

The court, in denying this portion of the new trial motion, stated:

> And, finally, the Court rules the prosecutor did not commit misconduct in arguing any of the arguments that he did during his closing argument.
>
> He properly referred to the victim impact regarding Mr. Renouf and Mr. Shockley. And any other comments being made by the – by the prosecutor were not improper, and/or were not

prejudicial to the defendant in any way.

So that reason, the Court tentatively denies the motion for a new trial.

(60 RT 19381.)

The court's assessment that the prosecutor did not commit misconduct was incorrect for the reasons appellant has already discussed. (See subparts C.1, C.2 and C.5., above.) Therefore, it was error to deny appellant's motion for a new trial on grounds of prosecutorial misconduct. (§ 1181, subd. (5); see People v. Pitts (1970) 223 Cal.App.3d 606, 815-816 [reversal based upon cumulative prosecutorial misconduct].)

E. This Was a Close Case on the Issue of Penalty and the Prosecutor's Misconduct Was Prejudicial

Appellant's counsel failed to contemporaneously object to some of the instances of prosecutorial misconduct discussed above.[41] However, the rule of waiver through nonobjection is not absolute. (People v. Hill (1998) 17

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[41] Defense counsel lodged contemporaneous objections to the prosecutor's arguments about Renouf's family and friends (59 RT 18953-18954) and his disparagement of the mental or emotional disturbance instruction (59 RT 18946-18947). Those instances, along with the prosecutor's argument regarding Underdahl's reaction to Shockley's death, were cited in defense counsel's unsuccessful motion for a new trial. (9 CT 2323-2329.)

Cal.4th 800, 821.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (Id. at 820 [citations omitted].) Admonitions may be considered futile in a case where the prosecutor engages in repeated misconduct which is so pervasive that individual admonitions by the trial court would not have cured their overall prejudicial impact. (Ibid.) In the present case, because the prosecutor's misconduct was both pervasive and subtle, the Hill exception to the need for defense counsel objection should be found applicable.

Furthermore, as explained in subparts C.1, C.2, C.3, C.5 and C.6, above, the prosecutor violated the court's May 9, 1995 Order with regard to his arguments about Renouf's family and friends, Denise Underdahl's reaction to Shockley's death, appellant's alleged lack of remorse, disparagement of the mental or emotional distress jury instruction, and appellant's serving as a poor role model and neglectful parent. Even without further objection, it is misconduct for a prosecutor to engage in a forbidden line of argument after the trial court has indicated that such will not be permitted. (See People v. Williams (1997) 16 Cal.4th 153, 252; People v. Rich (1988) 45 Cal.3d 1036, 1088; People v. Pitts, supra, 223 Cal.App.3d at 733, fn. 33.)

Appellant also acknowledges that his trial counsel did not specifically

cite federal constitutional provisions in voicing his objections to the prosecutor's various acts of misconduct. However, appellant's federal constitutional claims in this regard are adequately preserved for appeal because appellant's present constitutional arguments rest upon the same factual and legal issues as the objections defense counsel did assert. (People v. Partida, supra, 37 Cal.4th at 433-439; People v. Yeoman, supra, 31 Cal.4th at 117-118.)

The cumulative impact of the prosecutor's misconduct in closing argument denied appellant a fair jury trial and violated his rights to due process of law and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (Donnelly v. DeChristoforo, supra, 416 U.S. at 643; Beck v. Alabama, supra, 447 U.S. at 638; People v. Bell, supra, 49 Cal.3d at 534.) Where, as in the present case, prosecutorial misconduct serves to effectively deprive a defendant of constitutional safeguards, review is required under the standard of Chapman v. California, supra, 386 U.S. at 24: reversal is mandated unless the state can prove beyond a reasonable doubt that the misconduct did not contribute to the verdict. (People v. Bolton, supra, 23 Cal.3d at 214-215, fn. 4; People v. Barajas (1983) 145 Cal.App.3d 804, 810-811.)

There can be no question that this was an extremely close case on the

issue of penalty, given that appellant's first trial ended in a hung penalty-phase jury because three jurors were convinced that appellant deserved a life without parole sentence, rather than death. (See 7 CT 1785; 36 RT 10100.)

Furthermore, there were significant mitigating factors present. Appellant's addiction to methamphetamine was the motivating factor and driving force behind the offenses appellant stood convicted of. There was uncontested evidence that appellant suffered from an accelerating level of methamphetamine addiction in the period leading up to the crimes. (54 RT 15620, 15654-15655, 15664-15670.) A blood test performed at the time of his arrest indicated a high level of methamphetamine in appellant's system. (51 RT 14757-14758, 14792.) Although the prosecutor contested its significance as a mitigating factor, he did not dispute that the present crimes were committed while appellant was severely addicted to methamphetamine and that the overriding motive was to obtain cash to satisfy appellant's drug dependency. Appellant's drug addiction constituted a mitigating factor under section 190.3, subdivisions (d), (h) and/or (k).

Appellant came from a highly dysfunctional family background. His mother was an alcoholic and a neglectful parent. Appellant never knew his real father. (54 RT 15451-15452, 15463, 15465, 15468-15470.) Sonny Cordes, the man whom appellant as a child believed to be his father,

abandoned appellant when he was seven or eight years old, following bitter a divorce proceeding. (54 RT 15467, 15471, 15474.)

Notwithstanding appellant's problems with drugs and the law, appellant always managed to maintain a close and loving relationship with his wife and four children. (See 53 RT 15377-15378, 15395-15402; 54 RT 15609-15611, 15672-16779, 15682-15683; 55 RT 17878, 17880.) Throughout most of his adult life, appellant held lawful gainful employment and provided financial support to his family. (See 53 RT 15349-15362; 54 RT 15616-15617, 15624, 15655-15657; 55 17873-15873, 17880.) (§ 190.3, subd. (k).)

Another mitigating factor is that appellant acknowledged his wrongdoing early on by way of his confession to police detectives Faust and Ferrari shortly following his arrest. (§ 190.3, subd. (k); see also Cal Rules of Court, rule 4.423(b)(3).)

In sum, the jury could well have found mitigating circumstances presented under factors (d), (g), (h) and (k).

It by no means follows from the mere fact that a defendant stands convicted of multiple murders that a penalty phase verdict of death is inevitable or that penalty-phase errors may be written off as harmless. In Mak v. Blodgett, supra, 970 F.2d 614, the Ninth Circuit affirmed a grant of

habeas relief to a defendant who had been sentenced to death for 13 murders. (Id. at 620-621.) The prosecution argued that penalty phase error was harmless in the face of such a strong case in aggravation, even though the error prevented the jury from learning about significant mitigating facts. The federal district court and the Ninth Circuit disagreed. They concluded that there was a reasonable probability that the mitigating evidence might have prevented a unanimous verdict for death. (Ibid.) Mak indicates that factor (a) evidence standing alone is an inappropriate basis on which to conclude penalty phase error was harmless, even in cases with many victims. In Hendricks v. Calderon (9th Cir. 1995) 70 F.3d 1032, the defendant was responsible for killing at least five victims. (Hendricks v. Calderon (N.D. Cal. 1994) 864 F.Supp. 929, 930-931.) Hendricks was tried in two capital trials. In his Los Angeles case, a judgment of death was reversed by the California Supreme Court[42] and on retrial the jury was unable to reach a penalty verdict, whereupon defendant was sentenced to life without parole. (Id. at 931, fn. 3.) In Hendricks's San Francisco case, the Ninth Circuit found penalty phase error to be prejudicial and reversed the death sentence. (Hendricks v. Calderon, supra, 70 F.3d at 1044-1045.)

The jury in the present case deliberated about two days in determining

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[42] People v. Hendricks (1987) 43 Cal.3d 584.

its penalty verdict, which indicates that it had difficulty reaching a decision. (8 CT 2200-2201, 2207-2208.) In People v. Woodard, supra, 23 Cal.3d 329, this Court stated that "nearly six hours of deliberation by the jury before they reached a verdict" indicated that a case "was far from open and shut." (Id. at 341.) This sentiment was repeated in People v. Cardenas, supra, 31 Cal.3d 897: "Here the jury deliberated [for 12 hours,] twice as long as the jury in Woodard, a graphic demonstration of the closeness of this case." (Id. at 907 [emphasis added].) The length of deliberations in the second penalty trial, coupled with the 9-to-3 hung jury in the first penalty trial, clearly shows that this was a very close case with respect to penalty.

Given the closeness of this case regarding penalty, the prosecutor's commission of the misconduct cited hereinabove was highly prejudicial. The prosecutor's misconduct by way of arguing facts not in evidence regarding Renouf's family and friends, and Underdahl's reaction to Shockley's death was clearly directed towards illegitimately adding to the aggravating side of the ledger. The prosecutor's improper plea to the jury to show appellant the "the mercy he showed the victims when they were executed" (59 RT 18953) served to improperly undermine the jury's consideration of sympathy, under factor (k), and, in fact, twisted the concept of sympathy into a nonstatutory aggravating factor against appellant.

It was likewise improper for the prosecutor to use appellant's failure to express his remorse as a nonstatutory aggravating circumstance. A defendant's perceived lack of remorse is deeply offensive to a jury. (See People v. Gonzalez (1990) 51 Cal.3d 1179, 1232 [a "defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether" to impose death].) In the context of this case, therefore, in which the life or death decision was a close one, putting appellant's alleged lack of remorse at the center of the case for aggravation was bound to "create . . . the most severe 'type of prejudice' to [appellant]." (Miller v. Lockhart (8th Cir. 1995) 65 F.3d 676, 684 [prosecutor's equating failure to testify with lack of remorse requires reversal of death sentence].)[43]

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[43] In People v. Cain (1995) 10 Cal.4th 1, this Court indicated that, practically speaking, it does not matter whether a juror weighs a defendant's lack of remorse as the presence of aggravation rather than as the absence of mitigation. (Id. at 78; accord, People v. Gonzalez, supra, 51 Cal.3d at 1232.) Appellant respectfully disagrees. If, for instance, before factoring in lack of remorse, a juror believes the arguments for life and death are of equal strength, the difference between adding weight to the death side of the scale (which would result in aggravation outweighing mitigation) and merely not adding weight to the life side (which would result in aggravation and mitigation remaining equal) could easily mean the difference between a verdict of death or a verdict of life. To discount such error, as this Court has done in the past, relies on a perception of the weighing process that is distinctly at odds with the actual statutory scheme. (Cf. People v. Rodriguez (1986) 42 Cal.3d 730, 788 [recognizing that there is a difference between arguing that the absence of a mitigating factor: 1) militates against seeing the crime as "less serious" than "normal"; and 2) makes the crime "more serious" than "normal"]; accord, People v. Edelbacher, supra, 47 Cal.3d at 1033 [reversing in part because the

Conversely, the prosecutorial misconduct herein also served to undermine the defense case for mitigation. The prosecutor's commission of Boyd misconduct illegitimately turned appellant's mitigation evidence into aggravating evidence against him. In this respect, the prosecutor urged the jury to use appellant's neglect of his children and his failure to serve as a positive parental role model as factors in aggravation. The prosecutor further undermined the mitigation case by disparaging the very jury instruction which directed the jurors to the possibility that mental or emotional disturbance suffered by appellant might serve as mitigation.

The prosecutorial misconduct described above violated appellant's Fifth, Sixth and Eighth Amendment rights to be sentenced in accordance with court proceedings which are reliable, rather than arbitrary and capricious. (Johnson v. Mississippi, supra, 486 U.S. at 584; Beck v. Alabama, supra, 447 U.S. at 638.) This misconduct must cause this Court to doubt the reliability of appellant's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings. (Beck v. Alabama, supra, 447 U.S. at 637-638; Ake v. Oklahoma supra, 470 U.S. at 87 (conc. opn. of Burger, C.J.); see also Cal. Const., art I, § 17.)

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prosecutor argued the absence of a mitigating factor was aggravating].) To discount the prosecutor's misconduct regarding remorse based on the misperception expressed in Cain would itself violate due process. (Hicks v. Oklahoma, supra, 447 U.S. at 346.)

It is accordingly reasonably probable that, due to the misconduct discussed above, at least one juror's evaluation of mitigation versus aggravation was distorted to appellant's disadvantage. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that the prosecutor's misconduct had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Therefore, the judgment of death must be reversed.