S090602

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LOUIS JAMES PEOPLES, Defendant and Appellant.	AUTOMATIC APPEAL *Death Penalty Case*

Appellant's Opening Brief

Superior Court for Alameda County, No. 135280
On Change of Venue From
Superior Court for San Joaquin County, No. SP062397A

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INTRODUCTION

"This I know, my Lords, that where the law ends, tyranny begins."
William Pitt
(House of Lords, 9 January1770)

Michael E. Platt, Judge of the Superior Court for San Joaquin County from 1994 to 2002, is no longer a judicial officer. On August 5, 2002, two years after sentencing appellant to death, the *Commission on Judicial Performance* [Inquiry No. 162] voted 9-1 to remove Mr. Platt from office for repeated acts of gross misconduct. Indeed, some of the acts condemned by the commission occurred during the time Mr. Platt presided as a judicial officer over the capital murder trial of Louis James Peoples. This Court affirmed the removal order of Mr. Platt, and his license to practice law was suspended for one year. On November 19, 2003, Mr. Platt's license was reinstated by the *State Bar Court of California*, and he is currently in practice in Stockton, California. (03-V-03141-PEM.)[1]

One month after Judge Platt's removal from judicial office, George H. Dunlap, Jr., prosecutor of the case at issue, was relieved of his duties in the Office of the San Joaquin County District Attorney for misconduct, and *State Bar of California* briefly suspended him from the practice of law in 2003. After reinstatement, Mr. Dunlap joined the Office of the Santa Cruz County District Attorney. On August 29, 2008, the *State Bar Court of California* found Mr. Dunlap had committed multiple acts of professional misconduct from 1995-2001, and suspended him from the practice of law for two years,

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[1] Out of respect for the office, and for the sake of consistency, appellant will hereafter refer to Mr. Platt as "Judge Platt" or "the trial court."

imposing a probationary term of five years. The decision was affirmed by this Court on March 18, 2009. (02-0-14001-LMA; S169935.)[2]

Appellant argues on his automatic appeal judicial and prosecutorial misconduct so pervaded his trial that in the absence of the prejudicial courtroom atmosphere created by Judge Platt and Deputy District Attorney Dunlap it is reasonably likely results would have been different.[3] In the unique circumstances presented here, including arguments for reversal of his convictions and sentence of death based upon misconduct, appellant has separately requested judicial notice be taken of this Court's own records of disciplinary proceedings with respect to Michael Platt and George Dunlap, Jr. (California Rules of Court, *Judicial Council, Commission on Judicial Performance,* Rules 120; 136; *Rules of the State Bar of California*, Title 5, 'Discipline,' etc.; Evidence Code sect. 452; *Whittaker v. Superior Court* (1968) 68 Cal.2d 357 362-63.) As the record demonstrates, those who abuse power entrusted to them in the halls of justice are not confined by courtroom walls.

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2 Mr. Dunlap's actual suspension was amended to include a separate stipulated violation on December 9, 2009; he was effectively suspended for two years from April 17, 2009 (09-N-14492). He is also on indefinite administrative suspension for failing to pay family support.

3 In August, 1999, a jury found Louis Peoples guilty of four murders but it was unable to reach a verdict in the penalty phase; eight jurors voted for life imprisonment. On retrial of the penalty phase a second jury deliberated 10 court days (May 16, 2000 to May 30, 2000) before announcing it also had deadlocked – nine to three – on punishment; over objections, Judge Platt refused to poll jurors at impasse, used coercive instructions to pressure them, and provided the jury with the prosecutor's argumentative aids, but denied similar requests for charts used by defense counsel. On June 6, 2000, the second jury returned a death verdict.

STATEMENT OF APPEALABILTY

On August 4, 2000, upon retrial of the penalty phase, defendant and appellant, Louis James Peoples, was sentenced to death by Michael E. Platt, then Judge of the Superior Court for San Joaquin County, after review under Penal Code section 190.4, subdivision (e). (CT 13: 3430-3435; 3436-3478; 56: 15557; RT 97: 20664-20670; 20688-20702.) This is an automatic appeal from judgment under Penal Code section 1239 and California Constitution, Article 6, sections 10-11.[4]

STATEMENT OF THE CASE

Upon change of venue from Superior Court for San Joaquin County to Alameda County on March 9, 1999, appellant was tried before the first jury from May 28, 1999 - August 4, 1999. (CT 5: 1371; RT 8: 1582-83; RT 27-49.) On August 11, 1999, the jury found appellant guilty of four murders committed with a firearm during a two-week period, from October 29 to November 11, 1997. (RT 49: 10043-10052; CT 56: 15538-15556; see also, CT 8: 2025-2049.) The jury found the first homicide victim, James Loper, a former co-worker and tow-truck operator for *Charter Way Tow*, died of gunshot

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[4] All statutory references hereafter are to California Penal Code, unless otherwise noted, and, with no disrespect, after initial full identification of witnesses, victims, and attorneys, where possible reference is to surname only. (Unless otherwise noted, defense counsel refers [Michael] Fox, and the prosecutor to [George] Dunlap.) "RT" refers to reporter's transcript by volume and page, and "CT" refers to the clerk's transcript, also followed by volume and page number.

wounds on October 29, 1997 at 8 Mile Road in San Joaquin County, while appellant was lying in wait. (RT 29: 5876-5945; 30: 6088-6122; CT 56: 15551-53.) The jury also found the second victim, Stephen Chacko, an Indian immigrant, died from gunshot wounds during the course of a robbery of *Mayfair Liquors* in the Mayfair Shopping Center in the City of Stockton on November 4, 1997. (RT 31: 6200-02; 6350-51; CT 56: 15545-48.) Further, the jury found the two remaining homicide victims, Besun Yu and Jun Gao, Chinese immigrants, also died from gunshot wounds, during the course of a robbery of *Village Oaks Market* in the City of Stockton on November 11, 1997. (RT 31: 6401-03; RT 33: 6635-36; 6649; 6658-6661; CT 56: 15549-15553.) In addition, the same jury found true special circumstances of multiple murder, lying in wait (Loper), and robbery (Chacko; Gao;Yu), as well as three related counts of robbery. (CT 56: 15554.)

Moreover, the guilt-phase jury found appellant guilty of: 1) burglary of an automobile owned by Michael King, and receiving stolen property, committed on June 21, 1997, in the City of Stockton; 2) robbery of *Bank of the West* in the City of Stockton on October 24, 1997; and, 3) on September 16, 1997, burglary of a vehicle owned by David Grimes, and assault with a deadly weapon committed on former co-worker and employee of *Cal Spray Dry Co*, Thomas Harrison, in San Joaquin County, but the jury was unable to reach verdicts on attempted murder and other offenses alleged as to Harrison only, which were subsequently dismissed. (RT 28: 5569-80; RT 29: 5825-

5873; RT 49: 10242-43; RT 96: 20702; CT 56: 15533; 15538-15540; 15554.)[5]

Appellant was arrested on November 12, 1997, at 3:00 PM, near his home in the City of Stockton. (RT 33: 6755-59; 6771-73; 6808-09.) Over the next twelve hours he was interrogated by local law enforcement officers, and admitted many elements of the crimes under investigation. (RT 33: 6828-29; 6839-41; 34: 6961-69; RT 34: 6943; 7216-7224.) On November 14, 1997, a complaint was filed against appellant, charging him with multiple counts of murder, robbery, burglary and related special circumstances, and the San Joaquin County Public Defender Gerald Gleeson accepted appointment as counsel of record; Deputy Public Defender Michael Fox was assigned to the case in December, 1997, and continued as lead counsel throughout both trials. Mr. Dunlap represented the prosecution in both trials as well. (CT 1: 1-14; 15; 34-36.)

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[5] As discussed in detail following, Judge Platt suffered a heart attack during the recess following the prosecution's presentation of aggravation evidence in the penalty phase (August 19), and was replaced on August 24, 1999, by the Hon. Alfred P. DeLucchi, Judge. (RT 53: 10928-29.) The same jury that had decided guilt received evidence in mitigation August 24-September 9, 1999, and the case was submitted to the jury, September 17, 1999. (RT 53-60.) The jury deliberated two and one-half days (10 hours) before declaring a 6-6 deadlock, and they were asked to continue their deliberations. (RT 60: 12339-12346.) The jury deliberated another day without decision, and recessed for the weekend. (RT 60: 12347-12364.) On September 27, 1999, after approximately 20 hours of deliberations, the jury foreperson advised the court the jury was "deadlocked," and the court declared a mistrial – the vote was 8 to 4 in favor of life imprisonment. (RT 60: 12365-12374; 61: 12488.) Though defense counsel had moved to recuse Judge Platt before the penalty phase began, the motion was denied as moot; Judge Platt returned on November 22, 1999, and presided over the penalty retrial. (RT 54: 10992-94;11005-06; 56: 11335-39; 61: 12424-25.)

On December 2, 1997, Judge Platt was assigned for "all purposes" within the meaning of Code of Civil Procedure section 170.6, subdivision (a)(2), and appellant entered not guilty pleas and denials. (CT 1: 36-37; 2: 555; RT "A"- 12/2/97.) After defense motions for continuance were granted, preliminary hearing was reset for June 23, 1998. (CT 1: 43; 53-57; see also, RT "A" 3-6 [February-May, 1988].) Prior to preliminary hearing, the prosecution moved to dismiss several charges, and amend the complaint, and the court granted the motions. (CT 1: 72-73.) Preliminary hearing was held June 23-25, 1998, and appellant was held to answer on all charges and allegations. (CT 1: 73; 78-83; 99-245.1 - CT 2: 246-562.)

On July 10, 1998, San Joaquin County District Attorney John D. Phillips noticed his intention to seek the death penalty against appellant, who was then arraigned on the information, and entered pleas of not guilty and denied all special allegations and enhancements, including multiple special circumstances and gun usage. Over defense counsel's objection, trial was set for January 4, 1999. (CT 3: 592-93; RT 1: 1-14.)

Appellant moved to dismiss six charges related to the attempted murder of Harrison and four counts of automobile burglary arising from the *Cal Spray* incident on September 16, 1997. (CT 3: 610-621.) The prosecution did not file written opposition in defiance of local rules of court, and at hearing on the motion before the Hon. Terrence Van Oss, Judge, San Joaquin County Superior Court, defense counsel referred to the rule of implied acquiescence to the merits. At the hearing, Mr. Dunlap contemptuously

responded, "We were not going to waste time to even waste paper with a paragraph saying that we object to this as really ridiculous ...," a response cited by the court below as inadequate reason for failing to comply with local rules. (RT 1: 100-103.) Nonetheless, the court denied the motion and returned the case to Judge Platt. (CT 802; RT 1: 98-109.)

In the meantime, on November 6, 1998, defense counsel moved to recuse Judge Platt under Code of Civil section 170.1, subdivision (a)(6)(c). (CT 3: 763-775.) Counsel alleged that Judge Platt had engaged in ex parte with a senior member of the prosecutor's office, and had expressed a biased opinion towards a change of venue motion due to the extensive pretrial publicity. Defense counsel also alleged Judge Platt expressed ex parte opinions to a judicial colleague (Hon. Stephen G. Demetras, Judge), and to a former colleague, Deputy District Attorney Fleming, Homicide Unit Supervisor from the San Joaquin County District Attorney's office, while appellant's motion for change of venue was scheduled for hearing. The motion to recuse was forwarded to the Hon. Duane Martin, Judge, after briefing and declarations were filed in response. Judge Platt declared inter alia that he had discussed change of venue "en route to court" with Judge Demetras on September 16, 1998, the section 987.9 judge assigned to appellant's case, and Platt advised Judge Demetras, "It appeared to me that the venue issue was going to be contested." (CT 3: 805.) In addition, "either in the hallway or outside of the Courthouse, perhaps during the lunch hour," apparently because the prosecuting deputy (Dunlap) was "unavailable" to discuss the change of venue motion with him, "[he] asked Mr. Fleming if

Mr. Dunlap was, in fact, going to fight a venue issue should it be raised ... [and] Mr. Fleming indicated that his office intended to resist any venue motion." (CT 3: 805.) Judge Platt denied allegations that he had expressed disapproval for change of venue to anyone, and Mr. Fleming's recollection was equivocal on this point, particularly in light of the declaration filed by Public Defender Investigator Michael Kale. (CT 3: 767; 4: 872; 886-887.) Judge Martin found an appearance of impropriety, but denied the motion on November 20, 1998, and returned case to Judge Platt. (CT 4: 897-99; RT1: 129-155.)

On November 20, 1998, to accommodate Judge Platt's schedule, the court reset a hearing on the motion for change of venue, filed September 30, 1998, to December 7, 1998. (CT 3: 624-728; 4: 900-02.) The court also rescheduled appellant's motion to suppress his statements to law enforcement officials as coerced, originally set for November 12, 1997, to January 11, 1999. (CT 3: 729-749; 4: 1153-1234.) The prosecution filed written opposition to each motion. (CT3: 751-757; 758-763.)

On December 20, 1998, Judge Platt issued the first of thirteen "hybrid contempt" orders against Deputy Public Defender Fox. On this occasion, Judge Platt fined Mr. Fox $800.00 for not providing timely discovery of materials to the prosecutor for the hearing on change of venue. (CT 4: 919-920; RT 1: 201-220; 97: 20613-14.) [6]

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[6] Subsequently, Mr. Fox declared under oath that in his fifteen-year career practicing law he had never been sanctioned or fined by any court, and Judge Platt's "bias and intemperance towards [Fox] in this particular case" is discussed in detail following. (CT 13: 3391; RT 96: 20614; 20703-05.)

Extensive documentary exhibits were submitted by defense counsel, accompanied by expert witness testimony, to support the motion for change of venue due to pervasive and prejudicial pretrial publicity. (CT 3: 624-728; 4: 1001-1051.) Hearings were held over four days, and the prosecutor vigorously opposed a change of venue and thoroughly cross-examined witnesses, arguing the so-called "ludicrous" and "offensive" nature of expert testimony. (RT 4: 836; 842.)[7] On January 6, 1999, Judge Platt denied the motion without prejudice, until "some attempt be made with live bodies to determine whether or not, based upon whether it is a survey or simple argument of counsel, there is a reasonable likelihood that the defendant did not [sic] receive a fair trial ...," and "there has not been a showing that the defendant cannot receive ... or there's a likelihood that the defendant cannot receive a fair trial in this jurisdiction." (RT 4: 843; 846-47.)

As pointed out above, a change of venue was granted. Apparently over Dunlap's objection, senior prosecutors agreed to change venue in light of the pretrial publicity; the prosecution altered course the day before a jury panel was summoned to appear. On March 1, 1999, San Joaquin County District Attorney Homicide Unit Supervisor Lester Fleming appeared in court and offered a stipulation to defense counsel for a change of venue. (RT 5: 1510/1-1510/2.) Judge Platt noted, "While it is not my choice, I would

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[7] Mr. Dunlap's extensive use of pejoratives, such as, "ludicrous," "ridiculous," "outrageous," "offensive," and "umbrage," in reference to defense counsel and witnesses, is documented in *Argument V*.

endorse the stipulation." (RT 8: 1510/18-26.)[8] On March 9, 1999, the cause was formally transferred to Alameda County Superior Court for trial. (CT 5: 1371; RT 8: 1582-83.)

Deputy District Attorney Dunlap failed to appear for the next two trial conferences without explanation; Judge Platt did not sanction Dunlap or require any explanation for his absence. (RT 8: 1510/39-50.) At those two hearings, however, Judge Platt refused to "receive" appellant's motion for reconsideration of the denial of a requested continuance, and threatened Mr. Fox with sanctions. (RT 8: 1510/39-50.)

Prior to the transfer to Alameda County, however, appellant's motion to suppress his statements given to police was heard in San Joaquin County. The motion had been set for hearing January 7, 1999, but because the court continued the venue hearing from December and to early January, appellant's expert witness, Richard Leo, Ph.D., was not available on the day the court wanted to proceed to hearing. In addition, defense counsel had advised the court of his intention to move to continue trial, and filed a formal motion to continue the trial on the ground that he was not prepared to try his first capital case in less than 13 months since appointment. (RT 4: 847-851; 875-876.) Judge Platt decried the timing of the motion, and set the evidentiary hearing on the motion to suppress for

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[8] It should be noted court reporters erroneously paginated the record on occasion, and added hyphenated pages to 'correct' the record, e.g., RT 8 1510 includes 75 pages, numbered 1510/1 - 1510/75; RT 10, includes 2033/1 - 2033/299. Thus, a forward slash is used here to denote hyphenated or duplicate pagination.

February 1, 1999, which was continued to February 16. (RT 4: 878-879.)[9]

On February 16, 1999, the prosecution presented the testimony of detectives who interviewed appellant, the twelve-hour videotaped statement was played in court, and on February 25 and 26, the testimony of defense expert, Dr. Leo, was received. (RT 5: 908-921; 978; 983; 6: 1217-1318; 7: 1378-1459.) On February 26, 1999, after arguments of counsel, the court denied the motion to suppress the statements. (RT 7: 1466-1506.)

Appellant's trial counsel filed the first in a series of formal motions to continue the trial set January 5, 1999. (CT 4: 935-942; RT 4: 847-49; 873-879.) In pertinent part, Mr. Fox cited his own lack of experience in capital litigation, the relatively short period of time (13 months) since assignment to this multiple-murder death penalty case, the eight-week estimate for trial, and ongoing *in limine* hearings; on January 6, Fox proceeded *in camera* with a further offer of proof. (CT 943; RT 4: 852-872.) Fox filed declarations from case consultant, John Philipsborn, Attorney at Law, and State Public Defender

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[9] In conjunction with his first motion to continue the trial (RT 4: 873-879) discussed following, and at hearings on January 11 and 14, defense counsel explained to Judge Platt that Dr. Leo's teaching schedule and commitment to testify in another case had created a scheduling conflict and he would not be available until a later date in February. (RT 4: 885-895.) Judge Platt informed counsel that Dr. Leo was "making way too much money, [and] then I've got a real problem that their priorities are misplaced ... something that has stuck in my craw for many, many years." (RT 4: 894.) Subsequently, Judge Platt threatened exclusion and arrest if Dr. Leo did not appear as scheduled (February 25, 1999): "Dr. Leo will be here tomorrow or he will not testify ... I will find him in contempt, and I will issue a warrant ..." (RT 5: 1143-44; see also, 5: 1011-1012.)

Lynne Coffin. (RT 5: 1141-42; CT 5: 1235-1257; 1318-1328.) On January 8, Judge Platt refused to continue the February 16, 1999 trial date. (RT 4: 847; 878-879.)[10]

Judge Platt's "remedy" upon denying defense counsel's subsequent motion to continue, heard February 25, 1999, was to require the San Joaquin County Public Defender to explain office policies regarding the assignment of counsel, and then to force private counsel from the county's conflict defender program to join Mr. Fox in preparing for trial. (CT 5: 1329-1330; RT 5: 1085-1095; 1133-1140.) On March 1, 1999, Charles Slote, Attorney at Law, who had not previously tried a capital case, was appointed to assist Deputy Public Defender Fox, and he continued in a part-time "very limited role" throughout the first trial. (RT 8: 1510/9-10; 31: 6169-70.)[11]

With the stipulation entered into on March 1, 1999, and change of venue to Alameda County on March 9, 1999, numerous *in limine* motions were filed and decided prior to selection of the jury. (CT 5: 1371; RT 8: 1510/2 - 1510/17;1582-83.) Judge Platt

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[10] Defense counsel filed additional motions to continue, supported by his own and other more experienced capital defense lawyers, but to no avail. (CT 4: 1110-1149; 5: 1339-1347.) Fox found "fault" with himself for "not understanding capital litigation as well as perhaps one should after having the case for a year," which Judge Platt described as attempting to "intentionally establish a false record for purposes of appeal only," and termed his late filing of a demurrer and self-deprecating remarks "misconduct." (RT 5: 1075; 1077-78.)

[11] On March 23, 1999, Judge Platt ordered the San Joaquin County Public Defender's office to pay the conflicts program $1,875.00 in attorney's fees generated by prospective second-chair counsel due to the Public Defender's "internal, strategic or policy decisions ..." (RT 9: 1739-40.)

fined defense counsel $100 for filing a "frivolous" motion to move defendant closer to the jury, and $100 for not filing a timely demurrer. (RT 8: 1510/44; 1510/56.)

Over defense counsel's challenge to the venire, which Judge Platt denied as "untimely." Jury selection began on April 13, 1999, in Alameda County Superior Court. (RT 10: 2033/229-233.) For the next five weeks voir dire of prospective jurors included written questionnaires and individual, sequestered examination, and on May 28, 1999, a jury was selected. (RT 11-27; 27: 5411-5466; CT 6: 1611-12; 28: 7876 - 56: 15531.)

Counsel presented opening statements on June 1, 1999, the prosecution's case-in-chief was presented over the next four weeks, and the prosecution rested on June 29, 1999. (CT 6: 1618-19; 1675; RT 29-35; 35: 7264-65; 37: 7617.)[12] After appellant's motion for judgment of acquittal was granted as to two counts of automobile burglary allegedly committed at *Cal Spray* (Counts 5-6), the motion was denied as to premeditated attempted murder of Harrison during the same September 16, 1997, incident. (CT 6: 1695; RT 36: 7501-7508.) The defense presented evidence from July 7-July 22, 1999. (CT 6: 1696-1708; RT 37-45; 45: 9221.) The prosecution presented rebuttal, July 23-28

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[12] When the jury returned after Independence Day, over hearsay and foundational objections, the prosecutor was allowed to re-open July 7 for a limited purpose of documenting the issuance of a service weapon to Michael King, the victim of automobile burglary on June 21, 1997. (CT 6: 1696; RT 37: 7597-7598; 7603-7617 [Jeff P. Reed]; 7619-7623.) Appellant's trial counsel also made numerous motions for mistrial based upon prosecutorial misconduct, judicial misconduct, and erroneous and prejudicial rulings, which are set forth in detail in the *Argument* section.

1999. (CT 6: 1708-1711; 7: 1966; RT 45-47; RT 47: 9725.) Judge Platt pre-instructed the jury on July 30, 1999, and the prosecutor's summation was presented July 30 and August 3, 1999. (CT 7: 1996; 2002; RT 48: 9888-9943; 9944-10057.) On August 3, 1999, defense counsel presented his argument, the prosecutor replied, and the jury was given final instructions. (CT 7: 2002; RT 48: 10062-10121; 10121-10137; 10137-10142.) After one week deliberating, the jury returned guilty verdicts on August 11, 1999, as set forth above, and was then excused until August 19, 1999, to begin the penalty phase of trial. (CT 8: 2022-24; RT 49: 10043-10258.)

The first penalty phase began with opening statements of counsel on August 18, 1999, the prosecution presented aggravation under section 190.3, subdivisions (a) and (c), in the form of "victim impact" evidence, and appellant's two prior felony convictions for burglary committed in the State of Florida in 1982. The jury was excused until August 24, 1999, for presentation of mitigation evidence. (CT 8: 2224; 2244-45; CT 9: 2381; RT 50: 10320-23; 52: 10697-98; 10761-10779; 10780-10807; 59: 12088-12090 [Ex. 667 B].)

On August 18, 1999, however, Judge Platt apologized to the jury for a two-hour delay in beginning the penalty phase, as jurors awaited opening statements of counsel, and while counsel and court argued over discovery and instructional issues:

> " If you haven't been made aware, sometime in the last month I probably went through what has been categorized as a mild heart attack. Not a major issue, but something that I had to get some issues taken care of, some doctors appointments. Everything is fine. It is just a matter of it took some time away from things that I had allocated for the proceeding. So my fault.

We'll deal with it."
(RT 52: 10700-707; see also, RT 52: 10925-26.)

On August 19, 1999, defense counsel move for mistrial and recusal of Judge Platt under Code of Civil Procedure section 170.1(a)(6)(A)(i)-(a)(7). (CT 8: 2227-2234; RT 52: 10813-10822.)[13] Fox argued in pertinent part that the tension between the court and defense counsel was palpable, and, therefore, an inference could be drawn that he had caused Judge Platt's medical condition, thus distracting and alienating jurors from fair and unbiased consideration of appellant's case for life in the penalty phase, as "counsel now has to weigh how the jury perceives the defense advocacy, in relation to what it may or may not be doing to the health concerns of this court." (CT: 2333; RT 52: 10825-27.) Fox reminded Judge Platt of the heated exchanges they had been having in the presence of the jury, the "very, very angry, to the extent you lose control" and the "tendency to react viscerally," including episodes of swearing at counsel outside the presence of the jury; moreover, "I am concerned because the phone call to Mary Ann [Nayer], the clerk, to watch out for certain warning signals and if those occur, that you be brought immediately to a paramedic." (RT 52: 10818.) In brief, defense counsel "felt since you told us that you had a heart attack that I am walking on egg shells." (RT 52: 10818.)

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[13] Recusal may be appropriate under (a) (7) where, "[b]y reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding," or (a) (6) (A) (i) "[f]or any reason the judge believes his recusal would further the interests of justice." (See also, CT 8: 2227.)

Judge Platt responded by submitting a facsimile of a "clearance" letter from his personal physician attesting to his good health and no medical reason for "concern" about him. (RT 52: 10855.) Judge Platt also filed a verified response, attaching the letter of "clearance," denied the motion for mistrial, and then denied the motion to recuse and ordered it "stricken," but then referred it to the presiding judge of the Alameda County Superior Court, and San Joaquin County Counsel filed a formal response. (CT 8: 2256-2286; RT 52: 10864-67; 10892.) On August 19, prior to the admission of victim impact evidence, Judge Platt reminded the jury of his heart condition, but admonished jurors not to be "concerned" by "issues raised by the [defense] attorney," and not to worry about his personal health, "I'm fine. I'm healthy." (RT 52: 10825-27.)[14]

As pointed out in footnote 2, on August 23, 1999, Hon. Alfred A. DeLucchi, Judge of the Alameda County Superior Court, advised counsel he had been assigned to complete the trial in place of Judge Platt, who had suffered a heart attack "over the weekend, and he's presently indisposed ... [and] is scheduled for open heart surgery tomorrow morning." (RT 53: 10928-29.) Judge Platt suffered a heart attack during the recess following the prosecution's presentation of aggravation evidence in the penalty phase

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[14] Even after Judge Delucchi's substitution, defense counsel proceeded with the motion to recuse on the ground, "I just don't want to be doubly prejudiced if Judge Platt returns to health [a]nd I will object if he comes back to preside at the trial ...," but Hon. Philip V. Sarkisian, Presiding Judge of the Alameda County Superior Court denied the motion on September 1, 1999, as "moot, in view of Judge Platt's physical condition." (RT 56: 11338; CT 8: 2295.)

(August 19), and Judge Delucchi formally advised the jury of the situation on August 24, 1999, and excused jurors to the following day for presentation of mitigation evidence. (CT 8: 2248-49; RT 54: 10976-10984.)

The jury reconvened on August 24, 1999, Judge Delucchi presiding, and evidence in mitigation was presented August 25-September 9; after arguments of counsel on September 15 and 16, the case was submitted to the jury on September 17. (CT 8: 2252-2255; 2287-88; 2296-2307; 9: 2381-82; 2385-2388; RT 54-60.) The jury deliberated two and one-half days (10 hours), before declaring an impasse – 6-6 deadlock – on September 22, 1999, and Judge Delucchi suggested they "sleep on it," and continue deliberations the next day. (RT 60: 12339-12346; CT 9: 2482-86) The jury deliberated the following day, September 23, requesting read-backs of testimony, and, without a decision, recessed for the weekend. (RT 60: 12347-12364; CT 9: 2492-93.) On September 27, after approximately six days (20 hours) of deliberations, the jury foreperson again advised the court the jury was "deadlocked" (after 12 votes) and the court declared a mistrial – the vote was 8 to 4 in favor of life imprisonment. (RT 60: 12365-12374; 61: 12488; CT 9: 2495-2503.) On October 4, 1999, the cause was returned to San Joaquin County for further proceedings. (CT 9: 2503.)

On October 12, 1999, appellant appeared with defense counsel (Slote) before the Hon. Terrence Van Oss, Judge of the San Joaquin County Superior Court, and the case was continued to November 22, 1999. The prosecution declared an intent to retry the

penalty phase, and Dunlap requested an early setting for retrial. (RT 61: 12400; 12407.) Fox was on a stress-related medical leave for approximately four weeks following the first trial. (CT 9: 2503-07; RT 61: 12510-12.)

Though defense counsel's motion to recuse Judge Platt before the penalty phase began had been denied as moot, Judge Platt returned on November 22, 1999, and presided over the retrial of the penalty phase. (RT 54: 10992-94;11005-06; 56: 11335-39; 61: 12424-25.) Newly appointed second-chair counsel, Aron Laub, appeared before Judge Platt on November 22, 1999, in Alameda County, and advised the court a proposed retrial of the penalty phase on January 3, 2000, was not "realistic." Judge Platt ordered the jury to be summoned for January 3, 2000. (CT 9: 2507; RT 61: 12421-12445.) [15]

On morning of December 20, 1999, Fox suggested a continuance of the trial date might be in order in light of Laub's recent introduction to the case, and his own fatigue and stress from the first trial, which included physician's orders not to work for one month. (RT 61: 12509-13.) Judge Platt refused to alter the trial date. (RT 61: 12513.) In the afternoon, defense counsel pointed out the "respect" and "dignity" he had shown to

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[15] Within the week, Judge Platt fined Fox $100 in his first appearance back on the case for not being prepared to correct transcripts. (CT 9: 2508; RT 61: 12448-49.) Prior to November 22 Judge Platt had failed to correct *any* part of the record, as he was required to do under section 190.9, and California Rules of Court, rule 8.619 (former rule 35); Judge Delucchi initiated correction proceedings when he entered the case on August 25, 1999, noting transcripts had not been corrected in the first two years since the case had been filed. (CT 8: 2252; RT 54: 11003-04.)

the court, while Judge Platt frequently raised his voice and "was hostile and abusive ..." (RT 61: 12520-23.) Judge Platt denied he had been abusive, claiming Fox and Laub were attempting to "fabricate for the record" non-existent issues, and refused to allow a continuance. (RT 61: 12523.)

On January 3, 2000, the court recited ten new written motions filed by defense counsel in December, 1999, and opposed in writing by the prosecution. (CT 10: 2641-2753; RT 62: 12593-96.) A formal motion to continue the trial was heard first, defense counsel proceeding *in camera* with confidential disclosures. (RT 61: 12614-12640.) Judge Platt denied the motion, finding in both instances "there is not good cause for a continuance." (RT 61: 12613; 12641.)

Another motion, filed December 27, 1999, sought to videotape court proceedings to preserve the record of the court's demeanor. (CT 10: 2672-73.) Judge Platt secured declarations from some of his court staff to deny "yelling" at defense counsel and in support his denial of the defense motion for video coverage. (CT 2766-2768; RT 12684-85.)[16] Adopting many prior rulings, Judge Platt dispatched the remaining defense motions on March 6-7, 2000, including one filed in February, 2000, to allow jurors from the first trial to testify regarding appellant's demeanor in the first trial, and another in

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[16] Apparently, during this same time frame (March-April, 2000), Judge Platt was fixing the speeding ticket of a son of one of his bailiffs, and was using court staff to obtain records "for the benefit and friends and acquaintances, even after being warned by his colleagues and privately admonished by the commission." (See, *Judicial Commission, supra*, No. 162, p. 17.)

March, 2000, to allow appellant's expression of remorse to two pastors who met him after his arrest. (CT 11: 2896-2918; 2930-2951; 2960; 2966; see also, CT 11: 3018-3029; RT 75: 11596-15713; RT 76: 15716-15857.)[17]

The same format for jury selection was followed for the second trial, i.e., questionnaires and individual, sequestered voir dire, conducted from January 4-March 2, 2000. (CT 10: 2792; 11: 2800; 14: 3482 - 28: 7875; RT 62: 12733 -74: 15595.) On March 14, 2000, a second jury and five alternates were selected and sworn in to try the penalty phase. (RT 76: 15876-15960.)

Opening statements were presented by counsel on March 14 and 16, 2000. (CT 11: 2986; 2990; RT 77: 1600-16055; 16062-16136.) The prosecution presented essentially the same evidence from the first trial, including all forensic, autopsy photographs, and victim impact evidence, from March 20-April 10, 2000. (RT 78-84.) Appellant presented virtually the same evidence as had been presented in the first trial from April 10-May 3, 2000. (RT 84-92.) The prosecution introduced rebuttal evidence, the same testimony as it had provided in the guilt phase of the first trial, May 4-8, 2000. (RT 93-94.) Both parties rested on May 8, 2000. (RT 94: 19896.)

On May 10-11, 2000, the prosecutor presented his closing argument to the jury. (RT 95: 20013-20223.) On May 15, 2000, defense counsel moved for mistrial based

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[17] Defense counsel again moved to continue the trial on March 7, 2000, filing confidential documents and proceeding *in camera*, but Judge Platt denied a continuance. (CT 11: 2966-2978; RT 76: 15853-15866.)

upon numerous sustained objections and misconduct committed during the prosecutor's argument, and Judge Platt denied the motion. (RT 96: 20226-20231; see also, RT 96: 20390-92.) Defense counsel presented his closing argument May 15-16, and the court instructed the jury after arguments had been presented. (CT 12: 3217-3276; RT 96: 20232-20409; 20417-20445.)

On May 16, 2000, the jury began deliberating at 3:15 PM. (RT 96: 20445-48.) The jury continued to deliberate on May 17, 18, 22, 23, 24 and 25, 2000. (RT 96: 20451-20491.) On May 25, the jury deliberated a half day, and was excused for the Memorial Day weekend, returning on May 30, 2000. (RT 96: 20494-97.)

On May 30, 2000, after deliberating seven days, the jury foreperson advised Judge Platt the jury had reached an impasse after over 20 hours of deliberations, reciting six votes and numerical divisions over the course of deliberations, the last being nine to three. (CT 12: 3196; 3208; RT 96: 20498-20502.) Without polling jurors, Judge Platt advised the jury, *inter alia*, that "20 hours of discussion does not amount to an impasse that we cannot justify going further and having further discussion ... it's time again to roll up your sleeves and go back to work." (RT 96: 20502.) Afterwards, when defense counsel objected to the court's procedure, and suggested the court admonish jurors as Judge Delucchi had when the first jury declared an impasse after 10 hours, i.e., the law does not force jurors to stay "locked up in that room until they reach a verdict." Judge Platt refused on the ground that "20 hours of deliberation of a life and death issue is a drop in

the bucket [and] it will continue until I decide that they are not going to reach a verdict." (RT 96: 20503-20506.) After an hour of additional deliberations, the jury returned – still split and without a verdict – to be excused for the day; the court reread several standard jury instructions, and then advised the jury:

> " And I think I made a comment to counsel at one point after you folks had left that the 20 hours or so – now 21 hours, 21 and a half hours – that you've spent at this point in time with the issues that you are dealing with is a drop in the bucket.
>
> And until I decide that further deliberations are of no avail, then I'll have you continue to roll up your sleeves and go to work the best you can ...
>
> .....
>
> [O]bviously now there have been some positions taken. During the discussions that you have in the next few days, if you take the other side's position, advocate it as if it were yours, see whether or not that changes your own thoughts about your position."
> (RT 96: 20508.)

Once the jury had been excused, defense counsel objected to Judge Platt's admonition to the jury as an improper invasion of jury responsibilities, and a failure to advise jurors that they are not compelled to reach a verdict if they cannot in good conscience deliberate any further; he moved for a mistrial, which was denied. (RT 96: 20510-13.)

On May 31, 2000, the jury returned and deliberated the entire day without reaching a verdict. (CT 12: 3200.) At the end of the day, two jurors reminded the court of scheduled June travel and graduations, but Judge Platt advised jurors he would only break early the next day and on Monday, suggesting to one juror she try to "rustle somebody else up to do that driving ...," because "we're getting to some very critical stages [a]nd

I've got to try and balance everybody's interest." (RT 96: 20516-20520; CT 12: 3207.)

On June 1, 2000, the jury returned and deliberated in the morning, and towards the lunch recess requested a "time line" exhibit used in closing argument by the prosecutor, which included argumentative quotes and highlighted versions of case events. (CT 12: 3206; RT 97: 20525-20532.) Over defense counsel's objection and motion for mistrial, Judge Platt supplied the jury with three posters prepared and used by the prosecutor during his closing argument. (CT 12: 3201-02; RT 97: 20532-20536 [Exhibits OOOO; PPPP; QQQQ.].) The court admonished jurors the posters were not in evidence, and informed them that if they needed any other materials used by either the prosecution or the defense it would accommodate them. Within the hour the jury requested exhibits that defense counsel had used in his closing argument, "explaining the mitigating vs. aggrivating [sic] factor," and "that basicly [sic] stated: 'While wieghing [sic] aggrivating [sic] vs. mitigating ..... You may ... You may ... You may ... You must ..." (CT 12: 3204-05; RT 97: 20546-47.) The prosecutor objected to allowing jurors to have defense charts on the grounds they were argumentative. (RT 97: 20547-48.)

Judge Platt agreed to allow four CALJIC instructions enlarged on defense poster boards, but decided not to allow defense counsel's charts elaborating on what "must" and "may" be considered, advising the jury instead that those poster boards were "no more than an argument, and that Mr. Fox has analyzed ... not an incorrect statement of law ... [but] it's in your instructions that tells [sic] you about your weighing and balancing, what

you may or can or cannot do." (RT 97: 20554; CT 12: 3202 [Exhibits RRR; SSSS; TTTT; UUUU - admitted; VVVV-excluded.].) Defense counsel moved for a mistrial on the ground the rulings that had allowed the prosecution's boards "stating argumentative positions about what the facts were ..." into the jury room, but excluded defense statements accurately reflecting the law "as to how to weigh and balance," were "bizarre." (RT 97: 20555-56.) Judge Platt denied the motion for mistrial. (RT 97: 20556.)

After the jury recessed without a verdict on June 1, Judge Platt excused the jury to Monday, June 5, scheduling jurors to return to court for two hours for deliberations on Monday, and then four hours for Tuesday, June 6, with June 7-9 off: "I know we talked about the end of June [so t]hat still gives a lot of time for you to be able to deliberate or talk about it." (RT 97: 20557; CT 12: 3202.) The jury returned to deliberate for two and one-half hours on June 5, and recessed for the day without reaching a verdict. (CT 12: 3213; RT 97: 20561-65.) On June 6, 2000, after more than 12 days (33 hours) in deliberations, the jury returned a death verdict. (CT 13: 3348-3350; RT 96: 20566-20577; see also, RT 97: 20629.)

Upon denial of defense counsel's request to continue sentencing from August 4 to August 11, appellant's motion for new trial was filed on July 24, 2000, alleging pervasive prosecutorial and judicial misconduct, juror misconduct, and several other grounds, or to reduce punishment, (CT 13: 3377; 3379-3411; RT 96: 20579-20602.) Opposition was filed on August 1, 2000. (CT 13: 3414-17.) On August 4, 2000, Judge Platt denied

appellant's motion for new trial or to reduce punishment to life imprisonment without parole. (CT 13: 3424; RT 96: 20610-20632; 20632-35; 20635-20663.) On the same date, notwithstanding two penalty trials, Judge Platt reviewed the evidence and found it "overwhelmingly" supported a death verdict, and denied modification under section 190.4(e). (CT 13: 3424-3427; 3430-35; RT 96: 20663-20670.)

After receiving the statements of family members of the homicide victims, a judgment of death was entered August 4, 2000, and appellant was sentenced to consecutive determinate terms of imprisonment on multiple substantive counts and enhancements, totaling 56 years. (CT 13: 3427-3428; 3436-3449; 3459-3472; 3473-3478; RT 96: 20670-20682; 20683-20702.)[18]

Present counsel was appointed for both direct appeal and habeas corpus proceedings on March 16, 2006. The 38,000-page record was corrected and augmented in November-December, 2007, and certified by the lower court clerk on January 17, 2008. The record was returned for editing and corrections on April 17, 2008, and filed on June 27, 2008.

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[18] At the conclusion of sentencing proceedings, Judge Platt ordered sanctions against Dunlap ($200) for two counts of "hybrid contempt," and four counts against Fox ($400), be paid by December 31, 2000; nine additional counts ($900) against Fox were stayed pending his timely payment of $400. (CT 13: 3429; RT 96: 20703-20705.) On August 10, 2000, when appellant was not present, transcripts were corrected and certified. (CT 13: 3479; RT 96: 20707-20713.)

STATEMENT OF FACTS

1. *The Guilt Phase*

Louis Peoples worked a graveyard shift for *Cal Spray Dry Company* on the outskirts of the City of Stockton during the summer of 1994. (RT 30: 6140-41.) He was hired as a "miscellaneous man" to work a twelve-hour shift at the plant. (RT 30: 6142.) *Cal Spray* processes animal remains for dehydrated food products. (RT 30: 6129-30; 6150-51.) He moved up to "operator," which required close attention to valve switches on dryer tanks, processing upwards of 18,000 pounds of animal products at a time. (RT 30: 6150-51.) On one occasion, he failed to check the dryer valves properly, and over $6,000 worth of product was destroyed; he was suspended without pay for three days, and demoted. He was reinstated to operator shortly thereafter, but his supervisor, Gregory Beal, noted his "nervous" and often "erratic" behavior, including, "'On one occasion walking to his vehicle after he got off [work], he was spinning around and went down on his knees in the parking lot ..., talking to the ground pointing his finger at it and moving about on his knees.'" (RT 30: 6157.) As a result of his "odd" behavior, and another episode of contaminated products, *Cal Spray* fired Peoples at the end of August, 1994. (RT 30: 6146; 6154-58; 29: 5767-5769. [RT 78: 16323-16373].)[19]

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[19] The presentation of witness testimony from the "guilt" phase of trial was substantially the same in the retrial of the penalty phase, except where specifically noted. Initial record references are to the first trial with the retrial reference in brackets, usually at the end of each paragraph.

Three years later, Louis and his wife, Carol, lived in an apartment in the City of Stockton together with their six-year-old daughter, Lindsey, and Carol's twelve-year-old son, Matthew. (RT 38: 7884-86.) In summer and fall, 1997, the Peoples resided in Apartment 22 in a complex at *Paris Court*, located on Ben Holt Drive near El Dorado Street, short distances from case-related crime scenes: one city block from Anderson Park and *Mayfair Liquors*, less than one mile from *Bank of the West* at Pacific Avenue and Hammer Lane, two miles from the *Village Oaks Market* at Harrisburg Place and Porter Way, and seven miles from 8 Mile Road near Interstate Highway 5. (RT 29: 5825-26; 30: 6196-6200; RT 32: 6397-98; 33: 6755-57; 37: 7765-7770; 38: 7795-7800; 38: 7884-7900; [RT 80: 16556-57; 16694-96; 81: 16750-52; 82: 16966-16970; 87: 18219-18304; 18312-18343].)

With the exception of a brief period when they lived in Florida with Louis's parents (1991-92), over eight years of marriage, Louis and Carol Peoples were addicted to methamphetamine, and by summer-fall of 1997, usage had increased. (RT 37: 7771-72; 38: 7793; 7885-86; 7894-95. [87: 18219-18304].) Louis worked for *Charter Way Tow* as a tow-truck operator from June 30-October 6, 1997, but his health declined rapidly as a result of the increased methamphetamine use. He tested positive for methamphetamine, was suspended from work, and never returned to the job. (RT 32: 6531-32; 6545-46; 6548; 6574-76; 6591; 38: 7800; 7899 [79: 16483-16527; 80: 16540-16556].)

On June 21, 1997, at approximately 9:00 AM, Michael King, a resident of Stockton, and an Alameda County Sheriff's deputy, went to Anderson Park to watch a baseball game. (RT 28: 5569-71.) He placed his *Glock* service revolver, fully loaded with 16 hollow-point *Smith & Wesson* .40 caliber bullets, and his badge into a fanny pack and left it inside his 1993 Plymouth Grand Voyager, along with his wife's purse and checkbook, inside the locked vehicle, parked 20-30 yards from the baseball diamond. (RT 28: 5571-74; 5581; 5590.) When he returned to his vehicle at 11:00 AM, his gun, badge, and wife's purse and checks were missing. (RT 28: 5576-78.) At trial, Officer King identified a *Glock* semiautomatic handgun similar to his service weapon, but "the slide's [sic] been sanded down [and] the handle's [sic] been graded off." (RT 28: 5579; Exhibit 622.) He also identified his checkbooks, badge and identification card. (RT 28: 5580-85. [RT 78: 16168-16190].)

The next day, June 22, King recalled his son answering a telephone call at home. King responded to the call, and a male voice on the other end said, "'Thank you for the fucking gun, you idiot.'" (RT 28: 5577-78.) King, who had reported the vehicle burglary the day before, immediately contacted Stockton police to report the telephone call. (RT 28: 5577. [RT 78: 16177-78].)

On September 16, 1997, Thomas Harrison, a digest operator at *Cal Spray*, who had been working at the plant for seventeen years, drove into the fenced parking lot at 3:30 AM to begin his shift. (RT 28: 5699-5702.) Another employee, Timothy Steele, drove in through the gated entryway at approximately the same time. (RT 28: 5649; 5664-65; 5705; 5710-11.) After they both parked, Harrison noticed broken windows on a blue pick up truck owned by David Grimes. (RT 28: 5710-11; 29: 5794-97.) Steele also observed several vehicles in the employee parking had been vandalized. (RT 28: 5668-69; 29: 5807-5816; 5817-5824.)

Harrison walked towards the blue truck to investigate, and he observed a man in a baseball cap come out from behind the truck door. Harrison said he "panicked" as the man fired two rounds at him. The unidentified man ran away, firing over his shoulder, and Harrison fell to the ground. He observed more gun fire as he lay on the ground, and believes a ricochet may have caused a bullet to severely damage his right leg and pelvis. (RT 28: 5720-5721; 5726-29; 5736.) Seven .40 caliber shell casings were recovered from the parking lot. (RT 32: 6595-6612. [RT 78: 16200-16240].) Harrison was disabled from the gunshot wounds and unable to return to work. (RT 28: 5735.) Harrison had known Louis when he worked at *Cal Spray* in 1994, considered him an "exemplary" worker, and "had no problem with him." He did not recognize Louis as the assailant that night. (RT 28: 5719. [RT 78: 16241-16272; 78: 16272-16294].)

Michael Liebelt, an employee at *Cal Spray*, had responded to the scene in the

parking lot the morning before, and had seen Harrison on the ground and observed the police arrive. (RT 29: 5748-5754.) Liebelt's vehicle had been vandalized, the glove box had been rifled through, and a *Gerber* utility tool was missing. (RT 29: 5755.) Liebelt returned to work for the next shift, and in the morning (September 17), around 2:30-3:00 AM, he received a call, and "was asked if anybody had been shot out there ..., if anybody had died out there ...." (RT 29: 5758.) Liebelt demanded to know who was asking, but the caller did not identify himself. Instead, before hanging up, the caller responded, "'Did anyone get wasted last night?'" (RT 29: 5759.)

Liebelt had worked with Louis, and socialized with him on occasion. (RT 29: 5760-62.) He also described Louis's rise and fall at *Cal Spray* during the summer months of 1994, recalling a day when Louis was walking around in circles in the parking lot, "venting anger, yelling at the sky or yelling at the ground or cussing himself ..." (RT 29: 5772.) Liebelt and others "poked fun" at Louis, but he "never felt threatened by Louis." (RT 29: 5773.) Liebelt did not suspect Louis in the events of September 16-17, 1997, and was shocked when he saw Louis on television after arrest. (RT 29: 5774.[RT 78: 16308-16322].)

Gregory Beal, in charge of environmental systems at the plant, received a telephone call at home sometime after midnight on September 17 from an unidentified male, "that there was a fire at one of dryers." (RT 30: 6128-6133.) Beal verified there was no fire, and went back to bed. Then, around 3:30 AM, he received another call from

an unidentified male who said, "one of our employees had been shot." (RT 30: 6134.) Beal also described Louis's employment, and circumstances surrounding his erratic behavior and termination from *Cal Spray*. (RT 30: 6141-6151. [78: 16323-16373].)

Similarly, Charles Stife worked with Louis, and his vehicle was damaged on September 16, 1997, but nothing was stolen. (RT 29: 5817-5824.) David Grimes and Paul Siewert did not know Louis, but their vehicles were vandalized, and a number of personal items were missing upon inspection. (RT 29: 5791-5805; 29: 5807-16. [78: 16295-16307].)[20]

Gerald [Jerry] Ball was general manager and vice-president of *Cal Spray* for 32 years, and testified as a defense witness in the penalty phase at each trial. He hired Louis as "miscellaneous" man to work at the plant. (RT 57: 11524-11526.) As others described, Louis made substantial progress and was promoted to dryer operator, but it was a "tough" and "dirty" job, and Louis ultimately failed in his tasks and had to be

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[20] On penalty retrial, Stife and Siewert did not testify. However, Shayne Goodman testified on retrial that his 1995 Ford was parked in the parking lot at *Cal Spray*. The vehicle had an "anti-theft alarm" with a pulsing red light inside; the vehicle was not broken into, but his tires were slashed. Goodman described an incident in which Louis accused several employees in the break room of stealing his soda, when it was in his own back pocket; everyone ridiculed Louis after that episode. He also met Louis's family, and observed loss of weight and general decline before he was fired. He never suspected Peoples in the crimes of September 17, 1997. [RT 82: 19895-19908.] Stockton Police Officer Dean Happel testified at both trials and established crime scene details, including bolt cutters located near a cut hole in the chain link fence surrounding the parking lot, and number of vehicles (6) vandalized and shell casings (7) located in the lot. (RT 28: 5592-5640. [79: 16374-94]. See also, Evid. Tech. Beggs. (RT 32: 6595-6612. [78: 16201-16240].)

terminated. (RT 57: 11529-11531.) During a critical period of his employment with *Cal Spray*, Ball observed occasions of Louis's "bizarre" behavior, blank facial expression and "incoherent" speech, and accused Louis of using drugs, "like a father would a son." (RT 57: 11531; 11533-34.) Under subpoena, Ball readily admitted the conflict he felt about Louis and his "other friend" (Harrison), but also reflected upon the importance of testifying to the truth. (RT 57: 11534; [88: 18473; 18461-18475].) [21]

On Friday, October 24, 1997, at approximately 4:00 PM, Jason Tunquist was working a teller position at the *Bank of the West* branch located in the City of Stockton at Pacific Avenue and Hammer Lane. (RT 29: 5825-29; 5850-51.) It was a busy day and customers formed in line. A fifty-year-old man with a weather-beaten face, wearing a dark baseball hat, wired rimmed glasses, and a zipped-up jacket, walked up to his station in normal fashion, and handed him a piece of paper, which read, "'Give me all your tens, twenties, fifties and hundreds and no one will get shot.'" (RT 29: 5828-29; 5839-40; 5863-64.) He pulled a handgun, pointed it at Tunquist, and handed him a brown paper bag. (RT 29: 5829-30; 5854-55) Tunquist turned over about $900, and the man left

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[21] Though excluded from the jury's consideration in both trials, Ball's son became addicted to methamphetamine. Ball was permitted to testify in each penalty phase to his visits with Louis while he was pending trial, and in more depth to his observations of Louis's bizarre behavior, as well as "insights" Louis imparted during their visits in helping Ball understand the nature and symptoms of methamphetamine addiction in "going forward in [Ball's] life and things that have happened since." (RT 88: 18473; see also, RT 57: 11524-15535.)

hurriedly. (RT 29: 5832-34.) The robber had a unique "nervous twitch kind of thing," a "grinding" of "the lower part of the jaw [that] would just shoot out." (RT 29: 5859-60; 80: 16578-79].) Tunquist was unable to pick anyone out of a photographic lineup presented to him by police, but at the end of November, 1997, he identified Louis in a local headline newspaper article, "Cops Nab Suspect in Four Killings." (RT 29: 5869-75. [RT 80: 16556-16587.])

On October 29, 1997, shortly before 3:00 AM, Mary Kuwabara, a telephone operator for *The Answering Service*, received a telephone call for towing service on behalf of *Charter Way Tow*. (RT 30: 6088-6095.) She was familiar with the tow truck operators working for *Charter Way Tow*, and with the practices and procedures for responding to multiple calls. (RT 30: 6088-94.) The company employed a rotation system so each driver working would take turns at being a primary responder for one night, while others would be on back up if there were multiple calls for service at or about the same time. (RT 30: 6092-93.) On October 29, the duty driver, Larry Sheaffer, was dispatched for service at the southern end of Stockton near French Camp and State Highway 99 at 2:28 AM. (RT 30: 6101-6107; 6533-34.) A second call for service was received approximately one-half hour later for a stranded motorist on the north side of town on 8 Mile Road near a PG& E tower and Interstate Highway 5. (RT 30: 6108-09.) Kuwabara dispatched James Loper for service to 8 Mile Road at 3:08 AM, and Kuwabara

received a coded notice from his pager he had responded to the call shortly before 3:30 AM. She did not hear from Loper again. (RT 30: 6108-6109; [RT 79: 16457-16482].)

In the early morning hours of October 29, San Joaquin County Sheriff's Deputy Kenneth Bassett, and his partner, William Gardner, were on routine patrol in rural north county, when they noticed revolving tow-truck lights on an isolated section of 8 Mile Road. When they investigated further they found the engine running, no one in the cab, and no other vehicles in the area. (RT 29: 5876-85.) James Loper's body was discovered beneath the tow truck located 650 feet from Highway 5 shortly before 4:00 AM. Back-up and medical personnel were called. Loper died from multiple gunshot wounds. (RT 29: 5876-5880; 5895-96; RT 30: 5994-6058. [RT 79: 16394-16414; RT 80: 17156-17158.].) San Joaquin County Homicide Detective Antonio Cruz recovered nine *Smith & Wesson Remington Peters* .40 caliber bullet casings and three bullet fragments at the scene. (RT 29: 5925-28 [RT 79: 16414-65].)

Sandi Dove and her husband, Rodney, owners of *Charter Way Tow*, testified to the operation of the business, and to Louis's employment as a tow-truck driver from June 30-October 6, 1997. (RT 32: 6531-6565; 6574-6595.) He was introduced to the Doves by another driver, Ed Richards, and Louis appeared to be well-mannered, quiet and diligent; Richards trained Louis. (RT 32 6545-47; 6583-84.) While Louis was employed with *Charter Way Tow* he drove a 1996 *International*, and in July, 1997, he had a minor accident with the truck. Each month thereafter his pay check was docked until he could

repay the debt ($1,081.64) for the damage. (RT 32: 6543; 6577; 6587-88.) Though Louis appeared to accept responsibility for the wage reduction, his demeanor appeared to change somewhat. (RT 32: 6587; 6592-93.) At the time, the Doves employed four drivers for their business. (RT 32: 6545-46; 6583-84.) James Loper had been one of their drivers. (RT 32: 6544; 6583-84.) The Doves never noticed any problems between Louis and James. (RT 32: 6551; 6586-87.) Louis, like all the other employees, was randomly tested for drugs on September 30, 1997; on October 6 he was suspended for thirty days after testing positive for methamphetamine. Sandi Dove was not surprised, because after the accident, "something wasn't right" with Louis. (RT 32: 6545-48; 6592.) He told her he "expected" the test results. (RT 32: 6590-91.)

On October 30, the day after Loper's death, Sandi Dove received a telephone call from Louis, "he told me he was sorry to hear about it, that [James] was a good guy ... [a]nd he knew ... we were shorthanded, and did we want him to come back to work early." She informed Louis he still needed to serve out his suspension and take a drug test, and she did not hear from him again. (RT 32: 6581-83. [RT 79: 16583-16527; 80: 16540-16556].)

On November 4, 1997, at approximately 7:30 AM, City of Stockton Police Officer Ernest Alverson was dispatched and responded to what appeared to be a robbery and shooting in the Mayfair Shopping Mall near Anderson Park. (RT 31: 6177-6194.) Jeff Coon, Stockton Homicide Detective and lead investigative officer in this case, was dispatched to the scene at approximately 7:45 AM. (RT 32: 6195-6200.) Stockton Police Evidence Technicians arrived shortly thereafter, and criminalists from the Department of Justice assisted with crime scene reconstruction over the next twelve hours. (RT 31: 6200-05; 6219-6234; 6352-6366.) Thirteen bullet casings were located inside *Mayfair Liquors*, one outside, and one live round was found outside the store. (RT 31: 6301-02.) Stephen Chacko, an Indian citizen and store clerk at *Mayfair Liquors*, had run from the store and into the parking lot of the shopping center, but he died of multiple .40 caliber gunshot wounds. (RT 32: 6328-6351.) Investigators documented a possible "escape route" behind the store, through a bent chain link fence, leading to the back of a series of apartment complexes on Ben Holt Drive. (RT 31: 62097-6213; [RT 80: 16591-16610; 16612-16621; 16670-16684; 16689-16703; 81: 16708-16741].)

On November 11, 1997, at 9:57 AM, San Joaquin County Deputy Sheriff Charles Locke and his partner, Richard Tejada, were dispatched to a shooting that occurred at Harrisburg Place and the *Village Oaks Market*. They arrived within seven minutes of dispatch, and observed two people at the scene, talking rapidly, and under tremendous

stress. (RT 32: 6397-6400.) Officer Locke observed a trail of coins from inside the store to the outside. (RT 32: 6405-06.) Officers found two mortally wounded people inside the store. (RT 32: 6400-02.) Besun Yu, store owner, was found behind a counter, where a cash register had been forcibly removed, and Jun Gao, a friend assisting her, was found in an aisle; both victims died from multiple gunshot wounds. Numerous cameras and a video-taping device was installed in the store, but the machine did not contain a tape. (RT 32: 6401-02; 6415-17; 33: 6637-6676; [82: 16966-16983; 17156-17178].)[22]

At approximately 6:00 PM, November 11, 1997, Steven Hobson, was driving home, and exited on the Wilson Way off ramp from State Highway 99, where he noticed other vehicles swerving to avoid an object in the roadway. He pulled to the side of the road and removed a cash register from the road; there was no drawer in the register. A couple of hours later he saw a television broadcast of a homicide at the *Village Oaks Market* earlier in the day, and telephoned the police to report the object. (RT 32: 6466-76.) John Gareau, who lives on the outskirts of Stockton, arrived home around 6:00 PM on November 11, and his step-daughter left shortly after to run errands. When she returned two-three hours later, she reported seeing a broken cash-register drawer in the street near their house. Gareau picked up the drawer by the electrical cord, and returned to the house. His step-daughter called police. (RT 33: 6508-6518.) The cash register and

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[22] Officer Tejada was not called to testify at the guilt phase, but corroborated much of Officer Locke's testimony during the retrial of the penalty phase. (RT 81: 16742-16757.)

drawer from the Village Oaks Market were examined by expert latent print examiners. An unuseable, partial palm print and other "smudges" were located on the cash register, along with "swipe marks," but no useable fingerprints were found on the register or the drawer. (RT 32: 6352-6488; 6518-6530. [RT 81: 16804-16821;16826-16832; 16835-16841.].)

John Huber, San Joaquin County Sheriff's Homicide Detective, had been working the *Cal Spray* and *8 Mile Road* cases, and he compared notes with Stockton Homicide Detective, Jeff Coon, who had been assigned the *Mayfair Liquors* homicide. (RT 34: 6922-25.) They suspected a link, and submitted bullets and casings recovered from each scene to the California Department of Justice forensic laboratory. (RT 33: 6705-6719.)

DOJ Agent Michael Giusto, an expert in firearms identification, was unable to match bullets from *Cal Spray* and *8 Mile Road*. Upon first impression, Agent Giusto was only able to opine associated bullets and casings at each scene were probably fired from a *Glock* pistol, but "I just couldn't reach an identification" of bullets recovered at each scene. (RT 33: 6705-6711.[RT 81: 16793-16803.].) Giusto finds it "extremely difficult" to compare expended bullets fired from pistols manufactured by *Glock* due to "polygonal rifling" characteristics. (RT 33: 6677-6743; 6707-6710.) He "even had difficulty matching test-fired bullets to each other." (RT 6713.) On the other hand, "typically on a Glock the examination and comparison of expended cartridge casings is

extremely easy." (RT 33: 6709-6710.)

During Detective Coon's investigation of the *Mayfair Liquors* case on November 4, 1997, he had received information from witnesses who had arrived at the scene shortly after the robbery, and who had described a possible suspect vehicle leaving the scene as 1990's Nissan *Stanza*, 4-door, dark gray primer. He drove the surrounding neighborhood that evening, but was unable to find a similar vehicle. (RT 33: 6750-51.) On November 11, 1997, Detective Coon visited the *Village Oaks* crime scene, and had grown "desperate" for information because "we knew that they were all connected." (RT 33: 6752-6753.) He called on media resources to broadcast a description, and local law enforcement and volunteer patrols were notified of the priority. (RT 33: 5753-55.)

At approximately 1:00 PM, November 12, 1997, Detective Coon received a telephone call from Stockton Police Officer Brian Swanson, who was on patrol. He reported a vehicle matching the broadcast description, and Detective Coon advised him to conduct surveillance on the vehicle and detain anyone who might enter it. Detective Coon ran a vehicle record check and noted the registered owner to be Carol Peoples. Officer Swanson had also seen the license plate frame, "'Carol and Louis Forever,'" and ran a record check on Louis. Detective Coon advised Officer Swanson he recognized the name "Peoples" from an employee list at *Charter Way Tow*. By the time Detective Coon arrived at the vehicle site, Louis was being taken into custody. (RT 33: 6750-6755; 6765-6770. [RT 83: 17398-17401].)

Officer Swanson parked a few blocks away from the Nissan, called for backup, and a photograph was displayed on his patrol monitor. (RT 33: 6769-6770.) At approximately 3:00 PM, November 12, officers in an unmarked police car reported "a white male matching Louis Peoples' description was walking away from the apartment complex" on Ben Holt Drive towards an elementary school around the corner. Louis was carrying a backpack and a fanny pack, and was wearing a baseball hat, headphones, and appeared unkempt. As Officer Swanson drove his vehicle towards Louis, he observed Officers Kohler and Tribble approach on foot with guns drawn – backed up by several other officers – and they handcuffed Louis in a field near the school, a short distance from Anderson Park. (RT 33: 6755-59; 6771-73; 6808-09.) Louis did not resist arrest. (RT 33: 6808-09.) Swanson searched the packs for weapons. Inside the fanny pack he found a holster, knife, handcuffs, small binoculars, and an Alameda County Sheriff's badge and identification for Michael Scott King; inside the backpack Swanson found a baseball hat, police scanner, guide book, and a blue notebook with the words on the outside, "'Biography of a Crime Spree,'" in which the writer (Louis) details four homicides committed, "'merely for the motive of revenge," or "'to support my family.'" (CT 9: 2461; RT 33: 6796-98; Exhibit 578.) He noticed newspaper clippings from case-related crimes inside the "scrapbook," and then replaced items back into the packs. (RT 33: 6773-6775; 6796-6805; Exhibits 565-604.)[23]

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[23] A receipt for items purchased at a local *Walmart* on November 4, 1997 at 2:04 PM was also located inside a wallet in the backpack; it contained a receipt for

Officer Swanson placed the suspect into his patrol car without incident at 3:15 PM. Louis appeared passive, did not say a word during the ten-minute drive to the police station. Though Swanson had received academy training, he did not recognize any symptoms of drug intoxication or withdrawal, but did not conduct any tests of Louis. (RT 33: 6777-78; 6793; 6814-6844.) Officer Swanson stayed at the police station over the next twelve hours, while officers interrogated Louis. Swanson and booked Louis on murder charges at 4:30 AM, November 13, 1997. (RT 33: 6816-17; 6839-6841. [RT 81: 16866-16880; 82: 16916-16963.].)

Stockton Detective Clifford Johnson obtained a search warrant for the apartment where Louis and Carol Peoples resided, 230 W. Ben Holt, and shortly after 11:00 PM on November 12, 1997, he conducted a search of the apartment, accompanied by detectives and evidence technicians. (RT 33: 6861-6898.) Numerous items were collected, including an eviction notice, black *Ariat* boots and sole-print impressions outside the apartment, a camera, loose coins, a highlighted map of Stockton, newspaper articles, Dr. Pepper bottle, green and brown marijuana seeds and white powdery substance inside plastic wrap in an *Altoids* can. (RT 33: 6860-6898; Exhibits 522-537; 528; 597. [RT 83: 17193-17338.])[24]

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cash purchases 35 items at $74.58. (RT 34: 6930-6939 [Exhibits 330; 587; 591; 697].)

[24] A handwritten note was found in the top dresser drawer of the master bedroom: "CWT [Charter Way Tow] Can I help you? Dude, yeah, check this out. You and the popos are all fucked up about Jimbo. He was punk. He was on dope like the

From 4:30 PM, November 12, to 4:30 AM, November 13, 1997, Detectives Huber and Coon interrogated Louis, recording the sessions on videotape. (CT 9: 2471; RT 33: 6828-29; 6839-41; 34: 6961-69; Exhibits 695-A-B. [RT 83: 17347-50; 17369-88; 17405-08.].) For the first nine hours, Louis denied knowledge of the crimes. (RT 34: 6928-30. [83:17398-17403].) Confronted with the contents of the packs seized from him at the time of arrest, his wife's inculpatory statements made earlier that night, Louis, sweating profusely, pulling out his hair, rubbing his skin, twitching his facial muscles, grinding his teeth, asking for water and food, and at times appearing to nod off to sleep, admitted to commission of the crimes at issue in the final two hours of interrogation. (RT 34: 6943; 7216-7224. [83: 17405-408.].)

At 9:00 AM, November 13, Louis gave directions to police to assist in recovery of the gun he had used, and when law enforcement personnel could not locate the weapon, he went into the field at 9:45 AM and assisted in the recovery of King's *Glock* pistol near the point of his arrest. (RT 34: 7089-90; 35: 7241-7245; 7261-64; 47: 9724-25; Exhibit 622; [RT 83: 17398-401.].) By 2:30 PM on November 13, Kent Rogerson, M.D., a Forensic Psychiatrist retained by the San Joaquin County District Attorney's office,

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rest of the Charter Way drivers. He didn't want to pay. That's why he got capped. He wasn't the goodie-goodie everybody thought he was. So get it straight." (RT 33: 6887-88; Exhibit 537.) Numerous case-related newspaper articles were seized from a dumpster nearby. (RT 33: 6888-6890; Exhibits 513-519.) Officers also found the soles of the *Ariat* boots to be similar to impressions made at the 8-Mile Road scene. (See, RT 33: 6875-77; Exhibits 247-49; 251; 253]; 34: 6926-27.)

entered the San Joaquin County Jail and conducted a general psychiatric and competency evaluation for the prosecution. (RT 47: 9625-37; 9687-9691. [RT 94: 19762-19768; 19802-19809.].)[25] The next morning, as Louis waited in a courthouse holding cell for his arraignment, Detective Huber audiotape recorded an interview with Louis regarding the unusual scratches on the *Glock*. (RT 34: 7090-91; Exhibit 663. [RT 83: 17398-17401.].)

Upon recovery of the *Glock* .40 caliber firearm in the field near Louis's apartment, DOJ Agent Giusto was able to match all case-related cartridges as fired from the gun. (RT 33: 6711-6718; 6721-6737. [81: 16789-16803.] The serial number on the metal frame of the pistol had been "covered over and obliterated" and the breech face had been "scratched out." (RT 33: 6721-22; 6725-26; Exhibit 622; see also, RT 28: 5579.) Jeff Reed, Alameda County Sheriff's Deputy Regional Range Coordinator, testified in the guilt phase regarding issuance of firearms to officers. County records showed Exhibit 622 (Serial BMG014) had been issued to Daniel Harrison on March 8, 1996, while another *Glock* (BMG272) had been issued to Deputy King. County records did not show Exhibit 622 had ever been issued to King. Over foundational, hearsay, and relevancy objections, the records were admitted, and Deputy Reed speculated the guns must have been "inadvertently switched." (RT 37: 7603-23.)

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[25] Dr. Rogerson testified as a rebuttal witness in both trials, but is cited here for the time line of case events. (See also, *post*, 1.B.)

1.A. *Evidence Presented on Mental State - Lack of Specific Intent*

Defense counsel presented several lay and expert witnesses in the guilt phase of the first trial, who were then recalled for the second trial of the penalty phase.[26]

1.A.1. Lay Witnesses

Michael Jack, a bystander near the *Village Oaks Market* around 9:30 AM, November 11, 1997, observed a man near the telephone booth by the store, who appeared to him to be a "crankster" [methamphetamine user]. (RT 37: 7730-33; 7745-47.) Jack testified he had been addicted to methamphetamine at one time in his life, and described use among his family "all the way back three generations." (RT 37: 7739.) In his view, the man later identified as Louis – "looked a little like Woody Allen with dark hair" –

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[26] As discussed in detail in the *Argument* section, Dunlap did not oppose mental state evidence in general, but did interpose a specific objection to lay witness testimony regarding the effects of methamphetamine. (RT 35: 7140.) Although Judge Platt allowed lay witnesses to testify to the "physical" effects they observed, he refused to allow lay testimony on the psychological effects on the ground, "a person tak[ing] a drug that alters their state of mind; that individual, under altered state of mind, is not the best judge of what is being altered [because i]t calls for speculation." (RT 35: 7174; see also, 7169-7170.) Judge Platt viewed the proposition that a lay person who had been under the influence of alcohol or drugs could describe their mental experience, including nausea, dizziness, paranoia and the like, as "absolutely ludicrous." (RT 87: 18309-18311.) The court also refused to allow Brent Turvey, a forensic expert, to testify to the haphazard way in which the homicide-robberies occurred; he was briefly consulted as a 'profiler,' by Stockton Police Department during its early investigation but was proffered by the defense to rebut the prosecution's 'serial' murder theory. Judge Platt threatened sanctions if Turvey "crossed the line" in his testimony; defense counsel did not present Turvey. (RT 36: 7367-7578.)

appeared to be under the influence of methamphetamine, severely underweight, "drawn in the face ... a little wild looking." (RT 37: 7740.) According to Jack, "He looked like a crankster ...," and "crank takes everybody." (RT 37: 7740; 7750-51. [89: 18622-18648].)

Michael Quigel lived at the apartment complex on Ben Holt during the time Carol and Louis Peoples lived there. (RT 37: 7624-26.) Quigel, serving a six-year term of imprisonment for robbery, testified he had been a methamphetamine user and dealer in 1996-97, and had sold the drug to Louis and his wife. (RT 37: 7626-28.) He depicted methamphetamine use in the apartment complex as "epidemic," and admitted, "I was my best customer." (RT 37: 7628.) Quigel described Louis' marriage to Carol as "weird." (RT 37: 7432-33.) For instance, Carol Peoples, one of Quigel'ss regular customers, was "loud and obnoxious and belligerent," and on one occasion she got "drunk out of her head ... at a guy named Ed's [Richards] apartment, and she pulled up her shirt and was flashing everybody." (RT 37: 7432-33.) Apparently, her "slutty" behavior was not isolated; Carol "rubbed up" against Quigel's friend on another occasion, and was "always getting drunk ... and flashing her boobs, bending over in front of people." (RT 37: 7432-33.)

Louis, however, was "quiet, you know, kept to himself," appeared to be "just a loving, good father" with Lindsey and Matthew, never threatened or intimidated anyone, and Quigel never saw him drink alcohol. (RT: 7433; 7640-41; 7653-55) But Louis would routinely stop by Quigel's apartment and buy methamphetamine in "$30 bags here and there." (RT 37: 7427-28.) Quigel described Louis frequently under the influence of

methamphetamine, or "always wired for sound ..., [and] real jittery ..., movements were fast ..., face would be real oily ..., [pupils] pinned, and [iris] big ..., occasionally expelling his tongue" through his dentures. (RT 37: 7429-31.)

Quigel recalled reading in the newspaper about the *Village Oaks Market* robbery and homicide (November 11, 1997). He also recalled driving into the parking lot of the apartment complex a day or two before reading about the homicide, and seeing Louis, who looked "exhausted," and appeared to be preoccupied with something in the front passenger seat of his Nissan, which Quigel identified as a cash register:

> " [Louis] looked like his mind was somewhere else. He was there physically, but his eyes were real big. His face was oily. He was sweaty. His hair real oily. He was sucked up and real skinny." (RT 37: 7633-34.)

Quigel testified Louis bought $30 worth of methamphetamine the night before Quigel saw him in the parking lot. (RT 37: 7633-34; 7636-38; 7652.) Quigel was shocked when he learned Louis had been arrested on four murders, "totally opposite of his character ... I couldn't believe it." (RT 37: 7641; [RT 88: 18412-18447.].)[27]

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[27] Quigel also described Louis as looking "crazed" and "paranoid," and as discussed in *Argument* section, defense counsel properly described it as the result of the prosecutor "baiting" Quigel during his cross-examination. (RT 37: 7674-87.) The court admonished the first jury Quigel had violated a court order, "that nobody under the influence of any drug is the person to talk about how it affects you," and struck that portion of Quigel's testimony. (RT 37: 7691-93.) In the retrial, before Quigel testified, and at the request of the prosecutor, the court admonished Quigel if he used the word "crazed" or "drugs make you a psychopathic killer," etc., he would be held in contempt, and "I will make your life miserable if I have to." (RT 88: 18410-11.)

Joni Fitzsimmons, mother of three, lived in apartment 15 at the *Paris Court Apartments*, and met Carol Peoples while their kids were swimming together. Carol offered her a beer later that day, and after that they "hung out together every day ..., tak[ing] the kids places together." (RT 37: 7765-7769.) Joni and Carol began using methamphetamine together on a daily basis, ingesting it through the nose. (RT 37: 7771-72.) They would often stay up all night, and "either clean [their apartments] or really just start doing one thing over and over again." (RT 37: 7771-74; 38: 7795.)

Fitzsimmons met Louis early on but he really didn't interact with the women, other than to use methamphetamine. (RT 38: 7796-97.) Carol was the "dominant" person in the marriage, and Fitzsimmons observed her routinely screaming at and demeaning Louis, while he never reciprocated. (RT 38: 7803; 7812.) Carol was not employed, but would call Louis on his pager constantly, and would harass him; often it was about money. (RT 38: 7813; 7830.) By early November, Fitzsimmons knew Carol and Louis had been served with an eviction notice and their utilities were being turned off. (RT 38: 7832-33.)

Whenever Fitzsimmons saw Louis, he was either smoking marijuana or using methamphetamine. (RT 38: 7793-94.) She observed Louis to be "irritable ... wouldn't really talk to anybody, withdrawn" when he "snorted" the methamphetamine. (RT 38: 7796-97; 7807; 7831.) Louis would usually close the door to the bedroom or work on his bicycle after using methamphetamine. (RT 38: 7796-97.) Fitzsimmons was in the apartment on October 6, 1997, when he arrived after being suspended from *Charter Way*

Tow; she had been "partying" with Louis and Carol the night before. When Louis returned home from work that day he was sullen, and she could hear him pacing back and forth in his bedroom. (RT 38: 7802-03; 7817.)

Fitzsimmons never saw Louis become violent with anyone. In point of fact, even though she knew Louis was using drugs, often withdrawing into his own solitary world, she did not fear him, never saw any signs of him being violent with his stepson, Matthew, or his daughter, Lindsey, and he was attentive to her own sons, Gabriel and Jordan. She described Louis flying kites with the children and taking them to the swimming pool. Without reservation, Fitzsimmons trusted Louis with her children. (RT 38: 7804-06.) She was devastated when she learned of his arrest, "I just never dreamed that he would do anything bad." (RT 38: 7811; 7826-27; [87: 18312-18343.].)

Carol Peoples, thirty-one years old at the time she testified, had gone completely blind in her left eye and with severe loss of sight in her right eye. (RT 38: 7884-86.) When she met Louis in 1988 she was twenty, and by then Matthew, her son, was three years old. (RT 38: 7885-86; 56: 11346.) Carol and Louis smoked marijuana and used methamphetamine from the beginning of their relationship. (RT 38: 7885-86.) In 1990, when she learned she was pregnant with Lindsey, she quit using methamphetamine, but Louis did not; eventually, they decided to try to clean up, and the family moved to Florida in July, 1991, to be near Louis's parents and brothers, and they stopped using all drugs. (RT 38: 7887-89.) When they moved back to Stockton eighteen months later after the

falling out with Louis's family, Carol and Louis resumed their old drug habits. (RT 38: 7887-88; 7898.)

Carol described how Louis' health deteriorated in 1997, especially over the summer months, and during three-week period before his arrest (November 12, 1997), he was not sleeping or eating, "his whole being had run down." (RT 38: 7889-7891.)[28] She admitted she did not know precisely how much sleep her husband was getting before his arrest, because they had stopped sleeping together by then. (RT 38: 7896.) She also conceded she had become suspicious of Louis's activities, and towards the end he so much as admitted his involvement in the Chacko and Loper homicides broadcast on television news. (RT 38: 7899-7906; [RT 87: 18219-18304.].)

1.A.2 - Expert Witnesses

Joseph Chang-Sang Wu, M.D. (Psychiatry), an Associate Professor at the College of Medicine, University of California at Irvine, and Clinical Director of the UCI Brain Imaging Center, qualified as an expert in *Positron Emission Tomography* (PET) brain imaging technology. (RT 38: 7944-7974.) Dr. Wu has studied various mental health diseases, including Schizophrenia, Depression, Parkinson's and Alzheimer's, as well the effects of psychosis, sleep deprivation, and chemicals, such as Dopamines and illicit drugs (PCP, Cocaine, etc.). (RT 38: 7951-7957.) He has received numerous grants and

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[28] Defense counsel moved into evidence a copy of Louis's booking photograph from November 13, 1997. (RT 38: 7913-7920; Exhibit 106.)

awards, and has lectured "throughout the world on PET scanning, how research can shed new light on how the brain works." (RT 38: 7954-56.) He has published over forty peer-reviewed articles, and specifically has authored articles on how sleep deprivation and drug use affects the brain, and "how brain imaging is helping to advance the understanding of what is going on in the addict's brain." (RT 38: 7961-62.)

Dr. Wu explained how *Magnetic Resonance Imaging* (MRI) and *Computerized Axial Tomography* (CAT/CT) scans differ from PET scans:

> " There's a big difference between MRI [and CT] scans and PET scans. MRI scans look at brain structure. They show you if the brain is there, but it doesn't show you if the brain is working ... [MRI's] have major limitations because they can tell if the brain structure if there's some abnormality in the shape of the structure ..., [b]ut it doesn't really tell you what's going on inside the structure."
> (RT 38: 7968-7971.)

In short, "the new development of the PET scan and functional brain imaging has really given brain scientists and brain doctors a new telescope inside the living brain to see what's going on." (RT 38: 7977-78.)

Dr. Wu explained the history of PET scanning, and how a newer technology, *Single Photon Emission Computed Technology* (SPECT) "is cheaper than PET scanning, and it's more widely available ... [b]ut it's lower resolution, so you can't see things as sharply and clearly." (RT 38: 7976-79.) Each PET scanning device, including a cyclotron, weighs over 20 tons and costs upwards of $2,000,000 for each unit, and only the larger medical facilities (UCI, UCLA, UCSF, UCSD and Stanford University) operate

PET scans. (RT 38: 7976-79.)[29]

Louis was referred to Dr. Wu's clinic at UCI Medical Center for a brain scan, conducted on September 18, 1998. (RT 38: 7994-7997.) He reviewed multiple slides and reports during his testimony at trial. (RT 38: 7994-8000; Exhibits 107-109.) To the best of Dr. Wu's knowledge there was "no intervening, significant medical event" from September, 1997 to September, 1998, and, therefore, in his opinion, the "scan should reflect the activity of the brain that was present in September of '97 assuming there is no interviewing [sic] medical event." (RT 38: 8015.)

In Dr. Wu's opinion the PET scan reveals Louis's "brain is clearly abnormal, especially in the frontal lobe and limbic [amygdala] system in that this is consistent with some type of brain defect." (RT 38: 8011-8012.) According to Dr. Wu, the "overwhelming majority of doctors and brain scientists" agree, the "frontal lobe is involved in higher order thinking," or "executive functioning," and the "amygdala" is part of the "limbic system" associated with emotions. (RT 83: 8006-07; 8011.) In his view, the frontal lobe is probably the "most prominent abnormality" depicted in the PET scan, and "this is part of the brain of Mr. Louis Peoples [that] appears to be defective or broken." (RT 38: 8007.) In addition, he found in the PET scan "an unusual pattern, a

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[29] As discussed following, Daniel Amen, M.D. (Psychiatry) is an expert in the use of SPECT scans, conducted over 7,000 SPECT brain scans, and he testified to his opinions and conclusions regarding Louis's brain scan results from "the nuclear medicine study that uses isotopes, to actually study living organisms." (RT 40: 8260-8264.)

reversal of the normal pattern of the frontal lobe being among the most active regions of the brain," but in Louis's scan "the frontal lobe is relatively less active than the back of the head ...," a condition seen in patients with "traumatic brain injury ... [and] other conditions ..., including chronic exposure to toxic substance, [such] as high levels of substance abuse ...." (RT 38: 8004.)

Consequently, Dr. Wu opined, Louis "will be at much greater risk for poor judgment ... [and] increased risks would be exacerbated under certain conditions." (RT 38: 8012.) These conditions include, "sleep deprivation," documented in research as a major cause for "hypo-frontality," a decrease in frontal lobe activity relative to the rest of the brain, which, in Dr. Wu's opinion, results "in an even greater compromise in his ability as to demonstrate proper judgment and his ability to regulate aggressive impulse ..., [like] trying to stop the car and the car is going, but you've added another 500 pounds to the car." (RT 38: 8012-13.) Similarly, stimulants are known to decrease brain activity generally, causing "greater impairment in frontal lobe function like appropriate judgment and the ability to regulate aggressive impulse," and can "cause compromise in the vasculature of the brain, and ... chronic use could result in injuries or impairment in brain function or activity." (RT 38: 8013-14.) Traumatic brain injury is another risk factor. (RT 38: 8002; 8016-17.)[30]

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[30] Loretta Peoples, Louis's mother, testified in guilt and penalty phases. She described a major automobile accident when she was eight months pregnant with Louis, he was a "very unhealthy baby," had several head injuries, including two requiring sutures. (RT 43: 8960-67; RT 38: 8016-17; [RT 86: 17970-18058].)

In summary, Dr. Wu opined:

> " [M]r. Peoples' brain shows an abnormal decrease in the frontal lobe ... This is confirmed by both visual inspection of pattern recognition [in the scan] and statistical quantification. And that also he has abnormal increase in activity in the limbic system or the emotional circuits of the brain." (RT 38: 8010.)

Further, Dr. Wu opined, if Louis "was sleep deprived and taking stimulants, I believe that it would reflect an even greater compromise in brain activity than this base line [PET] scan would demonstrate." (RT 38: 8015.)[31]

Over multiple objections, the prosecutor's two-day cross-examination of Dr. Wu concentrated on argumentative repetition of the facts of each alleged crime, which Dr. Wu readily admitted at the outset he had not considered as part of his interpretation of PET scan data. (RT 39: 8144-8194; see, *post*, fn. 15.) Nonetheless, Dr. Wu's opinion remained the same. Louis brain is functionally damaged, and the crimes, as described by the prosecutor, "would demonstrate ... an impaired sense of consequences and judgment." (RT 39: 8150 [RT 85: 17716-17862; 86: 17893-17934].)[32]

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[31] With one important exception regarding improper revelation of confidential defense funding for alternative diagnostic procedures, Dr. Wu's testimony in the retrial was substantially the same. (RT 85: 17715-17846; 86: 17893-17934.)

[32] Judge Delucchi refused to permit the prosecutor to repeatedly engage witnesses in inflammatory and repetitive details of crime evidence. Under the guise that he was merely "go[ing] through the details of the planning, [and] the intent." Judge Delucchi sustained each objection, stating on one occasion, "I know you'd like to. But under 352, I'm not going to let you do it. Because the jury's already heard it. It's cumulative. They know what

Daniel Amen, M.D. (Psychiatry), qualified as an expert clinical psychiatrist with a speciality in brain imaging. (RT 40: 8260-8279.) He has published numerous peer-reviewed and general articles, has conducted over 7,000 SPECT scans at he *Amen Clinic* in Dublin, California, as part of his diagnostic and treatment protocol, and has extensive experience with stimulant-addicted patients. (RT 40: 8287-88; 8292-93; 8296-83-3.)

Louis was referred to Dr. Amen after the 1998 PET scan. Dr. Amen conducted three SPECT brain scans, which is his part of his clinical protocol. The first scan was conducted on February 2, 1999, while Louis was asked to do "concentration tasks." The second scan was conducted on February 8, 1999, while Louis' brain was "at rest." Then Dr. Amen conducted a third scan for Louis, "giving him a fairly high dose of legal stimulant ... Adderall that we use in our clinical practice to treat patients that have attention deficit disorder." *Adderall* is an "amphetamine-like drug." (RT 40: 8309-10.) In addition, Louis was "sleep deprived" for "about 33 hours ..., trying to replicate what his brain might have been like" in September-November, 1997. (RT 40: 8319-8320.)

Dr. Amen also provided slides of SPECT results, with and without the *Adderall* "challenge" and sleep deprivation. (RT 40: 8320-21; 8324-25; Ex 116-117.) In Dr. Amen's opinion Louis has "very dysfunctional brain," and his vulnerability to additives

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he's been convicted of. They know the details of the crime ... Mr. Dunlap: That's fine, Judge. No further questions." (RT 56: 11406-407; see also, RT 56: 11476-78.) As discussed in the *Argument* section, Judge Platt allowed the prosecutor to inflame the second jury with repetition of crime evidence to both lay and expert witnesses at the retrial.

of stress, including sleep deprivation and stimulants,"makes things worse." (RT 40: 8325-8331.) Louis is compromised in "overall" brain activity, and with the addition of stimulants and stress, he appears to get "stuck" or fixated "like a reset button at the bowling alley ...," and "it sort of makes his brain deranged, if you will." (RT 40: 8321-22.) In 1997, probability suggests "if you take already perhaps a vulnerable brain, put it under a lot of stress it's likely to be worse still as well." (RT 40: 8330-31.) After reviewing Louis' medical and social history, including family reports of head injuries and his long-term methamphetamine addiction, and considering Dr. Wu's PET scans, Dr. Amen found three areas of significantly impaired executive brain functioning in prefrontal cortex, cingulate gyrus and temporal lobes. (RT 40: 8337; 8353 [RT 84: 17493-17702].)[33]

Monte S. Buchsbaum, M.D. (Psychiatry), considered a "pioneer" in brain imaging research, qualified to testify as an expert in Nuclear Imaging Science at the guilt phase. (RT 41: 8534; 8539.) At the time of trial, he had been director of brain research and clinical treatment at Mt. Sinai School of Medicine in New York for eight years, associated at Columbia University as professor of psychiatry and director of neuroscience

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[33] Again, on cross-examination for two days, and over objection, the prosecutor repeatedly presented argumentative versions of each crime before the jury, allegedly to show "goal-directed" activity. (RT 40: 8435-8485.) Questioned on the *Biography of A Crime Spree*, Dr. Amen's opinion is "I never said he couldn't plan, I said planning is poor ...," and in his view the document provides additional evidence Louis' brain is "absolutely ... deranged." (RT 41: 8488-89.)

PET laboratory. (RT 41: 8524-27.) Previously, he had been professor of psychiatry and director of the Brain Imaging Center at UC Irvine, and worked with Dr. Wu for ten years. (RT 41: 8522-25.) He organized the International Society for Neuroimaging in Psychiatry, edited *Neuroimaging*, published nearly 400 articles in peer-reviewed scientific publications on brain scans, lectured extensively on nuclear imaging science, and in 1979 developed the Brain Imaging Center for the National Institute of Health, where he worked for fifteen years prior to establishing the Brain Imaging Center at UC Irvine. (RT 41: 8521-29.) He described PET as accepted within the "main stream" of brain research within the scientific community. (RT 41: 8547-48.)

Dr. Buchsbaum was contacted by trial counsel to review the PET and SPECT scans conducted by Dr. Wu and Dr. Amen, and was asked to independently evaluate the scans "to see were these similar to what I would expect to see in a normal 35-year-old man, or were there abnormalities here that were remarkable." (RT 41: 8544-51.) He explained how the scans "tend to reveal the same brain features .., blood flow [SPECT] and metabolism [PET] really go hand in hand ..." (RT 41: 8549; 8570.) He did not find any inconsistencies in the scans, and pointed out "both sets of images can be presented as three-dimensional images the way Dr. Amen did, and as two-dimensional images the way Dr. Wu did." (RT 41: 8554.) Having examined the scan images provided from Dr. Wu and Dr. Amen, Dr. Buchsbaum "would say relatively few people would show this kind of abnormality." (RT 41: 8551-53; Exhibits 107-109.) According to Dr. Buchsbaum, "both

the visual inspection and the statistics ... show basically the same thing ..., corroboration from two kinds of approaches ..." (RT 41: 8567.) Dr. Buchsbaum confirmed Dr. Wu's and Dr. Amen's conclusions of defects in Louis's brain functioning in their separate scans, and testified "it would be difficult to tell from the PET scan whether traumatic brain injury or the chronic effects of substance abuse could be involved in the process," but the abnormalities in both scans were "consistent with that combination." (RT 41: 8574-75.) In Dr. Buchsbaum's view, the scans conducted six months apart (1998-1999) suggests reliability, and "that the deficit in the brain was continuous throughout the period." (RT 41: 8575.) Assuming no intervening acts since September, 1997, "probably this deficit had been present for some time." (RT 41: 8575-76.) [34]

George Woods, M.D. (Psychiatry/Neurology), testified as an expert in Addictionology, "a recognized term in the field of medicine," emphasizing his experience

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[34] Defense counsel attempted to blunt the inflammatory cross-examination of Dr. Amen and Dr. Wu on the minute details of each of the crimes (RT 41: 8577-8579), but the prosecutor took the same improper tack with Dr. Buchsbaum over two days. (RT 42: 8584-8755 - 43: 8890-8942; see, RT 42: 8720-8755; 8905-8508.) Two examples from his pattern of argumentative questioning leading up to the crimes: "Q. Well, you're not in the unique position of being forced to be here every day to have to hear every aspect of this case are you? Mr. Fox: Judge, I'll object, it's argumentative. The Court: Sustained." (RT 42: 8720.) "Q. So the jury here is in a unique position of having heard all the evidence, are they not? Mr. Fox: Well, Judge, I'll object, this is argumentative. The Court: Sustained." (RT 43: 8934.) Dr. Buchsbaum opined the behavior was "bizarre, certainly poor planning ... [and] consistent with frontal lobe damage." (RT 43: 8951-52; see, *Arguments IV-V*, post.)

with treatment programs over the previous fifteen years. (RT 43: 9004-9027.) Defense counsel consulted with him "to determine whether Mr. Peoples has a history of addiction to amphetamines, and what impact that could possibly have on his behavior." He met with Louis over seven hours and half-dozen visits, including December 29, 1997, and reviewed the 12-hour videotape of the interrogation conducted by police on November 12-13, 1997, the report generated by Dr. Rogerson for the San Joaquin County District Attorney on November 13, 1997, and the brain imaging scans and reports of Dr. Wu and Dr. Amen. (RT 43: 9028-9030; 44: 9110-9111.) After talking with Louis, family, and friends, and other case materials, Dr. Woods opined Louis was a methamphetamine addict when the crimes occurred in 1997. (RT 44: 9113.) Though admittedly not an expert in brain imaging, Dr. Woods is familiar with scan technology and has used them in his clinical practice. (RT 43: 9015-9016.) In this case, "the effects of methamphetamine use are consistent with what was found on the PET [and SPECT] scans." (RT 44: 9116-17.)

Dr. Woods reviewed the criteria used for determining addiction, which include a genetic component, "like other illnesses, in families that have a history of addiction," social, psychological and other environmental factors. (RT 43: 9034-9036.) The euphoria that is initially felt by users of methamphetamine is eventually replaced by long-term effects, shown in studies to be "so similar to presentation of schizophrenia ... a chemical model ... [with] long-term effects, paranoia, psychosis, agitation and hypervigilance." (RT 43: 9041-42.) Studies also correlate methamphetamine use with

increased violence. (RT 43: 9037-38; 44: 9071-72.) Certain symptoms of "motor agitation" are also seen in methamphetamine addicts, including "all kinds of unusual body movements," and "chilliness ... heart problems ... effects still there for a significant period of time after the drug has been stopped." (RT 43: 9045.) Chronic use of methamphetamine frequently causes "reverse tolerance," in that the more one uses the less euphoria is felt, but the need increases, while devastating psychological symptoms continue and appetite decreases. (RT 44: 9063-9071.) Sleep cycles are disrupted, and extreme fatigue usually sets in, especially during episodes in which the addict withdraws from use and regains an appetite for food. (RT 44: 9076; 45: 9108-09.) "Tweaking" describes the addict appearing to get "a little bit tighter," and being "sucked up" describes the effects of dehydration and loss of appetite. (RT 44: 9102-03.)

The three "stages" of methamphetamine addiction are initiation, consolidation and withdrawal. During the initial stage of addiction the user experiences euphoria, feelings of exhilaration and power. (RT 43: 9037-38; 44: 9073-74.) During the second stage, the methamphetamine addict develops "both internal and external relationships so that you get to know people that use ...," which reinforces addiction, and eventually personal and professional relationships become impaired. (RT 44: 9073-74.) The withdrawal phase is "typically manifested by a real destruction in your life, either for some reason or another you have to stop using the drug." (RT 44: 9073-74.)

Dr. Woods was familiar with Louis's family background, and was aware of

rampant alcoholism in Louis' genetic links. (RT 44: 9077-78.)[35] Louis had been addicted to methamphetamine since 1988, except for a brief time in 1991-92 when he and Carol moved to Florida. (RT 44: 9078-9081.) In reading the testimony of Fitsimmons, Quigel and Carol Peoples, Dr. Woods did not find Louis's "normal" behaviors – playing with kids, working, etc. – unusual or inconsistent with methamphetamine addiction, especially when the witnesses themselves are experiencing sleep loss and other symptoms. (RT 44: 9104-05.) There were periods of "stereotypy" for each witness, "cranksters are list-makers ... take bicycles apart and put them back again," or are obsessed by "cleaning," as described by Carol Peoples and Fitzsimmons, all consistent with methamphetamine addiction. (RT 44: 9120-21.)

By fall, 1997, evidence showed Louis was increasingly addicted to methamphetamine. (RT 44: 9123-25.) He was also observed to be more withdrawn than ever before. (RT 44: 9122-23.) Red flags of significant motor and mental impairments caused by an extended period of sleep deprivation and withdrawal were apparent to Dr. Woods when viewing the 12-hour videotape of interrogation. (RT 44: 9108-9111.) He observed the unusual mouth twitching and postures – "dystonic movements" – accompanied by

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[35] Luther and Loretta Peoples testified in both penalty trials, but in the guilt phase of trial they established that they had met with Dr. Woods and related family histories of alcoholism. Luther, and alcoholic, quit drinking after his third son, Lee, was rendered paraplegic in 1984; Luther's father, brother and sister were also alcoholics. Loretta's maternal grandfather was an alcoholic, and her niece suffered an alcohol-related death. Loretta "never" drank. (RT 45: 9217-9221; [RT 86: 17940-18058; 18141-18179.])

expressions of being cold and fatigued, which demonstrate sleep deprivation and in turn "could lead to significant mental disruption and psychosis." (RT 44: 9110-9111; 9126.) While Dr. Woods did not find evidence that Louis suffered any periods of blatant psychosis, he did find "episodes of extreme paranoia," including in 1994 when he was observed talking to himself. (RT 44: 9114.) Louis' "downward drift" included job loss, loss of appetite, sleep deprivation, and paranoia. (RT 44: 9228-29.) Louis was in "the final stage in the consolidation phase ..., a complete disruption of social behavior." (RT 44: 9127.) These "kindling" effects are typical "when a person is about at the end of their addiction ..." (RT 44: 9116; [RT 90: 18870-18974].)[36]

1.B. *Rebuttal Evidence - Mental State*

Helen Mayberg, M.D. (Neurology), is Professor of Neurology and Psychiatry at University of Toronto and is board certified neurologist in California, New York, Maryland and Texas. (RT 45: 9222-23; 9236-37.)

Dr. Mayberg testified the "basic data" of the SPECT scan appears to be "all right,"

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[36] During the penalty retrial, Dr. Woods explained a "change in the quality of his [Louis] remorse ... from initially, 'I couldn't have done something like that ...' [to] having appropriate pain for the families, the victims, as well as for his own family, to where I see Louis now, and what I really believe is true remorse where he accepts responsibility for the crimes ..." (RT 90: 18936.) In his last interview with Louis, Dr. Woods noted it was "the first time that he did not cry during the entire session." (RT 90: 18936.) As discussed in *Arguments V-VI*, after the court excluded Louis's expressions of remorse to Pastors Kilthau and Skaggs, the prosecutor misleadingly argued to the jury that Louis showed no remorse – except to Dr. Woods, a "paid" defense expert.

but the way Dr. Amen "processed" it is "garbage." (RT 46: 9430-31; 9504-9507.) While the court sustained defense counsel's objection, striking her answer, she repeated before the jury in the guilt phase, "I won't use the term I used before ..., [b]ut the term remains ..., uninterpretable [sic]." (RT 46: 9430-31; 9433-34; 9507-09.)[37]

In short, while challenging methodology and conclusions drawn by defense experts Amen, Wu and Buchsbaum, Dr. Mayberg opined the PET scan is "pretty ambiguous," but concluded it "shows mild right frontal and cingulate hypometabolism ...., [s]o the answer is I think there's a PET scan abnormality." (RT 46: 9504-05.) Her "differential diagnosis" is Louis's scans appear to show he is "depressed at the time of the scan, or is, alternatively, not performing the task at the same speed and rate of accuracy as the control group." (RT 46: 9504-05; [RT 93: 19509-19735].)[38]

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[37] In the retrial, defense counsel attempted to demonstrate Dr. Mayberg's bias by referring to her degrading remark and to show her willingness to provide a contrary opinion irrespective of whether she had been provided 'interpretable' data. The court sustained the prosecutor's objection and admonished the second trial jury of the "extremely improper" question, and that it was defense counsel's fault for not providing Dr. Mayberg with the data in a timely fashion for the first trial. (RT 93: 19697-19708.) Although he did not call Dr. Buchsbaum in the retrial, Judge Platt denied defense counsel the right to cross-examine Dr. Mayberg on her testimony regarding Dr. Buchsbaum's opinions in the first trial, upon which she relied to form her opinions. (RT 93: 19626-19628; 19629-19630; 19670-19677; see, *Argument IX.*)

[38] During Dr. Mayberg's direct examination testimony, Judge Platt warned defense counsel against 'prosecutorial misconduct' objections, "I will consider it contempt of Court to do so without the reasonable basis ...," threatening much higher monetary sanctions, "It will not be sanctioned with a three digit sanction, period." (RT 46: 9394-95.) Immediately after the warning, the prosecutor questioned Dr. Mayberg's analysis of raw data, peppered with argumentative references to defense experts' so-called "screw ups," despite the fact defense counsel's

Kent Rogerson, M.D. (Psychiatry/Neurology), a Stockton physician, was contacted by District Attorney Investigator Dennis Kelly, and, as pointed out above, he interviewed Louis on November 13, 1997. (RT 47: 9625-35.) Dr. Rogerson testified he interviewed Louis for "a little less than two hours," though jail records show he spent barely one hour with him. (RT 47: 9637; 9688-9691.) He was provided police reports, the twelve-hour videotaped interview with Louis conducted by police on November 12-13, 1997, and a report generated by Harry Krop, Ph.D., in 1978, as part of an evaluation of Louis for Florida juvenile court. (RT 47: 9657-58; 9665; 9707-09.) Dr. Rogerson did not order blood or other bodily specimens at the time of his examination, and he did not review any medical records. (RT 47: 9717.) He considers SPECT and PET scans as "investigative tools," but does not use them in his practice, and did not review the scans presented in this case. (RT 47: 9635-37; 9717.)

Dr. Rogerson concluded Louis was mentally competent at the time he examined him: "I felt that he did not show any evidence of psychosis, thought disorder, or brain injury ... [a]nd so I thought he was sane at the time of the commission of the alleged offense." (RT 47: 9653.) After consulting the *Diagnostic and Statistical Manual* (DSM-

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objections to the improper nature of such questions were sustained. (RT 46: 9413-14; 9418.) Similar objections to questions regarding Dr. Mayberg's alleged "heart attack last night when you looked at raw data ...," and "That's the last time I buy you dinner ...," were sustained. (RT 46: 9413-14.) The prosecutor's improper fraternizing with witnesses is not an isolated incident. (See, e.g., RT 91: 19179-19181, "Q. How was lunch? A. [Deputy Sheriff William Weston]: Very good, thank you." Weston admitted on re-direct examination that Dunlap bought his lunch before he was called to testify by the defense; see *Argument IV.*)

IV), Dr. Rogerson's "diagnostic impression" under Axis I "was amphetamine dependence ... impairing his functioning, and he had some withdrawal symptomology ...," and "my Axis II diagnosis ... was personality disorder antisocial type, with schizoid traits." (RT 47: 9654.)

2. *The Penalty Phase*

2. A. Evidence in Aggravation/Rebuttal[39]

The prosecution presented Louis's two 1982 burglary convictions from Florida, and victim impact testimony. (RT 52: 10761-10907; RT 49: 10138; see, Exhibit 667 [84: 17488-89].)

Monica Loper, James Loper's widow, testified to the devastating loss and "alienation" of her two sons since the loss of her husband. (RT 52: 10827-10832.) Over objection, she narrated stories behind photographs of her husband and family. (RT 52: 10832-34.) She had seen Louis at *Charter Way Tow* but had never spoken to him, and she did not know of any problems between Louis and her husband. (RT 52: 10835-36.) She attended church with her husband, where Reverend Kilthau officiated. (RT 52: 10836; [83: 17428-17435].)

Hazel Loper also testified to the terrible loss of her son's life on his father, as well

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[39] As pointed out above, in the penalty retrial, the prosecution presented many of the same witnesses, whose testimony was substantially similar to the guilt phase, including Dr. Mayberg and Dr. Rogerson as rebuttal witnesses. (See, RT 93: 19509-19735; 94: 19762-19895.)

as on his wife and children. (RT 52: 10837-48.) Over objection, she utilized photographs to depict some of her son's life history. (RT 52: 10843-47.) She wanted the jury to know her son was "not a troublemaker," but a "strong person" whose family "depended upon him for everything." (RT 52: 10848-49; [84: 17455-17462].)

Judy Moorehead, Loper's older sister, testified to her father's depression and her mother's emotional collapse. (RT 52: 10856-59.) Shortly before his death Loper told his sister he was planning to change jobs because, he said, "one of these days, someone was going to get killed going out at night by themselves." (RT 52: 10859-10860; [RT 83: 17436-38].)

Anise Chacko was married to Stephen for seven years, and they had three children, one (Joseph) born after her husband's death. (RT 52: 10868-10874.) She met Stephen in India where he had been a lawyer for nearly ten years before moving to the United States; he was studying to take the California Bar Examination at the time of his death. (RT 52: 10874.) Over objection, she presented photographs of her husband's funeral in India, and described the outpouring of support. (RT 52: 10882; [RT 84: 17463-17469].)

Karen Yu Tan and her two brothers, Jack and David Yu, each described the devastating loss of their beloved mother, Besun Yu. (RT 52: 10883-10906.) Jack and David Yu attempted to explain their grief-stricken father's reaction to the loss of his wife of thirty-five years, the onset of his debilitating headaches, and his emotional withdrawal. (RT 52: 10896; 10905-06.)

Besun Yu had been an educator in Taiwan until 1979, when she and her husband immigrated to the United States with their three children. (RT 52: 10885.) She purchased the *Village Oaks Market* from a friend who fell on hard times. She worked tirelessly at the store until her death. (RT 52: 10887-88; 10896-98.) David Yu introduced Jun Gao to his mother, and Gao, who had recently arrived from China, assisted in the store. (RT 52: 10904; [RT 84: 17470-17487].)

2. A. Evidence in Mitigation [40]

Loretta Peoples gave birth to Louis on June 30, 1962 at Dameron Hospital in Stockton, California, the second child of her marriage to Luther in 1960. Louis's father joined the United States Navy when he was 17, and was at sea most of the time during first fifteen years of their marriage, and at the time of Louis's birth. (RT 54: 11076-77; 11129-11132 [86: 17957].) Larry, Louis's older brother, was born thirteen months earlier, and, Lee, the third and last child of the union, was born March 30, 1967. (RT 54: 11079-80; 11483-85.)

Loretta Peoples described her forty-year marriage as essentially loveless. (RT 54: 11082.) Her sister, Alice Jeanette Hamilton, called it, "39 years of misery." (RT 56: 11435.) Her sister-in-law, Joyce Southard, described her brother as "controlling," and

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[40] As noted in the *Statement of the Case*, *ante*, p. 2, Judge Delucchi presided on August 23, 1999, after Judge Platt suffered a heart attack, and before the defense presented mitigation evidence in the first trial. Judge Platt returned for the retrial of the penalty phase.

"always put [Loretta] down ..., never helped with the kids ..., [and] wasn't there for her spiritually, physically, or any way." (RT 56: 11313-14.) Loretta testified, "I honestly don't think my husband comprehends the word love ... minding him and doing what he wants you to do, and if you don't do that, then he turns off ..." entirely. (RT 54: 11102.)

Loretta met Luther on a ship docked in San Francisco when she was 18 years old, and married him in Stockton, where she had been raised. (RT 54: 11073-75.) Luther sailed out of San Francisco at first, but they moved to Chula Vista near San Diego when Louis was a toddler. Luther would be at sea for 30-40 days at a time, and when he returned home he was invariably drunk. (RT 54: 11073-75; 11079-11080.) He threatened to leave Loretta and the children many times. (RT 54: 11083-84; 11135.) According to Loretta, the alternative was to move back to Stockton, but her mother was "not any better than he [Luther was]," so they stayed together and moved to Florida in the mid-1970's. (RT 54: 11083-84; [RT 86: 17970-18149].)[41]

Luther's father was also an alcoholic who did not participate in his upbringing in North Carolina. (RT 54: 11128; 56: 11411.) Luther started sneaking alcohol when he caddied at a local golf course at age 8, and considered himself an alcoholic by age 21. (RT 54: 11129-30; 11145-46.) Luther described his relationship with Loretta, as "I guess

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[41] Both her husband and her mother "told [her] all of [her] life that [she was] stupid." (RT 86: 17974.) Loretta's animosity towards her "bitch" mother, Loretta Orr, also referred to as "the drill sergeant" whose "Gestapo tactics" were well documented at trial. (RT 54: 11073-75; 56: 11431-32 [86: 17949-17951; 17971; 17977]; see also, Dr. White, *post*, pp. 75-76.)

I loved her, but I was always drinking." (RT 11129-30.) He admitted he was "never around," but when he was he considered his role to be that of disciplinarian; Loretta testified, he was "like a stranger coming into the house that slept with mommy, and they [children] did not understand any of this." (RT 54: 11078; 11145-46; 11131-35; 11145.) Luther's sister, Joyce, described him as "self-centered," "condescending," and "sarcastic." (RT 56: 11413.) And, "I mean if you did wrong, you were stupid," and that was the way Luther treated his wife and children. (RT 56: 11414.)

Louis weighed 7 pounds 11 ounces at birth, but was a "colic baby" who was prescribed "very intense iron shots," and gained only five pounds during the first eight months. (RT 54: 11076-77.) As noted above, Loretta was in a serious automobile accident while pregnant with Louis, but she recovered without apparent consequences to her fetus. (RT 43: 8960-67.) But there was "a lot of disharmony after the birth of Louis." (RT 54: 11078.) Luther requested a transfer and they moved to North Carolina where he grew up, but Loretta was extremely unhappy there and moved back to Stockton with the boys. Luther was able to transfer back to California. (RT 86: 17970-71.)

Louis was "a bed wetter, and that's very disturbing ..." (RT 54: 11180.) Larry had been an independent child, Lee was "bright ... happy-go-lucky, gregarious," but Louis was "very timid, almost as if he was afraid" during his infancy and childhood. She grew "terribly annoyed" with Louis, "wash[ing] sheets and towels and bedspreads every day seven days a week for I cannot remember how long." (RT 54: 11079-82.) Even though

one of his teachers described Louis in 1973 as "cheerful" and having "come a long way," Loretta reported he continued to wet his bed and soil himself into sixth grade. (RT 54: 11081-82; 86: 1798.) She took him to Navy physicians, who told her, Louis "would grow out of it, he had a small bladder." (RT 54: 11081-82; [RT 86: 17966].)

While still living in Chula Vista, and fed up with Louis when he came home from school one day with wet underwear, Loretta decided to "strip him down in the front room [a]nd put a diaper on him." (RT 86: 17967.) She then forced her older son, Larry, to tie Louis to a tree in the front yard of their house. Loretta "invited the neighbor children to laugh and mock at him in hopes he'd quit what he was doing." (RT 54: 11081-82.) Larry described his feelings of helplessness, his father at sea, and the despair he felt at his little brother "struggling, pulling on the ropes, and completely degraded." (RT 56: 11487-88.) Humiliated, when untied, Loretta and Larry watched Louis run and hide "underneath the car ... until all the kids went away and quit laughing at him." (RT 54: 11081-82.) The neighborhood children crowded "down looking under there pointing at him and still laughing at him." (RT 56: 11488; [RT 86: 17967-92: 19299-19339].)[42]

The "cure" did not take. (RT 86: 17970.) As time went by, Louis's enuresis did

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[42] By the time of trial, Larry Peoples testified that he had worked as a correctional officer on the condemned-inmate unit of Florida State Prison for six years. At the penalty retrial, Larry testified he believed the death penalty was appropriate in some cases, but "I would like to tell the jury that I hope and I pray that they will not kill my brother and that he's shown humanity to his children, my children, to my family, and that the impact on my family would be devastating." (See, RT 92: 19338; see also RT 56: 11480; 11491-11493.)

diminish, but his "acting out" increased. (RT 54: 11083-84.) Joseph Uybungco, a childhood friend from Chula Vista, recalled introducing Louis to drugs and smoking marijuana together on a regular basis during his early teen years. (RT 56: 11424-27.) Uybungco was 15 years old, while Louis was 11-12 years old. (RT 56: 11425-26.) Larry observed his younger brother making a brew of psychedelic mushrooms one time, and frequently caught him with marijuana, during the time they lived in Chula Vista. (RT 56: 11483-85; [89: 18590-18602].)[43]

In the mid-1970's, Luther retired from the Navy and moved the family to Florida to be near his own parents. (RT 54: 11083-84.) He went to work for the Florida Department of Corrections where he supervised in the supply warehouse for many years, and eventually quit drinking altogether. (RT 54: 11136-37; 11079-11080; [RT 86: 18141-18163; 87: 18195-96].) Loretta and Luther moved around Florida the first few months, deciding to "ship out" Louis to Luther's sister, Joyce. (RT 54: 11084-86; 56: 11409; [RT 86: 17968-69].) Joyce Southard and her husband also lived in Florida, their children were no longer at home, so Louis lived with his aunt and uncle for a few months. But Louis

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[43] Jeffrey Sproles, also called to testify in both penalty trials, grew up with Louis and Uybungco in Chula Vista; he attended 6-8th grades with Louis. (RT 56: 11442-47; [89: 18606-16].) Sproles shied away from aggressive kids and recalled Louis as a "loving person," one of the few boys who continued to see a mutual friend paralyzed in a motorcycle accident. (RT 56: 11444.) When pressed by the prosecutor, Sproles seemed evasive about drug use; on redirect, defense counsel asked, "When did you first start using drugs?" The court sustained a relevancy objection. (RT 89: 18613-16.)

"took 30 dollars from my husband's wallet, and we ended up having to take him back to his mom and dad's, which was difficult, but he needed discipline, and I wasn't the one to do it." (RT 56: 11418-19; [RT 86: 18102-18121.)

Luther and Loretta settled with the three boys in the small town of Keystone Heights in Clay County, Florida. Louis had his own room, and started out well enough in elementary school but Larry described the "culture shock" experience for them: "We were the outsiders in town." (RT 56: 11488.)

Carla Hawthorne, a retired correctional officer, lived in the same neighborhood. (RT 54: 11014-17.) Hawthorne was not a licensed social worker, but was involved as a youth counselor for various state agencies at the time. (RT 54: 11014-16.)[44] Hawthorne's two daughters, Tonya and Tosha, and her son, John, were about the same age (13-14) as Louis when she met him: "My kids, instead of bringing home strays like dogs, cats, and birds, they would bring home little boys and girls." (RT 54: 11019-11021.)

When Loretta Peoples learned of her son's friendship with the Hawthorne children, she came to Carla for help, borne out of frustration with her son and husband.

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[44] As presented in *Argument XI*, records reveal the juvenile court assigned Louis to John Fry's caseload in 1977. Later, the subject of multiple-victim molest investigations, and convicted of procuring homosexual prostitution, Fry, a counselor, molested Louis over a period of several months of court-appointed supervision. (RT 57: 11574-11580; 90: 18780; Exhibits 804-806.) Hawthorne knew John Fry, and described him as "a very large-bellied ... sloppy man ... at the time, my evaluation is that he was a homosexual." (RT 54: 11031-32; see also, 54: 11087-89, Exhibit PP.)

(RT 54: 11022; see also, 54: 11085-86.) Hawthorne also described Luther Peoples as a "bully" who "absolutely ... refused" to get involved in counseling sessions, which she conducted with Loretta and Louis. (RT 54: 11023-24.) According to Hawthorne, Luther and Loretta "always held Larry his older brother and Lee his younger brother up on a little pedestal ... [but] Louis could never do anything right ..." (RT 54: 11030.) Loretta agreed: "[Luther] wanted to get rid of the bad apple in the barrel." (RT 54: 11088-89.)[45] Hawthorne had ample opportunity to observe and interact with Louis, who was around her home frequently, and he was always "very submissive ..., very polite," but clearly a "very troubled young man." (RT 54: 11020-21.) She knew Louis, like her own children, was experimenting with drugs, and like John had gotten into trouble at school and with juvenile authorities, but in her view her home gave Louis a place for "some kind of love, some kind of affection, some kind of recognition." (RT 54: 11025-29.) She observed Louis being "teased" by his peers "constantly being poked at, made fun of ... a dog is down, and you keep kicking him." (RT 54: 11027.) Hawthorne never saw him retaliate against anyone, he "suppressed" all his feelings. (RT 54: 11042-44.) He had a "little stubble of a laugh," was completely without "confidence where he could really have a relationship with a female," describing himself to her on more than one occasion as "'lower than ant dung' ..." (RT 54: 11025-29 [internal quotes added.].)

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[45] Joyce Southard confirmed, "it was very obvious that [Larry] was the favorite..." (RT 56: 11416.) As to Louis, Loretta rigged "alarm bells" in her closet, "I had never seen anything like it before [a]nd her reasoning was to keep Louis out." (RT 56: 11416.)

Eventually, Hawthorne cut ties with Loretta because she was "calling at all hours, and it was not a good parting," and Luther prohibited Louis from visiting her home. (RT 54: 11031-32.) She did not see Louis again until he returned to Florida with Carol and their children, then as "a very caring, loving father." (RT 54: 11033-36.) Shortly before testifying at trial, when she learned the details of the horrendous crimes Louis committed in 1997, she was struck "completely dumb." (RT 54: 11042-44; [89: 18547-18574].)

Tosha Hawthorne testified she met Louis in 1976 through her brother, John: "We used to get high together." (RT 54: 11047.) They used "all kinds" of drugs. (RT 54: 11052; 11057-59.) Louis was "very submissive," a diminutive 110 pounds, and John, over 6 feet and "very good looking," would bully Louis, calling him "nipple head" and such. (RT 54: 11050.) Louis was very shy. Tosha never saw him with a girl, and John, merciless in front of their peers, taunted Louis after he returned from a stay in juvenile hall, "'You let 'em butt fuck you is what you did.'" (RT 54: 11050.) Louis would not defend himself, but was "so embarrassed and humiliated." (RT 54: 11050.)[46]

Tosha, like her mother, lost touch with Louis after high school, but she did see him again when he returned to Florida with his wife and young daughter, Lindsey. She described Lindsey as "lov[ing] her daddy and her daddy doted on her." He was "an

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[46] As discussed in more detail following, Dr. White testified to how Louis reacted with disgust and shame to Fry's oral copulation of him on two occasions under color of authority, along with Hawthorne's taunts about his masculinity, and Dr. Lisak testified generally to how molested boys respond to such trauma. (RT 57: 11578-11583; [RT 90: 18780-81]; RT 57: 11667-11712 [RT 91: 19090-19150].)

incredible family man." (RT 54: 11054-56; [89: 18575-18590].)

After the parting of ways with Carla Hawthorne, Loretta's problems with Louis increased: "I picked up the phone one day and told them to come and pick him up, that I couldn't handle him anymore ... [and] they picked him up at school and took him to Green Cove Springs and put him in the juvenile detention facility." (RT 54: 11090.)

Louis was sixteen years old when they were evaluated by court-appointed psychologist, Harry Krop, Ph.D. (RT 54: 11087-88.) According to Loretta, there was no therapy provided, as Dr. Krop had recommended. Instead, they were introduced to John Fry, juvenile court counselor, who visited their home in Keystone Heights at least four times, and was assigned to supervise Louis upon release. (RT 54: 11089-90.) Fry, a child molester, "supervised" Louis for several months. (RT 57: 11577-78.)

According to Loretta, as Louis's problems continued, the juvenile authorities placed Louis in faith-based facilities where he received Christian "instruction":

> " He started out in Hattiesburg, Mississippi. And the people that had the boys ranch had two ranches. They were starting the one in Pikeville, Tennessee. And they put eight boys, I believe it was in Pikeville, Tennessee, with another gentleman and his wife, who were also workers at the Hattiesburg ranch."
> (RT 86: 18012.)

Before Louis was removed from the school and the family home, however, he attended Keystone Heights School, which combined grades 7-12. (RT 56: 11451-52.) Kenneth Blair, a retired guidance counselor and assistant principal at the school, knew all

three Peoples's boys, and he also knew John Hawthorne and Gene McReynolds, who Louis associated with in high school. (RT 56: 11450; 11453.) Blair knew Carla Hawthorne as well:

> " With all due respect, Mrs. Hawthorne and her attempts to help Louis, the truth is, she had a son [John] that could easily be characterized as out of control, one who eventually ended up in prison. And I had spoken with her before. I had parent conferences with her before in her capacity as parent of John. And she never struck me as the kind of person that I would refer someone to for help."
> (RT 56: 11453-54.)

Louis was "a very short, skinny kid, with glasses ..., you almost had to get him to speak up in order to be recognized ..., [and] I never met anyone that had any less presence or any less personality, frankly, than Louis at that time." (RT 56: 11456.) Blair described Louis as "below average academically," passive, and because of his size and demeanor Blair "would have expected violence to have been perpetrated on him ..." (RT 56: 11452; 11456; 11458.) He did not run with the popular kids, but with Gene McReynolds, who was known for "bullying, pushing, threatening, intimidating even teachers ...," and John Hawthorne, "without a doubt one of the most violent kids in the school ..." (RT 56: 11457-58.) Until trial, Blair had lost touch with Louis when he was removed from school in the eleventh grade, and was not familiar with his juvenile crimes because of the lack of communication between juvenile authorities and school officials. (RT 56: 11470-11474 [RT 86: 18071-18102].)

Gretchen White, Ph.D. (Psychology), a clinical and forensic psychologist, as well

as a certified marriage, family, and child counselor, was asked by defense counsel to evaluate for trial the Peoples's family dynamics, and to render an expert opinion on Louis's childhood development and psychosocial history up to 16 years of age. (RT 57: 11539-11541; 11586 [RT 90: 18801].) Though early childhood records were sparse, Dr. White interviewed Louis, all members of his family of origin, reviewed the 1978 report of Harry Krop, Ph.D., other juvenile records, records related to John Fry, the testimony of various witnesses, and concluded the following themes and patterns dominated Louis's developmental years:

> " One was the very very poisonous atmosphere of the home;
> The family's longstanding pattern of holding grudges;
> The resentful attitude of family towards the outside world;
> The hostile dependent family relationships;
> The family's unwillingness to change;
> The father's alcoholism [and lack of commitment to the family];
> The family trait of avoiding feelings;
> Louis as the invisible middle child;
> Louis as a passive, withdrawn boy;
> Louis' unassertive and avoidance of conflicts;
> Louis' humiliations;
> Louis' lack of social standing;
> Louis' molestation."
> (RT 90: 18783-84.)

In Dr. White's opinion, after Dr. Krop's report to the juvenile court made it clear that therapy was imperative, the lack of intervention in Louis's life demonstrated a critical failure for one whose lack of insight into his own problems was evident. (RT 57: 11628.) In point of fact, Louis's "shutting down" and depression referred to in Dr. Krop's report became firmly entrenched as Louis's "psychological defenses:" emotionally distancing

himself from others and self-medicating through drug abuse. (RT 57: 11628-29.) In therapy, "these are exactly the kind of issues that you would be working on ... basically to develop that kind of self awareness and awareness of the feeling sand emotions that went with it." (RT 57: 11629.) As both Dr. Krop and Ken Blair had reported, Louis was living in an "incredibly destructive" environment and had become the "invisible" teenager. (RT 57: 11564-65; 11630-31.)

David Lisak, Ph.D. (Psychology), is a clinical psychologist whose practice is in Boston, Massachusetts, and whose speciality is in studying the impact of sexual abuse on male development, and treating sexually traumatized males. Dr. Lisak did not evaluate Louis and was not familiar with his background or the case facts, but his opinion was offered to assist the trier of fact in understanding the causes, symptoms, and harm caused to molested boys. (RT 57: 11667-11675; 11692; 11698-11702.) He described in detail the kind of "fear network" that develops for child victims of sexual abuse, along with feelings of humiliation and shame. (RT 57: 11678-79.) From experience he has found "it's rare for, particularly for a boy, to disclose abuse to anyone," and it may take "decades" for disclosure and healing to occur. (RT 57: 11682.) For the adolescent male, research and practice shows this is a period of "consolidating his identity as a male, as a man, trying himself out in the interpersonal world ..., [and sexual trauma] can have a very severe impact on their identity formation ...." (RT 57: 11683.) A boy abused more than once is more likely to suffer "long lasting effects," including "feeling chronically

insecure, feeling chronically inferior," or, for those who deny the abuse, "[t]hey deny all vulnerability, fear, helplessness, that they experience ..." (RT 57: 11686-87 [RT 91: 19082-19154].)

As Louis entered adulthood he had been convicted of numerous thefts in Florida, and was sent to Lancaster Correctional Facility for youthful offenders. (RT 54: 11091-92; 57: 11631-32.) According to his mother, after being paroled from prison, "he came home and got into trouble again." (RT 54: 11092.) It was during this time that Lee, seventeen years old and the youngest son, broke his neck in a diving accident on a lake near home. (RT 54: 11092.) Lee was rendered quadraplegic, and after several months of hospitalization, returned home, where he requires 24-hour care. (RT 54: 11094-95; 11152.) The accident occurred in 1984 when Louis was at home in Florida; he was twenty-two years old. (RT 54: 11152; [RT 86: 18134-18141].)

After paroling again from state prison, Louis was under the supervision of Roy Gratzmiller, a parole officer for Florida Department of Corrections, from June, 1984-August, 1985, when he moved to California. (RT 58: 11904-07.) Louis had served a concurrent sentence on two counts of burglary, including theft of food. (RT 58: 11906-07.) Gratzmiller saw Louis once per month, and was familiar with Lee's accident, and the "stress" it placed on the entire family. (RT 58: 11908.) Louis completed parole without incident. (RT 58: 11908 [RT 87: 18196-18218].)

When Louis left Florida he moved to Stockton to live with his maternal

grandparents, Loretta and Arnold Orr. (RT 54: 11092-93; 57: 11631-32; [RT 86: 17949-50].) Loretta and Lee traveled to Stockton in 1986 to visit, and stayed with her parents for three weeks. Louis was working, and not home during much of the visit. (RT 54: 11093; 55: 11231-32; 11297-98.)

Scott Huber met Louis at *American Molding* in 1986 and worked with him for four-five years. (RT 55: 11297-98.) Louis operated a forklift, and was a good worker and friend. (RT 55: 11299-11301.) Huber went to work for *Diamond Walnut*, but remained friends with Louis and knew Carol, Matthew and Lindsey. He was aware Louis used methamphetamine and marijuana, but he never saw him use around the children. (RT 55: 11301-02.) He was shocked when he learned of Louis's arrest for murder.[47]

Loretta did not see Louis again until 1990, when she, Larry, and his three children, flew from Florida to California to attend her parents' 50th Wedding Anniversary. (RT 57: 11093.) Loretta met Carol for the first time, who was pregnant with Lindsey. Louis "was very, very happy ... had a girlfriend [sic] and a brand new baby on the way, and he was just tickled ... could hardly wait to see the baby." (RT 57: 11094.)

Carol Peoples was recalled as a witness for Louis in the penalty phase. (RT 56: 11346-11423 [RT 87: 18219-18306].) Carol met her husband through a mutual friend in August, 1988, while he was working at *American Molding*. (RT 56: 11347-48.) Carol and her son, Matthew, moved into Louis's apartment a few months later: "I had friends

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[47] Huber did not testify at the retrial, but Dr. Woods testified to Louis's use of methamphetamine at *American Moulding*. (RT 90: 18916; 18966–67.)

that had children that their real fathers didn't treat their children as good as Louis treated my son." (RT 56: 11348.)

Louis and Carol both used methamphetamine and other drugs, and did so together, until she found out she was pregnant in early 1990. (RT 56: 11348-49; 11389.) Lindsey was born October 19, 1990. (RT 56: 11349.) Louis did not stop using, and by summer, 1991, Carol was addicted to methamphetamine again: "[W]e would cry and know that we were doing wrong [but] neither one of us had the power to change it ..." (RT 56: 11349.)

After brief discussion with Louis's parents, Louis and Carol decided to move to Florida, and "left [Stockton] to get away from drugs." (RT 56: 11350.) While Carol was pregnant with Lindsey, she met Loretta and Lee at the Orr's 50th wedding anniversary, and they had high expectations about the move. They agreed to move into the front bedrooms of the house in Keystone Heights with Luther, Loretta and Lee. Loretta and Luther were both working, and the plan was for Carol and Louis to help out with Lee, who required 24-hour care. (RT 56: 11350-51; 54: 11094.) Carol and Louis moved to Florida in July, 1991, and stayed until the end of 1992. (RT 56: 11351; 54: 11139-40.)

At the beginning, the arrangement worked out well, though Louis was fired from a job in a saw mill not long after being hired. (RT 56: 11351.) Carol worked part time for about 8 months. (RT 56: 11351-52.) Louis secured a position with *Griffen Industries,* and for the most part he was employed while they were in Florida. (RT 54: 11140; 56:

11352.)[48]

After three months, problems between the two families mounted. Carol found Luther's sarcastic remarks unbearable: "It was very tense ..., no place to raise kids ..., it was unloving ... hard for me to imagine how anyone was raised around his family." (RT 11354.) It was clear to her that Luther and Loretta did not like Matthew, and on one occasion, Luther told Matthew, "go outside and to eat with the dog." (RT 56: 11353.) Luther did not support Louis either, repeatedly calling him "stupid" and "dumb." (RT 56: 11355.) Luther called Carol "lazy" and a "fat bitch." (RT 54: 11097; 11105-08; 11110.)

Louis and Carol, who had been clean and sober for nearly 18 months, decided to leave Florida in March, 1993. (RT 56: 11357; RT 54: 11102.) According to Carol:

> " He was so proud of Lindsey and Matthew to bring them there, and he still wasn't accepted by his family. He was no better off than when he was ten there. He was a man now with a family, and we – he still didn't get the respect that he deserved." (RT 56: 11357.)[49]

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[48] Guy Lazarro testified at both penalty phases. He knew Louis from *Griffen*, where Louis was assigned the "very nasty" job of cleaning truck trailers of nonedible remnants of chicken parts. (RT 46: 11392-11406 [86: 11806-118071].) He testified Louis never refused to carry out his duties and considered Louis an "excellent worker." (RT 56: 11396-97; 11404.) Louis was terminated, however, after a mishap caused damage to property. (RT 56: 11400-401.)

[49] Other witnesses attested to Louis's joy as Lindsey's father, and his nurturing role as Matthew's step-father, during their residency in Florida in 1991-92. (See, Loretta Peoples [RT 54: 11097]; Luther Peoples [RT 54: 11140]; Lee Peoples [RT 54: 11153-54]; Larry Peoples [RT 56: 11490-91]; Jeanette Hamilton [RT 56: 11437]; Carla Hawthorne [RT 54: 11033-36]; Tosha Hawthorne [RT 54: 11055-56].) Despite the resumption of

They gave notice at work, packed their bags, and left in their car for California – without saying goodbye anyone. A friend stayed with Lee in the hasty departure. (RT 54: 11155.)

They drove back to California. (RT 56: 11358-59.) After the debacle in Florida, letters of recrimination passed between Louis and his parents. Luther wrote his son:

> " ' Louis, I am writing this letter to let you know that ... what you did, I will use words that you and your fat bitch wife can understand.
> You no longer have a dad, because I did not father any girls. You must be ... a girl because you don't have any balls. You're a sorry mother fucker for not ... saying anything, to leave Lee before you left, like the sneak thief you are. Lee is not your brother anymore. I wonder how long it will be before that fat bitch has you in jail. Do not call for anything. You do not have anyone in Florida.'"
> (RT 54: 11141-42 [Ex. 805]

Louis responded with an equally bitter letter four months later, addressed to the "'psycho idiots,'" and concluding, "'We hate you for the way you treated us, and we hope nothing but the worst for all of you ..." (RT 54: 11102-04 [Ex. 800].)[50]

On the fourth anniversary (March, 1997) of their "'great escape'" from Florida, Louis wrote his parents regarding "'freedom from your prison,'" but requested

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methamphetamine use, the same theme was repeated by those who observed Louis with the children in 1996-97.

[50] At the first penalty phase, Carol informed the jury of her love and continued support for her husband, but when she attempted to read correspondence with her husband since his incarceration in November, 1997, she was overcome by emotion. Judge Delucchi read the letters aloud in the first trial. (RT 56: 11363-11379.) At the retrial, defense counsel read the letters to the jury for her. (RT 87: 18246-18263.)

photographs from his childhood to share with his own children. (RT 54: 11106-08 [Ex. 801].) In May, Luther suffered a heart attack, and after Louis was informed, he wrote to his mother to suggest reconciliation, forwarding his mailing address: "'When you quit hating, you can start the healing process ..., [and] I care about what happens to dad, and I care about him ... the ball is in your court.'" (RT 54: 11110-12 [Ex. 802]; 56: 11441.)[51]

Carol testified that Louis felt he had failed her and the children in Florida, and she thought the move back to California was the worst possible scenario for them. (RT 56: 11357). In Stockton, Louis drifted from job to job, and they both slipped back into methamphetamine abuse. (RT 56: 11358-59.) Unemployed, Carol described her methamphetamine and alcohol addictions:

> " In the summer of '97 me and Louis were still together. We were still doing drugs a lot. I was drinking. Louis didn't drink ... He didn't like it when I did [drink], but I did, and we would fight over that too ... 'cause I was an idiot when I drank ... I would act really bad towards Louis, and, you know, I did a lot of things when I used to drink. And I used to embarrass Louis ... to disrespect him and ridicule him ... lift my shirt and tease people."
> (RT 54: 11360-61.)[52]

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[51] After Louis was taken into custody on the murder charges, family members began reconcile, as reflected in testimony. (See, RT 54: 11123-24 [Loretta]; 56: 11145; 11148-49 [Luther]; 56: 11155 [Lee]; 56: 11492-93 [Larry]; see also, RT 86: 17941-17969; 18134-18141; 18141-18163.)

[52] Joni Fitsimmons and Michael Quigel, *ante*, described Carol's obnoxious behavior and overbearing attitude in more detail. David Epling, a neighbor who testified at the retrial, also recalled that when Carol got "hammered," which was frequent, she would raise her voice and liked to "show herself

Mary Redvelski, Lori Fike and Arnetta Scott were neighbors when Louis and Carol Peoples lived in Stockton after their return from Florida. (RT 55: 11202-11219; 11307-11315; 11316-11325.) Each witness testified to observations of Louis around his children and theirs, and each described him as a "loving father" and "good friend" who could be trusted around children. (RT 55: 11202-05; 11307-09; 11314; 11316-11320; [RT 88: 18356-18372; 18383-18393; 18393-18397].)[53]

San Joaquin County Sheriff's Deputies Timothy Ballard, Johnny Johnson, Richard Williams, Fred Wilson, and Judy Perez, Gary Sanchez and William Weston testified as correctional officers who had contact with Louis at various times while he was in their custody. Each witness testified they never felt threatened by Louis, but, unlike most inmates, he was unusually calm and quiet, always exhibiting proper decorum and respect. (RT 58: (RT 58: 11780-83; 11790-93; 11793-94; 11803-04; 11805-07; Sanchez- 11796-11802 [91: 19155-19160]; Weston - 58: 11784-88 [19175-19192].)

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off to the public," while Louis did not become violent but appeared "embarrassed" and "disgusted." (RT 88: 118376-77.) Edward Richards, who recommended and trained Louis for the job at *Charter Way Tow*, and a former neighbor, was also called at the second trial only; he recalled Carol standing naked in front of her bedroom window and loudly asking him "if her nipples were too big." (RT 88: 18405-06.)

53 As pointed out above David Epling, Mary Redvelski's ex-husband, and Edward Richards, testified in the retrial only; they confirmed other neighbors's observations of Louis as a loving parent and trusted with their children. (RT 88: 18374-18382; 18399-18409.) Rhonda Allen testified that Lindsey played on her baseball team with her young boys; Louis helped her with the baseball, and she became friends with Carol and Louis, and frequently trusted them to care for her children. (RT 91: 19162-19174.)

James Esten, a correctional consultant, retired twenty-year employee of California Department of Corrections, and former classification, appeals, and supervising correctional officer at Soledad State Prison, as well as administrator of officer training, vocational and housing director at Salinas Valley State Prison, Rainier Division, testified as an expert with respect to Louis's potential for adjustment to a maximum security prison for life without possibility of parole. (RT 11809-11893 [RT 92: 19223-19293].) Esten holds a Bachelor of Arts degree from California State University at San Francisco and a Master's Degree in educational administration. (RT 58: 11816-17.)

Esten had testified approximately twenty-five times as an expert witness in state courts, and consulted on numerous other cases, including several in which he could not render a favorable opinion regarding adjustment. (RT 58: 11816-11821.) Esten reviewed police reports related to the case, Louis's history of incarceration in Florida's penal system and in jail during trial, visited the four institutions in Florida where Louis had been housed, and spent seven hours interviewing him in order to form an opinion. (RT 58: 11822-26.) After reviewing Louis's prison records, and visiting Florida institutions where "no one remembered him," he concluded Louis had an "uneventful period of incarceration" in Florida and did not view him as "someone who as a youthful offender was on his way to becoming a career offender." (RT 58: 11825-26.) Initially segregated in San Joaquin County jail due to the charges, Louis was placed in general population in Alameda County, where he had no "write ups." (RT 58: 11888-89; 11780-81.)

Based upon standards and principles for maximum security classification and placement, the nature of the murder convictions, Louis's lack of gang affiliation, the fact that it is "impossible to maintain a drug habit in prison," his "passive" personality, and his institutional history of one "who is eager to be compliant, ... follow directions ...," and who "thrives in a structured environment," Esten opined Louis would make a good adjustment to prison and would not be a threat to others. (RT 58: 11855-60; 11888-89.)

Troy Skaggs started a prison ministry in 1953, and he and his wife had brought the Christian message to inmates for nearly five decades when they met Louis. Pastor Skaggs met with Louis approximately ten times by the time of the second trial, and through correspondence, they also joined together in Bible studies. Pastor Skaggs had been called to testify only twice before in his life, but he considered Louis sincere in his spiritual life and a friend. (RT 92: 19293-98.)[54]

Louis's daughter, Lindsey, and his step-son, Matthew Todd, expressed their love for him. They each read selected letters from their extensive correspondence with their father. (RT 58: 11929-11930; 11930-11937; [RT 92: 19354-19364; 19364-19374].)

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[54] As discussed in *Argument VI*, Judge Platt erroneously restricted Pastor Skaggs's testimony, and, as a result, defense counsel did not call him in the first penalty trial. Judge Platt also refused to allow Pastor Kilthau to testify to Louis's expressions of remorse. Pastor Kilthau had been pastor of James Loper's church and had been bedeviled by the notion that someone could so senselessly murder a member of his congregation. After he initiated correspondence with Louis, and then met with him several times, Pastor Kilthau found a remorseful and compassionate soul in turmoil, and the experience dramatically altered Kilthau's own preconceptions.

I.

JUDGE PLATT SHOULD HAVE BEEN DISQUALIFIED PRIOR TO TRIAL FOR ENGAGING IN EX PARTE COMMUNICATIONS WITH THE SUPERVISING HOMICIDE DEPUTY DISTRICT ATTORNEY AND EXPRESSING AN OPINION ON CHANGE OF VENUE, COMMUNICATING WITH THE JUDGE ASSIGNED TO OVERSEE CONFIDENTIAL DEFENSE REQUESTS, AND COMMUNICATING WITH THE ATTORNEY FOR APPELLANT'S WIFE (CAROL PEOPLES); THE FAILURE TO DO SO VIOLATED APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS.

As pointed out in the *Introduction*, *ante*, p. 2, appellant presents grounds for reversal of his convictions and sentence of death because he was severely prejudiced by judicial misconduct committed during the guilt phase and both penalty trials. At the outset, he argues judicial bias was demonstrable before trial, and that his direct challenge to Judge Platt's impartiality was erroneously denied. Not only does this claim establish that his trial was heard and he was sentenced to death by a judge who was not fair or impartial, but it also lays the foundation for the broader claims presented in *Arguments II-IV* that his rights to due process of law and to a fair trial under state and federal constitutions were violated, creating a "structural defect in the constitution of the trial mechanism..." (*Arizona v. Fulminate* (1991) 499 U.S. 279, 309-310; *Gomez v. United*

States (1989) 490 U.S. 858, 876; *People v. Cahill* (1993) 5 Cal.4th 478, 501.) It is well settled that "[n]o matter what the evidence against [a defendant], he ha[s] the right to have an impartial judge, one whose motives and interests are neutral, not to convict." (*Tumey v. Ohio* (1927) 273 U.S. 510, 535; *Arizona v. Fulminate, supra,* 499 U.S. at 310; *Gray v. Mississippi* (1987) 481 U.S. 648, 668 [right to "impartial adjudicator"]; *People v. Brown* (1993) 6 Cal.4th 322, 333.) Heightened scrutiny to ensure an impartial adjudicator presides at trial is critical not only because the trial judge has the responsibility to reweigh the evidence before imposition of a sentence of death, but because "the penalty of death is qualitatively different from all other sentences of imprisonment however long." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Dawson v. Delaware* (1992) 503 U.S. 159; Pen. Code, § 190.4, subd. (e).)

A. Factual and Procedural Background

Judge Platt, a former San Joaquin County prosecutor, was assigned the *Peoples* murder case as judge for "all purposes" on December 2, 1997. (Code Civ. Proc. §170.6, subd. (a)(2); CT 1: 36-37; 2: 555; RT "A"- 12/2/97.) He had been appointed to the bench three years earlier, presided over the preliminary hearing in this case in June 1998, and after defense motions to set aside certain charges filed in the information were heard in another court in September 1998, the cause was returned to Judge Platt for pretrial proceedings on November 9, 1998. (See, CT 3: 610-621; 802-803.) With the exception of the first penalty phase (August 24 - September 29, 1999), when he suffered a heart

attack and Judge Delucchi assumed judicial responsibilities during that period, Judge Platt presided over all but a handful of the proceedings below. (RT 53: 10,928 - 61: 12488.)

In November 1998, appellant moved to disqualify Judge Platt pursuant to California Code of Civil Procedure, section 170.1, subdivision (a)(6)(A)(iii).[55] On November 6, 1998, defense counsel, Michael Fox, filed a motion to disqualify Judge Platt, alleging that sometime before August 7, 1998, when preliminary discussions occurred in open court with respect to a potential change of venue in light of extensive pretrial publicity, Judge Platt had engaged in ex parte communications with San Joaquin County Deputy District Attorney, Chief of Homicide, Lester Fleming. (CT 3: 763-775; see also, RT 1: 16-56.) Fox alleged Judge Platt had not only engaged in an improper communication with an attorney representing a party to the lawsuit, but he had prejudged the potential change of venue, creating the appearance of bias and unfairness in the capital murder case at issue. The factual bases for the claim, coupled with two other claims, were supported by the declarations of trial counsel, and former police officer and public defender investigator, Michael Kale. (CT 3: 765-68; 4: 886-888.)[56]

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[55] Code of Civil Procedure section 170.1, was amended after this trial, but the ground alleged below ((a)(6)(c)) remains the same; it provides that: a judge shall be disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

[56] Code of Civil Procedure section 170.3, subdivision (c)(1), provides a challenge for cause must be accompanied by a "verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge."

Appellant's trial counsel alleged in his declaration that Judge Platt, who had been a prosecutor in the Homicide Division of the Office of the San Joaquin County District Attorney, approached Chief of Homicide, Lester Fleming, and asked him whether the prosecution planned to oppose a change of venue. (CT 3: 766-67; 4: 886-888.) Fleming declared in his response that the conversation was initiated by Judge Platt "sometime in May or June,"1998, near the courthouse "at the northwest corner of Main and San Joaquin streets on the sidewalk." (CT 4: 872: 21-23.)[57] Kale's declaration included reference to a discussion with Fleming in which the Chief of Homicide informed defense counsel's investigator that he had "made a satirical comment [to Judge Platt] about San Diego being nice this time of year." (CT 4: 887: 7-8.) Fleming did not admit or deny this part of the conversation in his own declaration – filed after Kale's – but simply averred that Judge Platt inquired whether the District Attorney's Office was "'going to fight the venue motion or roll over,'" and he had responded that his office intended to "fight it [change of venue] because we are not going to roll over." (CT 3: 872: 26 [internal quotations supplied].) According to Kale, Fleming also informed him that Judge Platt said "he would be scrutinizing, very closely, any request for a change of venue and would not be granting it unless it was absolutely necessary."(CT 4: 887:12-13.)

In point of fact, it was Judge Platt who, on August 7, 1998, initiated the

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[57] Preliminary hearing was held June 23-25, 1998, and appellant was arraigned on the information on July 10, 1998. (CT 1: 73; 78-83; 99-245 - CT 2: 246-562; RT 1: 1-15.)

discussions on the record regarding a potential change of venue. Judge Platt broached the subject – before a motion to change venue had been filed by defense counsel – by setting a special hearing: "If it [venue] is one that needs to be litigated, as is normally the case, I'm not excited about going anywhere, so that much has been made real clear already." (RT 1: 18: 18-21; See CT 3: 624-728 [*Motion*, September 30, 1998].)[58]

Trial counsel also declared Judge Platt had improperly conversed about a change of venue with the Hon. Stephen G. Demetras, Judge, specially assigned under Penal Code section 987.9 to supervise defense funding requests. (CT 3: 767.) In addition, Fox challenged Judge Platt's impartiality because of his ex parte conversations held with Patrick Piggot, counsel assigned for Carol Peoples, Louis's wife and an alleged accomplice. (CT 3: 767-68.)

On November 10, 1998, Judge Platt filed his declaration in answer to the disqualification motion. (CT 3: 803-806.) Judge Platt admitted that he had discussed

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[58] Ironically, after vigorous resistance to defendant's motion to change venue, and after acceding to Judge Platt's predilection for attempting to select a jury regardless of what pretrial public opinion surveys or expert testimony might show, a procedure Dunlap considered a "a waste of money and time" (RT 1: 61: 16; RT 1: 100-103), Chief of Homicide Fleming appeared in court on March 1, 1999, to propose a stipulation with defense counsel to change venue *after* surveys had been conducted and introduced into evidence; the court reluctantly accepted the stipulation and the case was removed to Alameda County. (RT 8: 1510/1-1510/2; 1510/18-26; see, CT 4: 804: 9-15 ["some attempt at selection of live jurors is required"]; RT 1: 20: 19-20 ["My practice has been and will be ... to attempt to get the jury here if we can do so."].)

change of venue "en route to court" with Judge Demetras, but declared that occurred on September 16, 1998; Judge Platt had advised Judge Demetras that "it appeared to [Judge Platt] that the venue issue was going to be contested." (CT 3: 805.)[59] In addition, "either in the hallway or outside of the Courthouse, perhaps during the lunch hour," apparently because the prosecuting deputy (George Dunlap) was "unavailable" to discuss – ex parte – his position on change of venue, Judge Platt declared, "I asked Mr. Fleming if Mr. Dunlap was, in fact, going to fight a venue issue should it be raised ..., [and] Mr. Fleming indicated that his office intended to resist any venue motion." (CT 3: 805: 3-4.) Judge Platt denied other allegations made by defense counsel, i.e., he had discussed with Fleming his prior experience as a prosecutor who had tried a murder case in another county on change of venue, had prejudged change of venue, or had expressed disapproval for a change of venue. (*Ibid.*) He declaimed, "I viewed the contact as an aid to motion scheduling and a need for the Court to determine the amount of time necessary ... to set aside for venue purposes." (CT 3: 805: 10-12.) Judge Platt added to his sworn statement, "It is not my common practice to engage in ex-parte [sic] communications as a matter of course nor in any specific instance, including the present matter." (CT 806:12-14.)

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[59] Judge Demetras did not file a declaration and was not called as a witness at the hearing on the motion to disqualify. (See, RT 1: 154.) It is unclear why Judge Platt identified September 16, 1998 as the date for the conversation with Judge Demetras, when, as discussed in more detail following, Judge Platt referred to being "approached" about funding issues before the hearing on August 7, 1998, when *he* brought up the subjects of venue change and associated defense costs.

Michael Kale also declared that he interviewed Patrick Piggott, attorney for Carol Peoples, on October 13, 1998, and Piggott admitted to an unrecorded bench conference with Judge Platt during the preliminary hearing. (CT 4: 887.) Judge Platt admitted to the conversation as well, which he said was "outside of both counsels' presence," and Piggott informed him of Carol's intention to "invoke the spousal privilege." (CT 4: 805.)

The matter did not rest there. Michael Fox filed a supplemental response. (CT 4: 882-884.) Fox reminded Judge Platt that when the judge had been the prosecuting attorney in *People v. Bernard Patrick Gordon* (San Joaquin County Superior Ct. No. SC035456), venue had been transferred to Fresno County for trial (No. 351278-7), and he had engaged in ex parte communication with the trial judge, Hon. Stephen Demetras, creating the appearance of impropriety, causing judicial disqualification, and requiring the assignment of a new judge for trial. (CT 4: 883.) Whatever "practice" Judge Platt was referring to in his declaration filed in this case was belied by his own record. (CT 4: 806.) No one disputed Fox's reference to the facts in the *Gordon* case.

As prescribed by court rules, The Judicial Council of California forwarded the motion to disqualify Judge Platt to Hon. Duane Martin, Judge for San Joaquin County, on November 17, 1998. (RT 1: 110-127.) County Counsel filed a formal *Answer*, supported by Judge Platt and Deputy Fleming's declarations, and Deputy District Attorney Dunlap joined in County Counsel's answer opposing disqualification. (CT 4: 875-878; 890-91.) At the hearing on the motion, November 20, 1998, no additional evidence was

introduced. (RT 1: 129-155.)[60]

Defense counsel focused on the "simple implication that [Judge Platt] made a search for George Dunlap and couldn't find him, and then he came upon Lester Fleming," and "these communications" would lead an ordinary person with doubts about the trial court's ability to be fair and impartial. (RT 1: 140-141.) Although Dunlap filed a one-page joinder in County Counsel's *Answer*, at the hearing on the motion he protested "outrage" at defense counsel's "veiled interpretation" of the actions of "judicial officers [Platt] and officers of the court I believe are above reproach." (RT 1: 139-140.)[61]

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[60] Although not referenced at the hearing before Judge Martin, Judge Platt had begun the hearing on August 7, 1998, shortly after arraignment, as follows: "The Court was *approached regarding funds* that are about to be requested, *I guess*, or expended in regards to experts for jury selection, and *I was worried* about whether or not ... the change of venue motion was going to be one that truly was something that needed to be litigated, *so I had the clerk notify* both counsel [and set a hearing]." (RT 1: 18: 5-11; emphasis added.) Judge Platt did not disclose *who* "approached [him] regarding funds," but six weeks later, when Fox inquired during colloquy how he had known on August 7 that defense counsel had obtained funds to explore a change of venue, Judge Platt replied disingenuously, *"I was told by you guys that you had asked for money*, and it was going to the judge [Demetras?] that was dealing with it, that it wasn't coming to me." (RT 1: 80: 1-4; emphasis added.)

[61] Had Judge Platt or Mr. Dunlap been truly "above reproach" it is unlikely either would have been removed from office or suspended from the practice of law. Immediately following the hearing to recuse, Fox portended things to come: "Mr. Dunlap is in the habit of constantly insinuating that I'm doing something improper and has always given me sleight and ridicule and castigation." (RT 1: 164.) Judge Platt deflected such "decorum" issues, calling Dunlap's histrionics nothing more than vigorous efforts to "establish the record, the same as you ..., [but] I don't care whether you get along." (RT 1: 164.) Within two weeks, at Dunlap's insistence, Judge Platt fined

Judge Martin opined that if there had been "a conversation that Judge Platt had gone to Lester Fleming's office and engaged in conversation *behind closed doors* or had Lester Fleming come into his chambers *behind closed doors* I think the public would say ... he's talking about the case ...," but because the conversation took place in a public setting, he concluded erroneously, any appearance of or actual impropriety had not been established. (RT 1: 145; emphasis added.) In the final analysis, Judge Martin considered the allegations "from Piggott to Demetras to Fleming ...," and concluded:

> I just don't think when you look at the objective standard of the average person, knowing what the facts were and how that question was raised and why the question was raised, and the purpose of it, would have about the impartiality of Judge Platt."
>
> (RT 1: 150: 18-23.)

Judge Martin denied the motion, and the cause was referred back to Judge Platt for further proceedings the same day. (CT 4: 897-99; RT 1: 129-155; 156.) Defense counsel did not file a petition for a writ of mandate and request for stay as required by Code of Civil Procedure section 170.3, subdivision (d) for pretrial review of the denial of the motion to disqualify, but, as discussed in *Argument II* following, he moved to recuse

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> Fox for eight problematic violations ($100 each) of non-statutory discovery deadlines imposed for production of confidential defense exhibits on hearing a motion for change of venue. (CT 4: 919-920; see also, CT 3: 598-602 [*Opposition to Prosecutorial Discovery of Defense Exhibits*, filed August 19, 1999.].)

Judge Platt again at the end of the guilt phase of the first trial.[62]

California Code of Civil Procedure, section 170.3, subdivision (d), does not bar review of appellant's due process challenge to the impartiality of the presiding judge, even though trial counsel did not seek pretrial relief by writ. (*People v. Brown, supra,* 6 Cal.4th at p. 333.) In *Brown*, this Court made it clear that a defendant has a fundamental federal due process right to an impartial judge, and that violation of this constitutional right is a fatal defect in the trial mechanism:

> " [T]o foreclose appellate attack on the fundamental constitutional integrity of the judgment would be a radical and extreme step. It would simultaneously (i) preclude traditional full appellate review of defendant's federal constitutional claim, and (ii) impair what defendant asserts is his state constitutional right of appeal."
>
> (*Id.* at pp. 333-334)

This Court also concluded that defendant's negligent failure to resolve the issue through exhaustion of statutory means may constitute a waiver of that right of review, but it does not preclude non-statutory due process review based upon a demonstration of actual

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[62] California Code of Civil Procedure section 170.3, subdivision (d) provides that: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding."

judicial bias. (*Id.* at pp. 333-336.) Trial counsel preserved his right to challenge the trial court's misconduct by filing a pretrial motion to recuse Judge Platt, which was erroneously denied, and, as set forth in *Argument II, post*, p. 98, he renewed his motion to recuse Judge Platt on separate grounds at the beginning of the first penalty phase.

It was error not to grant the motion to disqualify Judge Platt based upon the grounds asserted under Code of Civil Procedure section 170.1, subdivision (6)(c). As set forth in detail in *Arguments II-IV, post*, Judge Platt demonstrated prejudice against defense counsel and appellant so that appellant could not – did not – receive due process of law or a fair and impartial trial. Appellant's previously enumerated state and federal constitutional rights to due process, fair trial, impartial judge, and non-arbitrary guilt, death-eligibility and penalty determinations were violated. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. 1, §§ 1, 7, 13, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *In re Winship* (1970) 397 U.S. 358, 362-364; *Brinegar v. United States* (1949) 338 U.S. 160, 174; *Gomez v. United States, supra,* 490 U.S. 858, 876; *Gray v. Mississippi, supra,* 481 U.S. 648;*Arizona v. Fulminate, supra,* 299 U.S. 279, 309-310; *Tumey v. Ohio, supra,* 273 U.S. 510; *People v. Cahill, supra,* 5 Cal.4th 478, 501; *People v. Brown, supra,* 6 Cal.3d at p. 333.)

II.

JUDGE PLATT SHOULD HAVE RECUSED HIMSELF, GRANTED A MISTRIAL, OR BEEN DISQUALIFIED FROM CONTINUING TO PRESIDE OVER ANY ASPECT OF TRIAL AFTER HE SUFFERED A HEART ATTACK, BECAUSE HE HAD BEEN PHYSICALLY INCAPACITATED, HIS ANIMOSITY TOWARDS DEFENSE COUNSEL CONTINUED TO CREATE A PREJUDICIAL ATMOSPHERE IN THE COURTROOM, AND HE DID NOT ACT AS AN IMPARTIAL ADJUDICATOR, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS.

On August 19, 1999, at the beginning of the first penalty phase, defense counsel moved for a mistrial, and he moved to disqualify Judge Platt from any further activity on the case under Code of Civil Procedure sections 170.1, subdivision (a)(6)(A)(i)-(a)(7). (CT 8: 2227-2234; RT 52: 10813-10822.)[63] Michael Fox articulated several bases for the motion, but primarily his motion was based upon a disclosure Judge Platt made to the jury regarding "a mild heart attack," and the impact such disclosure had in light of the court's

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[63] Recusal may be appropriate under (a) (7) where, "[b]y reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding," or (a) (6) (A) (i) "[f]or any reason the judge believes his recusal would further the interests of justice." (See also, CT 8: 2227.)

ongoing deprecation of counsel. (RT 52: 10701; 10818.) As pointed out in *Argument I, ante*, as well as part of the cumulative impact of the overall pattern of judicial misconduct asserted in *Arguments III-IV* and *XIX, post*, this separate claim stands alone as evidence that appellant's state and federal constitutional guarantees to due process of law, to a fair trial, to present a defense, to confront and cross-examine witnesses, to effective assistance of counsel, and to a reliable and individualized penalty determination, were violated by Judge Platt's participation in this case on and after August 18, 1999, creating a "structural defect in the constitution of the trial mechanism..." (*Arizona v. Fulminate, supra,* 499 U.S. at 309-310; *Gomez v. United States, supra,* 490 U.S. at 876; *People v. Cahill, supra,* 5 Cal.4th at 501.) It is well settled that "[n]o matter what the evidence against [a defendant], he ha[s] the right to have an impartial judge, one whose motives and interests are neutral, not to convict." (*Tumey v. Ohio, supra,* 273 U.S. at 535; *Arizona v. Fulminate, supra,* 499 U.S. at 310; *Gray v. Mississippi, supra,* 481 U.S. at 668 [right to "impartial adjudicator"]; *People v. Brown, supra,* 6 Cal.4th at 333.) Heightened scrutiny to ensure the adjudicator is impartial is critical in California not only because the trial judge has the responsibility to reweigh the evidence before imposition of a sentence of death, but because "the penalty of death is qualitatively different from all other sentences of imprisonment however long." (*Woodson v. North Carolina, supra,* 428 U.S. at 305; *Stringer v. Black, supra,* 503 U.S. at 230-232; *Dawson v. Delaware, supra,* 503 U.S. 159; Penal Code, section 190.4(e).)

As background to the motion, on Wednesday, August 18, 1999, the penalty phase was set to begin with opening statements of counsel, and defense counsel and the prosecutor met briefly with Judge Platt at 10:05 AM outside the presence of the jury in one of the many heated exchanges discussed in greater detail in *Argument III.* (CT 8: 2224; RT 52: 10695-97.)[64] Shortly after meeting with counsel, Judge Platt convened the jurors and announced that court and counsel had additional work to undertake before commencing with opening statements, excusing jurors to 1:30 PM; Judge Platt then informed the jury:

> " We just didn't accomplish all that needed to be done. Most of that is my fault.
>
> If you haven't been made aware, sometime in the last month I probably went through what has been categorized as a mild heart attack. Not a major issue, but something that I had to get some issues taken care of, some doctors appointments.
>
> Everything is fine. It is just a matter of it took time away from the things that I had allocated for the proceeding. So

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[64] The jury deliberated on guilt phase issues from August 4 - August 11, 1999, and jurors were excused after guilty verdicts had been entered and directed to return for the penalty phase one week later. (RT 49: 10167-10252; 10254-58.)

my fault. We'll deal with it."

(RT 52: 10701.)[65]

When the jury returned at 1:30 PM, counsel presented opening statements, and the jury was excused for the day. (RT 52: 10760-10807.) After the jury was excused, defense counsel moved for a mistrial, arguing that the court had improperly sustained objections to his opening statement, prohibited him from filing as a record for appeal the "script" he had prepared for his opening statement, and arguing that the prosecutor had presented "a very calculated, specific opening statement with facts that detailed the lives of each and every one of the victims and their families," none of which had been disclosed in discovery; such a violation of court orders and discovery laws would, Fox argued, "not render any verdict of death reliable under the 8th Amendment to the Constitution." (RT 52: 10810.)

While defense objections had been made to argumentative portions of the prosecutor's opening statement, counsel did not "want to disrupt the prosecution's opening statement with continuous objections under [Penal Code section] 1054." (RT 52: 10811.) Judge Platt had sustained objections made during the prosecutor's opening statement, but he refused to rule on the latter argument, needing "far more detail," and set

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[65] Three weeks earlier, July 30, 1999, Judge Platt suddenly stopped and recessed the proceedings, "Mr. Dunlap, I hate to interrupt. I'm going to take a personal call. I've got an emergency I've got to deal with." (RT 48: 9987.) No explanation was ever offered for the 'personal emergency.'

Friday morning (August 20), "when we have ample time to deal with it without the jury here." (RT 52: 10811-12.) As far as Fox's opening statement was concerned, Judge Platt remarked, "the Court's rulings were correct," and he would not allow augmentation of the record with a written outline. (RT 52: 10814.)

The following morning (Thursday), however, defense counsel again moved for mistrial based upon the grounds submitted orally the day before, but included reference to Judge Platt's medical condition disclosed to the jury, and submitted in writing his request that Judge Platt recuse himself because his medical condition "severely compromises the defense counsel's ability to zealously advocate for his client." (CT 8: 2233: 8-9.) During argument Fox cited Judge Platt's ongoing "volatile," "very, very angry," and often "visceral" reactions to him, "to the extent you lose control" (RT 52: 10818), and the "untenable" position that advising jurors had placed him in for the remainder of trial: If Fox were too vigorous jurors might perceive him as a source for Judge Platt's medical problems; he might then be perceived by jurors as "insensitive," or in fact *the* cause of undue stress, and in fact, he did "not wish to cause any stress on the court which may bring about health hazards." (CT 8: 2233: 12; 16-17; 23.) Fox added, "I am concerned because [of] the phone call to Mary Ann [Nayer], the clerk, to watch out for certain warning signals and if those occur, that you be brought immediately to a paramedic." (RT 52: 10818.) In light of the court's statement to the jury as the penalty phase began, Fox explained, "I'm walking on egg shells," and with "all these dynamics now in place

that I feel compromise my ability to aggressively advocate for my client," appellant's constitutional rights to effective assistance of counsel, due process and an individualized penalty determination had been jeopardized by Judge Platt's continued involvement in the case. (RT 52: 10818: 9; 10819: 4-6; CT 8: 2233; see also, RT 52: 10867.)

Judge Platt denied the motion for mistrial and refused to recuse himself. (RT 52: 18016.) In point of fact, he proclaimed, "I am capable of proceeding on without any danger to my health or any danger in any fashion." (RT 52: 10816: 25-27.) He recited in detail his eighteen-hour days, including the commute between Stockton and Alameda, "working in the new facility [he and his wife] opened, the childcare center, to about 11:00, 11:30, and getting home sometime after 12:00 [AM]," helping his wife get their children ready for school early each morning, moving his family from one house to another, moving "[his] mother from the Bay Area to the San Joaquin County Valley ...," and so "a lot of stress had absolutely nothing to do with this trial ..." (RT 52: 10815.)[66] Judge Platt claimed he had explained this to the jury – though he had not – and "in no way was it reflected as to defense counsel or the prosecution or the fact that the Court was sitting in this case." (RT 52: 10815-16: 1-2.)

By August 19, however, Judge Platt claimed he had resolved most of the stressors

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[66] Apparently, "put[ting] out some fires at the home day care center," was not an isolated problem; on June 23, 1998, Judge Platt was late to convene for the afternoon session, apologizing to the jury for the delay caused by his family business. (RT 34: 7069: 4-5.)

in his life, "no longer putting in the long hours at the day-care center," relocating, etc. (RT 52: 10817: 3-4.) As far as defense counsel was concerned, Judge Platt denied he had ever been "uncontrolled" or "in any instance lost that control," and with regard to "the use of language ...," he denied saying anything "improper," and said, "so they are not misread or misinterpreted, that's the way I talk ... at the bench ... [and] when I'm not on the bench." (RT 52: 10819: 20-24.) For example, Judge Platt viewed yelling at counsel, swearing, followed by an apology, as something "that I don't think there was a necessity for, but because there's a record being made and someone is going to review this and think that judges are supposed to talk in a different language or remain aloof from the proceedings or change their demeanor and manner ..., I don't do that ..., I've never worried about it ..., I roll my sleeves up ..., I get in the trenches ..., [it h]as nothing at all to do with the Court's composure. Period." (RT 52: 10819 - 10820: 1-18.) Indeed, he ordered, "both counsel pursue their case without concern for the Court's health, period. It is not an issue, period. Absolutely, positively, unequivocally, without question not an issue." (RT 52: 10821: 27-28; 10822: 1-2.)[67]

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[67] As discussed in greater detail in *Argument III, post*, a newspaper reporter covering proceedings in February, 1999, described Judge Platt at a pretrial hearing as "enraged," and he apparently "apologize[d] for the explicit description of bodily functions ['shit'] that I indicated was not to take precedence ..." as "certainly not the appropriate place on the record to get that explicit, *I suppose*." (RT 46: 9567: 23-28 - 9568: 1; emphasis added.) Hearing Judge Platt attempt to defend his own misconduct, Deputy District Attorney Dunlap pointed the finger at Fox, claiming he had been "offended by counsel ..., I'm sitting here, quite frankly, in shock ... I don't think the

When the jury was brought into court to begin hearing victim impact evidence proffered by the prosecution on August 19, 1999, without previewing the matter with counsel, Judge Platt advised the jury at length that he was "fine" and "healthy," and had been "doing too many things at home at night and doing too many things and trying to juggle them, and I just wasn't slowing down enough to deal with it," and "absolutely" not to "concern yourself with any issue about whether issues raised by an attorney is doing anything to jeopardize that." (RT 52: 10825-26.) After excusing the jury for lunch, Judge Platt stated,"[T]he Court is on *Lopressor* ..., designed to slow the working of the heart and not to allow it to overwork ..., [a]nd a coated aspirin a day." (RT 52: 10850: 1-4.)

When the court reconvened after lunch, and outside the presence of the jury, Judge Platt stated there was "absolutely" no basis for recusal, and he ordered defense counsel's motion and affidavit to recuse "stricken" from the record. (RT 52: 10865: 11; 10866: 5.) Apparently, however, out of an abundance of caution he changed his mind and forwarded the motion to the presiding judge for Alameda County Superior Court, saying he would file a verified response that would include a physician's release. (RT 52: 10866.) Judge Platt referred the matter because defense counsel alleged that appellant's constitutional rights to effective representation and to a fair penalty determination had been jeopardized, and in his view there was "absolutely" no basis for "pulling of punches or hesitation to zealously advocate on behalf of your client." (RT 52: 10867: 10-11.)

Court has ever lost control ..." (RT 10820: 20-23.)

As the prosecution's presentation of victim impact evidence continued well into the afternoon, a short recess was taken. (RT 52: 10891.) Outside the presence of the jury, Judge Platt read into the record a facsimile of the "clearance" letter from his physician sent that afternoon as a response to the motion to recuse:

> " To Whom It May Concern:
>
> Judge Michael Platt has been under my care for the past month. He was admitted to the hospital with an episode of chest pain. A myocardial infarction was ruled out. A subsequent Thallium Scan showed no evidence of ischemia. He is now in excellent health and has no limitations on his activities. Please call if you have any further questions." (RT 52: 10892: 4-10.)

At the end of the day, August 19, 1999, coinciding with the prosecution resting its case in aggravation, the court excused the jury until Tuesday, August 24. (RT 52: 10906-07.)

On Friday morning, August 20, 1999, court and counsel met and conferred regarding scheduling of a jury instruction conference and for reconsideration of proffered mitigation evidence on remorse. (RT 52: 10909-10927.) Judge Platt then advised counsel that he wanted "the record on appeal to reflect" that he had no medical appointments during the week between the guilt phase and the penalty phase (August 11-17), and that the reason he advised the jury of his medical condition on August 18 when they returned from the break was to "deflect" or "divert responsibility of things from counsel where the

responsibility appropriately should have laid." (RT 52: 10926: 15-17.) According to Judge Platt, had counsel taken care of business during the week between guilt and penalty phases he would not have had to make up "excuses" about his health as reason for delaying the commencement of opening statements – for two hours – on August 18, and so he had magnanimously "deflected" jury attention away from counsel to his own health, "[a]nd it was done for that purpose solely." (RT 52: 10926: 19-20.) The court stood in recess for the weekend. (RT 52: 10927.)

On Monday afternoon, August 23, 1999, the Honorable Alfred A. Delucchi, Judge for the Alameda County Superior Court, held a hearing with counsel and appellant present, and he advised the following:

> " [T]his morning at approximately 11:00 o'clock, I received a visit from the Presiding Judge, who advised me that Judge Platt, who was trying this case, had suffered a heart attack over the weekend, and he's presently indisposed. It's further my understanding he is scheduled for open heart surgery tomorrow morning. As a result, [Presiding] Judge Sarkisian assigned this case to me to complete or until Judge Platt is able to rejoin us."
>
> (RT 53: 10,929: 18-26.)

On August 25, 1999, jurors reconvened as scheduled; Judge Delucchi advised them:

> " I have some bad news for you. First of all, Judge Platt, who was

trying this case, suffered a heart attack on Saturday. We don't know when he'll be able to come back. He's still alive. And so we don't know when he's going to be able to come back.

Our prayers are with Judge Platt. We're hopeful he'll be able to overcome this, but we can't tell if he's going to be gone a month, two months, three months. Nobody knows.

So what was decided is that the case would be assigned to me to complete in this department. So that's what we're going to do. " (RT 54: 10977: 1-11.)

Defense counsel moved for a mistrial before Judge Delucchi on the ground that Judge Platt suffered from a physical infirmity during trial, should not have presided over the case once his "physical condition preclude[d] clarity," and that Fox felt he had not afforded appellant effective assistance of counsel because "Judge Platt told the jury that he had suffered a heart attack ..., [and] it put [Fox] in a very compromising position ... to take extra precaution not to offend the Court or to argue with the Court in the jury's presentation [sic]." (RT 54: 10993: 15-24.) The court denied the motion. (RT 54: 10994.)

In the mean time, the original motion that had been referred to the Presiding Judge for Alameda County Superior Court, Hon. Philip Sarkisian, was met with written opposition filed on August 27, 1999 by San Joaquin Chief Deputy County Counsel, David Wooten. (CT 8: 2256-2286; RT 52: 10864-67; 10892.) Wooten referred to many of the

same quotations from Judge Platt during the hearings on August 19-20, 1999, and argued there was not only no basis for recusal but the issue was rendered moot, as "subsequent to the filing of the instant motion to recuse, [Judge Platt] suffered a medical situation which resulted in his hospitalization and reassignment of this case to Judge Delucci ... for the duration of the trial court proceedings." (CT 8: 2255: 25-28 - 22257: 1-2.)

On September 1, 1999, despite Judge Delucchi's substitution into the case, counsel proceeded to hearing on the recusal motion on the ground, "I just don't want to be doubly prejudiced if Judge Platt returns to health [a]nd I will object if he comes back to preside over the trial ...." (RT 56: 11338: 17-20.) Judge Sarkisian denied the motion as "moot, in view of Judge Platt's physical condition." (RT 56: 11338: 25; CT 8: 2295.)

Though defense counsel's motions for mistrial and recusal had been filed before evidence in aggravation had been presented in the penalty phase of the first trial, and was subsequently denied by Judge Delucchi and Judge Sarkisian during the mitigation phase, a mistrial was declared by Judge Delucchi on September 27, 1999, after the first jury was unable to reach a verdict; they were hung 8 to 4 for life imprisonment without possibility of parole. (RT 60: 12365-12373.) On September 28, 1999, counsel appeared before Judge Sarkisian, and the cause was referred to San Joaquin County courts for further judicial assignment. (RT 60: 12375-12383.) Michael Fox objected to the prosecutor's attempt to set the trial within 60 days because of his own exhaustion, informing Judge Sarkisian "I will be able to tell this Court on Tuesday, when I have heard the word from

my physician, as to my status." (RT 60: 12381: 16-17.) Apparently, Presiding Judge Thomas Teaford, Jr., San Joaquin County Superior Court, "indicated that Judge Platt had actually called, I believe, yesterday, and indicated that he would be willing to come back within six or eight weeks, if the doctors allow." (RT 60: 12382: 6-9.)

After several hearings with the Hon. Terrence Van Oss, Judge, San Joaquin County, and Judge Delucchi in October - November, 1999, on November 22, 1999, Judge Platt appeared and presided over the retrial of the penalty phase. (RT 61: 12384-12424; 12424-25.) Newly appointed second-chair defense counsel, Aron Laub, appeared before Judge Platt on November 22, 1999 in Alameda County Superior Court, and advised Judge Platt that Michael Fox was on vacation, and a proposed retrial of the penalty phase on January 3, 2000 did not appear "realistic." (RT 61: 12424.) Judge Platt informed counsel none of the attorneys "are in control ... [t]here was enough of that the first time through the trial," and "this case is going to proceed ... is going to be done." (RT 61: 12427: 17-20; 26.) Judge Platt informed Laub and Deputy District Attorney Thomas Zeigler, appearing without George Dunlap, who was also on vacation, "If it has to be done by finding counsel in contempt and taking them into custody to assure they are here, I will do it." (RT 61: 12428: 20-21.) Judge Platt summoned a jury panel for January 3, 2000. (CT 9: 2507; RT 61: 12425.) Within the week, Judge Platt fined Michael Fox $100 in his first appearance back on the case for not being prepared to correct transcripts. (CT 9: 2508;

RT 61: 12448-49.)[68]

For the reasons stated in *Argument I, ante*, pp. 96-97, California Code of Civil Procedure, section 170.3, subdivision (d), does not bar appellate review of appellant's due process challenge to the impartiality of the presiding judge. *(People v. Brown* (1993) 6 Cal.4th 322, 333.)[69] In *Brown*, this Court made it clear that a defendant has a fundamental federal due process right to an impartial judge, and that violation of this constitutional right is a fatal defect in the trial mechanism:

> " [T]o foreclose appellate attack on the fundamental constitutional integrity of the judgment would be a radical and extreme step. It would simultaneously (I) preclude traditional full appellate review of defendant's federal constitutional claim, and (ii) impair what defendant asserts is his state constitutional right of appeal."
>
> (*Id.* at pp. 333-334)

This Court also concluded that defendant's negligent failure to resolve the issue through

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[68] As pointed out elsewhere, Judge Platt had not corrected a single transcript from December, 1997 - August 20, 1999. Only after Judge Delucchi was substituted into the case on August 23, 1999, did the process of correction begin. (See, *Statement of Case, ante,* p. 17, fn. 12.)

[69] California Code of Civil Procedure section 170.3, subdivision (d), provides that: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding."

exhaustion of statutory means may constitute a waiver of that right, but it does not preclude a non-statutory due process review based upon a demonstration of actual judicial bias. (*Id.* at pp. 333-336.)

It was error not to grant the motions for mistrial and to recuse Judge Platt based upon the grounds asserted under Code of Civil Procedure sections 170.1, subdivision (a)(6)(A)(I) - (a)(7). As the record demonstrates, Judge Platt's physical condition, along with his prejudice against defense counsel, denied appellant a fair and impartial adjudication. In the present case, as is further documented in *Arguments I, III* and *IV*, the trial court, in fact, demonstrated prejudice towards appellant and his attorney throughout the guilt phase and both penalty trials, showed favoritism towards the prosecution, and appellant was sentenced to death by a judge who was not fair or impartial. Appellant's previously enumerated state and federal constitutional rights to due process, fair trial, present a defense, confrontation, impartial judge, and non-arbitrary guilt, death-eligibility and penalty determinations were violated. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Calif. Const. Art. 1, §§ 1, 7, 13, 15-17; *Beck v. Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *In re Winship* (1970) 397 U.S. 358, 362-364; *Brinegar v. United States* (1949) 338 U.S. 160, 174; *Gomez v. United States, supra,* 490 U.S. at 876; *Arizona v. Fulminate, supra,* 299 U.S. at 309-310; *Gray v. Mississippi, supra,* 481 U.S. 648; *Tumey v. Ohio, supra,* 273 U. S. 510; *People v.Cahill, supra,* 5 Cal.4th at 501; *People v. Brown, supra,* 6 Cal.3d at p. 333.)

III.

JUDGE PLATT'S MISCONDUCT AND PALPABLE BIAS AGAINST DEFENSE COUNSEL AND APPELLANT PREJUDICIALLY INFECTED EVERY ASPECT OF BOTH THE GUILT PHASE AND PENALTY PHASE OF APPELLANT'S TRIAL, AND THE INDIVIDUAL INSTANCES OF SUCH AS WELL AS THE CUMULATIVE EFFECT RESULTED IN A DENIAL OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

Introduction

On July 27, 1999, at the initial conference regarding jury instructions for the guilt phase of trial, Judge Platt, apparently dissatisfied with defense counsel's proffered draft jury instructions, reprimanded them for not abiding the court's "absolute" authority:

> " I don't care if it meant not eating, not sleeping, not taking a shit, it absolutely was meant to have [defense counsel] focused on this case for the entire time frame from the moment I made the order until the conclusion of trial."
>
> (RT 46: 9524: 10-17.)

On May 3, 2000, in rejecting an expanded mitigation instruction proffered for retrial of the penalty phase, Judge Platt informed defense counsel the modification:

> " ... presents it so that [jurors] are so god damned stupid that they

cannot understand simple terminology. And I find offense to that ...

I've said it before, and I will say it again. If our system is so flawed because human beings have their heads so far up their ass that they cannot understand the issues at hand on this case or these cases, then we should eliminate the jury system as a whole.

Enough said on the issue. And nothing more will be commented on in that regards."

(RT 92: 19441; Defense Proposed No. 11-12; CT 12: 3321-3324; see also *Argument XVI, post*, p. 541.)

The trial record in this case is replete with Judge Platt's taunts, insults, sarcasm, and at times unbridled contempt for the attorneys – especially Michael Fox – appointed to defend appellant in his capital trial. Judge Platt imposed excessive sanctions and oppressive orders, used deprecating remarks and unnecessarily harsh admonitions in the presence of jurors, threatened, pressured, and coerced defense counsel, repressing appellant's right to a vigorous defense in the process. The record also reveals a clear, though sometimes subtle, double standard applied to the prosecution; despite Deputy District Attorney George Dunlap's pervasive misconduct, impervious to legal objection and judicial admonishment, Judge Platt's application of a separate and partial standard to the prosecutor, and, conflation of Dunlap's behavior to joint acts of "counsel," essentially provided the prosecutor free reign to do whatever he liked – manifested in bullying his

way with witnesses and defense counsel.[70]

The truth of the matter is that Judge Platt acted the tyrant throughout the trial court proceedings in this capital case. Plagued by his need to assert "absolute control" (RT 5: 927; 943; 61: 12428), Judge Platt relentlessly deployed monetary sanctions, threatened incarceration, associated Fox as complicit in Dunlap's improprieties, and insulated the prosecutor by refusing to take appropriate action to curb Dunlap's misconduct. As a result, Judge Platt abused the trust of his judicial office, eviscerating appellant's enumerated constitutional rights in the process.[71]

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[70] As set forth in detail in *Argument V, post,* the improprieties of the prosecutor saturate the trial record, and they are *character* driven. Of Judge Platt's 13 counts of contempt issued against Michael Fox, as well as monetary sanctions for the Public Defender, all are either based upon misprison of duty, such as, alleged failures to meet disputed discovery deadlines set by the court, or because of a dispute over Public Defender policies; so-called "frivolous" motions were also punished, but sanctions were not issued because defense counsel had committed unethical acts. By contrast, of the two contempt citations issued against George Dunlap, *both* were based upon unethical behavior, including blatant "disrespect" (RT 24: 4841), and violation of an in limine ruling on examining appellant's former employer, Rodney Dove, which the court did not "think" constituted "intentional" misconduct or "we'd be addressing mistrial issues." (RT 32: 6569: 12-15.) Prosecutorial misconduct is so pervasive, and objection utterly futile, the effect of judicial misconduct only exacerbated the denial of appellant's rights to due process and fair trial. (See, RT 38: 7835-7843 [defense counsel admonished before jury for objecting to 'prosecutorial misconduct'].)

[71] As discussed following, Fox reiterated the "dignity" and "respect" he had shown the court, "never rais[ing] my voice at the Court," imploring Judge Platt to "reciprocate" in order to provide his client with a fair trial. (RT 61: 12520: 23-27.) As pointed out in Fox's declaration accompanying the

Appellant's rights under state and federal constitutions to due process of law, to fair trial, to present a meaningful defense, to confront and cross-examine witnesses, to reliable guilt and penalty determinations, effective assistance of counsel, as well as his right to be free from cruel and unusual punishments, were violated because his trial was heard and he was sentenced to death by a judge who was not fair and impartial, creating a "structural defect in the constitution of the trial mechanism..." (*Gomez v. United States* (1989) 490 U.S. 858, 876; *Arizona v. Fulminate* (1991) 299 U.S. 279, 309-310; *People v. Cahill* (1993) 5 Cal.4th 478, 501.) It is well settled that due process and fair trial demand, "[n]o matter what the evidence against [a defendant], he ha[s] the right to have an impartial judge." (*Tumey v. Ohio* (1927) 273 U.S. 510, 535; *People v. Mahoney* (1927) 201 Cal. 618, 626; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., Art. 1, §§ 1, 7, 13, 15, 16 & 17; *Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Dawson v. Delaware* (1992) 503 U.S. 159; *Beck v. Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *In re Winship* (19714th 12180) 397 U.S. 358, 362-364; *Brinegar v. United States* (1949) 338 U.S. 160, 174; *Gomez v. United States, supra,* 490 U.S. 858, 876; *Gray v. Mississippi* (1987) 481 U.S. 858, 876; *People v. Brown* (1993) 6 Cal.3d 322, 333.)

California courts have recognized that in order for a fair trial to occur a defendant

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motion for new trial, in fifteen years of trial practice no court had ever held him in contempt. (CT 13: 3391.) Unlike the trial judge and prosecutor in this case, Fox has no record of disciplinary action taken against him by the *State Bar of California.*

is entitled to a fair judge, but especially when the life and death of a human being is at stake. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244, citing *People v. Zamora* (1944) 66 Cal.App.2d 166, 210 ("'Trial judges 'should be exceedingly discreet in what they say and do in the presence of the jury lest they seem to lean toward or lend their influence to one side or the other.'") It is precisely "[b]ecause the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply." (*Gray v. Mississippi, supra*, 481 U.S. at 668; *People v. Sturm, supra,* 37 C.4th at p. 1244.) The California Code of Judicial Ethics states, among other things:

> "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control." (Canon 3B(4)); and,
>
> " A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of his duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice ..." (Canon 3B(5)).

As the record demonstrates, Judge Platt was rude, impatient, undignified and

discourteous to defense counsel and defense witnesses, creating an atmosphere of bias in favor of the prosecution and prejudice against appellant in violation of his enumerated rights, not simply harmless beyond a reasonable doubt but a structural defect in the trial itself. (*Arizona v. Fulminate, supra,* 299 U.S. at 309-310; *Tumey v. Ohio, supra,* 273 U.S. 510; *People v. Cahill, supra,* 5 Cal.4th 478, 501; *People v. Sturm, supra,* 37 Cal.4th at p. 1244.)

A. Abusing Defense Counsel, Cleansing the Record of Rage, and Applying a Double Standard for the Prosecutor.

Specific examples of judicial bias alleged in written motions to disqualify Judge Platt are presented in *Arguments I-II, ante*, incorporated as if fully set forth here, but they form the tip of the iceberg. The record demonstrates Judge Platt's prejudice against defense counsel and appellant is set against a double standard applied to the prosecution, and appellant incorporates *Arguments IV-V, post*, as if fully set forth here. The contrast in treatment is demonstrable in an overall pattern throughout proceedings held in hearings during the pretrial stages before the guilt phase, during the guilt phase, and in the retrial of the penalty phase, and misconduct is not confined to proceedings made out of the presence of jurors. Characterizing himself as a practical jurist who simply liked to "roll up [his] sleeves" and "get in the trenches," offered to mitigate his abusive behavior and offensive "language" towards defense counsel, Judge Platt's depiction "resembles more a post-hoc rationalization ... than an accurate description ..." of his demeanor. (*Wiggins v.*

Smith (2003) 539 U.S. 510, 533-34; *New York v. Quarles* (1984) 467 U.S. 649, 656.)[72]

Not long after the first recusal motion was denied by Judge Martin, Judge Platt scheduled the bulk of pretrial and *in limine* motions for November-December, 1998, but then rescheduled them for the week of March 1, 1999, in large part because his trial schedule had changed during December, 1998 and January, 1999. (See, RT 4: 900-902; 6: 1080-1082; 7: 1506-1510; *Argument I, ante*, p. 95.) As it transpired, Dunlap appeared in court with Chief Deputy Lester Fleming on March 1, 1999, and a brief discussion about juror questionnaires began; Charles Slote had been named second chair to Fox for the defense by this time. A stipulation was reached to change venue and other venue procedures were discussed on that date as well. (RT 8: 1510/2 - 1510/32.) At the end of the session, Judge Platt remarked, "All right, gentlemen, see you tomorrow morning at 8:30." (RT 1510/31: 10-11.) Dunlap did not request a continuance, and there was no indication he would not be present for hearings on the remainder of the pretrial motions.

On March 2, 1999, another deputy prosecutor appeared, and the court inquired, "Where's Mr. Dunlap, Ms. Verber?" (RT 1510/34: 11.) Verber replied that she was in "telephone contact" with Dunlap, but, "He'll be gone until next week." (RT 8: 1510-34.) Without providing an explanation for Dunlap's absence, and without *any* judicial inquiry,

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[72] As will be recalled from *Argument II, ante*, pp. 104-106, after admitting he had used language in the courtroom better suited to a pool hall, Judge Platt turned the blame on counsel for a two-hour delay before opening statements were given in the first penalty phase. (RT 52: 10819-10820: 1-18; 10926.)

Judge Platt set the case on calendar for the next day, stating, "There are other motions that still are pending and we can hear and deal with and not kill additional time while we're waiting to determine how long it's going to take [to select a new venue] and what the answer is from the judicial council." (RT 8: 1510/34: 15-19.)

On March 3, 1999, Deputy District Attorney James Willett appeared for the prosecution, and the court inquired, "I assume [Willett's appearance] means Mr. Dunlap is not available today to address any other pending motions at this point?" (RT 8: 1510/39: 17-19.) When Willett responded "that's correct," Judge Platt simply asked, "Is he going to be available yet this week, or are we killing this week?" (RT 8: 1510/39: 21-22.) When advised Dunlap was simply not "available," the court dropped the matter, granting Fox's request for his own ongoing medical treatment scheduled the following Monday. (RT 8: 1510/39-41.) The court informed Fox that it would not reconsider a defense motion to continue the trial at that time, but would "address the issue of the frivolous nature" of one of Fox's two recently filed *in limine* motions. Judge Platt chastised defense counsel by previewing a motion that "absolutely, absolutely, in my opinion, at this point, is frivolous," and provided the government an opportunity to respond – which it never did:

> " There are far, far greater issues to focus on and deal with; and who sits closest to the jury is absolutely not on my list of the top 10,000 things to worry about in a trial.

We'll take that issue up on Tuesday, the 9th, at

10:00 o'clock as well.

Mr. Fox: Well, Judge, just for the record –

The Court: I don't need a record established.

You can argue it on the 10th – the 9th at 10 o'clock, Mr. Fox.

Mr. Fox: I'd just like the record to –

The Court: Enough. You can establish your record

on the 9th at 10 o'clock when we argue the motion.

Mr. Fox: Thank you. (Proceedings concluded.)"

(RT 8: 1510-44: 15-28.)

The next day, March 4, court reconvened. Again, Willett and Fox appeared. Fox had filed a *Supplement to the Proceedings Held on March 3, 1999*, stating that while he had attempted to "obey the court's previous order not to speak when told to stop by the court, or face sanctions ...," he had "wished to state on the record at the time the court was addressing the issue of defendant's motions ..., the court was directing its discussion at defense counsel in a tone of voice that was rebuking and hostile." (CT 5:1365-66.) Judge Platt responded, "It's kind of the way my mother raised me ... [and] the court will not have the record indicate that it was either rebuking or hostile." (RT 8: 1510/48: 16-22.)

In point of fact, two weeks earlier, during hearings on the voluntariness of appellant's statements to police, Judge Platt ruled the victims' family members, who had

been designated as victim impact witnesses for the penalty phase, would be allowed over objection to remain in the courtroom during the pretrial hearings. (RT 5: 938; see also, *Argument VII, post.*) Fox requested that the "record reflect, because its not going to reflect on the record, your inflection in reading this [statute] is to emphasize these factors ... emphatically." (RT 5: 937: 12-16.) After the prosecutor objected to defense counsel's characterization of Judge Platt's demeanor in ruling on the motion to exclude potential witnesses, the court told Fox "enough," and refused to allow "the record to reflect that [he had raised his voice]." (RT 5: 937: 18-19.) The court then advised counsel:

> " When I say enough, I mean stop talking. But every word that comes in after enough at $100 a word is going to get the message across that when I have ruled, I have ruled."
>
> (RT 5: 938: 6-9.)

In these early stages of the proceedings, Judge Platt did not hesitate to reprimand and sanction Michael Fox, or express his contempt for defense witnesses, flying into rages at times for minor inconveniences; when George Dunlap failed to appear for pretrial hearings *for the entire week* set aside for that purpose he acted as if Dunlap's absence and case delay were of no consequence. During brief hearings held on January 11 and 14, 1999, for example, Judge Platt became irate with defense counsel when he advised the court that Richard Leo, an expert witness previously scheduled to appear for the hearing on the voluntariness of Louis Peoples's statement to police on November 12, 1997, was

unavailable on the date that Judge Platt had reset to accommodate his own revised trial schedule; Judge Platt had taken on another trial that overlapped with the original date set for an extended hearing on the critical motion. (RT 4: 885-902; see, *Argument VII, post.*) When Fox suggested, "We don't have to rush through this," and could start the trial one week later than scheduled, Judge Platt responded, "Nobody is rushing through anything, Mr. Fox ..., [and w]e're not going to rehash it again." (RT 4: 897; 899.) Instead, Judge Platt remarked that Dr. Leo's academic commitments were "fine and dandy," but "he is making way too much money ..., something that has stuck in my craw for many, many years." (RT 4: 894.)[73] Judge Platt then threatened to hold defense witness Dr. Leo "in contempt, and I will issue a warrant ...," or "he will not testify," if he could not resolve the scheduling conflict and appear on the date the court unilaterally reset in February 1999 for evidentiary hearing. (RT 5: 1143;6: 1148-49.) Indeed, on February 16, 1999, Judge Platt not only rejected Fox's request for a court reporter for the playing of the videotape of appellant's statement to police during the hearing on the motion to suppress, but took the opportunity to belittle defense counsel: "Simple taking of notes and preserving objection is not a difficult task [Mr. Fox a]nd if one cannot handle that, they

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[73] During the guilt phase, despite the prosecutor's projected – and protracted – examination of one defense expert (Dr. Wu) to last the entire day, Judge Platt informed Fox that another defense expert (Dr. Amen) had to be ready after the lunch recess: "If he has to wait, he has to wait ..., [because] they get paid big bucks ..., [and] its not any secret, in my opinion ..., other activities that they have simply must take a back seat ...." (RT 39: 8090.)

should not be trying this case." (RT 5: 929: 11-13.)

After the hearing on the motion to exclude appellant's statements to police, and while transfer of venue was still pending, Deputy District Attorney Dunlap appeared in court for the first time on March 9, 1999. Even though he had not appeared for the entire week set aside for *in limine* motions, the court immediately entered a gag order on both counsel, and then broached the subject of the "spurious" nature of one of Fox's motions filed with the court. Fox requested first, however, that the court "make inquiry into the trial deputy district attorney [Dunlap] that's assigned to this case, since we were supposed to do pretrial motions, *in limine* motions last week." (RT 8: 1510/54: 8-12.) Judge Platt cut off Fox in mid-sentence, admonishing him:

> " I decide how we're going to proceed on it. I did not indicate anything to that regard. The representations were made by the prosecution's representatives last week."
>
> (RT 1510/54: 13-18.)

As the record demonstrates, "representatives" from the District Attorney's Office never offered an *explanation* for Dunlap's disappearance, and none was ever offered. Judge Platt acted as if nothing had happened, and refused to inquire further.[74]

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[74] Had he applied the same tolerance towards defense counsel, it would not be an issue, but the record shows the opposite to be the case. As pointed out above, for example, when it came to being prepared for jury instruction conference, the court ordered "any and all persons available," because "it is absolutely unacceptable, it is improper, it is unprofessional, and it will not

Instead, Judge Platt confronted Fox about the lack of authority cited in his motion to move counsel's tables so that defendant would be close to the jury, especially when records showed Louis Peoples did not present a security risk. (CT 5: 1351-54.) Fox responded that he had relied upon capital defense seminar materials, and Judge Platt scolded, "lots of things in seminars and in a teaching institution ... do not belong in a court or any courtroom, that is without merit to it." (RT 1510/56: 13-16.) Without written or oral opposition, not only did Judge Platt find Peoples an "undue security risk" solely on the basis of the pending charges, but he immediately sanctioned Fox "$100 for filing a spurious and frivolous motion." (RT 8: 1510/54: 23-24; 1150/57: 10-12.)[75]

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be tolerated" for assigned defense counsel not to be "absolutely" prepared at all times. (RT 46: 9524: 24-25.) Terming it "poor strategy" not to be ready for the conference, even though Fox explained he had been responsible for coordinating witnesses for the penalty phase, the court demanded, "I want every minute used." (RT 46: 9531: 16.)

[75] During the penalty retrial, Judge Platt termed what is "taught in capital [defense] seminars in Monterey ..., and a number of things that are applicable in a school room or a classroom ... have no place in a courtroom ... absolutely no basis." (RT 97: 20642: 9-14.) Without compunction, however, he saw nothing *frivolous* about citing "Ms. Kirby, the Court Clerk that had recently attended a seminar in Arizona" as sufficient authority to allow the prosecutor's argumentative poster boards into the jury's deliberations after they had declared an impasse during the retrial. (See, RT 97: 20535; *Argument IV, post,* p. 177.) And, over objection, for "authority" to unilaterally transfer the case back to Stockton for sentencing, Judge Platt cited "assistant court administrator, Sharon Morris ...," who "was advised that the Court has authority to sit where the Court designates." (RT 97: 20593: 11; 20-28.) Although largely beside the point, Fox's citation to defense seminar materials was not wholly without authority, as one commentator points out in federal district courts, "such matters as the arrangement of counsel tables, who shall sit at each table ... are controlled

Indeed, while refusing to allow the "the record to reflect" his caustic demeanor as alleged by defense counsel on February 17, 1999 (RT 5: 937: 18-19), at least one newspaper reporter for the *Stockton Record* described Judge Platt as "enraged" at another hearing held the same week. Judge Platt again took issue with anyone who might portray him as something less than a model of judicial restraint, and attempted to "correct the record" on February 26, 1999. (RT 7: 1416: 19.) At that hearing, Judge Platt called the newspaper account of his behavior on February 19, 1999, "a bit editorializing," adding:

> " The paper described it as the Court being enraged. A bit flowering [sic]. Certainly the Court was significantly concerned, upset, angry. Enraged is not the way I felt, nor the way I would appropriately describe it, for the record. If that ever becomes part of the record, this part of the record should be clarified."
>
> (RT 7: 1417: 2-11.)

Despite the *Stockton Record's* view of Judge Platt's demeanor in the courtroom on February 19, 1999, and defense counsel's efforts to establish an accurate record, Judge Platt repeatedly rationalized his outbursts towards defense counsel and continued to

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> by local custom, the trial judge's personal preferences, and such consideration as the number to be accommodated and the facilities available ..., [and are] left to discretion of the trial court ..., but a record of the reasons for refusing any such request should be made." (Hunter, R.S., *Federal Trial Handbook: Criminal* 4th Ed. (2007), § 2: 4, p. 48.)

harangue them throughout trial proceedings.[76] By advising both counsel early on in the case to "choose your language carefully," but not to feel "gagged" by his demeanor, Judge Platt actually used an iron fist to exercise "an absolute duty to control" defense counsel, including multiple sanctions, threats of incarceration, and verbal abuse, but applied kid gloves to the prosecutor. (RT 5: 927; RT 61: 12428.) As discussed following, Judge Platt allowed the prosecutor to run amok, but attempted to badger, humiliate, and embarrass defense counsel into submission, admonishing jurors in the guilt phase and penalty retrial of defense counsel's alleged improprieties. For example, after one of the countless objections to Dunlap's repetitious and improper line of inquiry with an expert during the guilt phase of trial, Judge Platt sarcastically remarked to the jury: "That's the point of the examination, Mr. Fox. Overruled." (RT 39: 8153; see, *Argument V, post.*)

Furthermore, during the week of February 19-25, 1999, Judge Platt refused to accept at face value Fox's motions and declarations for continuance of trial on the grounds it was his first capital case and he had been representing appellant for less than fourteen months (RT 5: 1074-75.) Fox repeatedly expressed concerns that he was not

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[76] Judge Platt advised jurors during the guilt phase, "I'm not concerned about having you getting a ticket on the way, and me having to explain it to somebody." (RT 33: 6791: 14-17; see, *Appellant's Motion for Judicial Notice in Automatic Appeal*, filed January 5, 2010; *Judicial Commission Report No. 162* [dismissing traffic citations for staff was misconduct.]) As discussed following, counsel moved to videotape proceedings during the penalty retrial to document demeanor in the courtroom. (See also, *Argument XV, post,* p. 524.)

competent to provide effective assistance of counsel to appellant, and did not believe he could in good faith proceed to trial. Judge Platt demanded an explanation from then Public Defender Gerald Gleeson as to why Fox was not receiving additional assistance. (RT 5: 1076-79.) First, however, Judge Platt fined Fox $100 for filing a tardy demurrer, which Fox attributed to his inexperience with capital defense motion practice. (CT 4: 1052-1103; RT 5: 1072-1075; RT 5: 1111.) Judge Platt then found Fox had committed "misconduct" by suggesting he was performing below professional norms established for competent capital defense practitioners,[77] "prepared the transcripts" from February 19, and reported defense counsel to the State Bar for a "determination about that [ethical] issue." (RT 5: 1111.) Again, however, only a few days earlier (February 16), Judge Platt rejected Fox's request for a court reporter during the playing of the videotape of appellant's statement to police for the hearing on the motion to suppress, and rebuked him: "Simple taking of notes and preserving objection is not a difficult task [Mr. Fox a]nd if one cannot handle that, they should not be trying this case." (RT 5: 929: 11-13.)

Moreover, on January 8, 1999, Judge Platt, who had previously determined to proceed to trial regardless of defense counsel's protestations of unpreparedness, rejected any and all declarations from colleagues that had been mustered to support his motion to

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[77] Fox's motion to continue the trial was supported by experienced capital defense counsel, including, Lynne Coffin, John Costilleros, John Phillipsborn, and San Joaquin County Public Defender Gerald Gleeson, Assistant Public Defender Larsen and Peter Fox. (CT 4: 1110-1145; CT 5: 1235-1257; 1318-1328; 1339-1347; see also, *Argument XV, post,* p. 525.)

continue the trial date from February 16, 1999 for five months (July, 1999). (RT 4: 873-884; 5: 1178; 1191.) Fox had objected at arraignment on July 10, 1998, when the prosecution announced the decision to seek the death penalty, to setting the trial in February, 1999, and had requested a date in June, 1999. (RT 1: 1-15.) Over his objection, the court set the trial for February 15, 1999. (RT 1: 10.) Fox had been working on the *Peoples* case exclusively for seven months by that time (RT 5: 1099), but his frustration at the denial of motion to continue was expressed by extreme "disappointment with the court's ruling," supported by his conviction "somehow that this court will find somehow a jury from the venire in this community ...," and that he would be forced to prepare for trial during jury selection set to commence in four weeks. (RT 1: 882-83.) Judge Platt lashed out at Fox, calling his "last comments ... dangerously close to attacking the integrity of this court ..." by implying he had already planned "to proceed and select a jury despite what the proof may or may not show ...," and "I will not tolerate it." (RT 1: 884.)[78]

As pointed out above, however, during the guilt phase of trial, after Judge Platt accused counsel of not being prepared for the jury instruction conference on July 27, 1999, Fox declared that since January, 1999, and because of the intricacies of "brain

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[78] Judge Platt's declaration filed in response to the motion to recuse him in November 10, 1998, suggested his view was that "some attempt at selection of live jurors was required before the ultimate issue of venue change could be decided ...," and in court on August 17, 1998, he avowed to select a jury in Stockton, because, "I'm not excited about going anywhere, so that much has been made real clear already." (CT 3: 804; RT 1: 18: 18-21; 41.)

science" and other complexities presented by the case he was "completely unfamiliar" with prior to assignment, "seven days a week, 14, 16 hours a day, I have spent working one case, thinking about the case, talking about the case, and working on the case, with no respite." (RT 47: 9798-99.) The court's response to Fox's frustration: "Let's move to instructions." (RT 47: 9799.) [79]

Judge Platt's prejudice against defense counsel and appellant was not limited to the guilt phase or the prosecution's case in the first penalty phase. (See also, *Arguments I-II, ante*.) On November 22, 1999, in Judge Platt's first appearance after the medical leave, he threatened Michael Fox, who had been on medical leave himself, and George Dunlap, apparently enjoying time away from the office, after the three-month ordeal ended with a hung jury and mistrial. (RT 61: 12424-25.) Aron Laub, newly appointed to assist Fox as co-counsel for the retrial of the penalty phase, appeared alone with appellant, and Thomas Ziegler, Deputy District Attorney, who had assisted Dunlap throughout the first trial, appeared for the prosecution. Judge Platt made short shrift of Laub's suggestion that a trial date of January 3, 2000, might not be sufficient time to prepare for the retrial, and ordered: "This is when the jury will be summoned, and that is

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[79] Judge Platt appointed Charles Slote to assist Fox. Slote assisted with pretrial motions only, was unavailable during most of the proceedings, and did not participate in the jury trial. (See, RT 5: 1206-15; 10: 2033/31: 8-9; RT 31: 6161- 6174.) Despite the complexity of issues, inexperience of counsel, and exhaustion, Judge Platt declared after hearing Fox's opening statement to the jury on June 9, 1999, "the amount of time that was had to prepare this case was more than ample time to be ready to proceed." (RT 31: 6171.)

when we will commence." (RT 61: 12425.) Judge Platt also warned:

> " I want to make it real clear that neither the district attorney's office, nor Mr. Dunlap, nor Mr. Ziegler, nor the public defender's office, nor Mr. Fox, nor now Mr. Laub, are in control and are setting the pace at which the matter is going to proceed. There was enough of that the first time through the trial. It will not be acceptable during the retrial ..."
>
> (RT 61: 12427.)

This episode was nothing more than an echo of the theme to "get the case done" in the months leading up to the first trial; however, at this juncture he advised Laub and Ziegler:

> " [A]ny person assigned to this trial has this as their first and if necessary only priority. Period. This case is going to proceed. It is going to be done."
>
> (RT 61: 12427.) [80]

In order to get the case "done," Judge Platt forewarned counsel (and his court staff):

> " If it has to be done by finding counsel in contempt and taking them into custody to assure they are here, I will do it. Period. This takes priority and precedence, period ... It will happen,

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[80] As noted in *Argument II*, Judge Platt had personal business to attend to and other "priorities" interfered with this case, including "new assignment" in January, 1999, and at least two trials in November-December, 1998, and January, 1999. (See, 1; 118; RT 4: 880; 900-901; RT 5: 892.)

gentlemen, if we have to go five days a week and weekends,

on Thanksgiving, on Christmas, interrupt any vacations."

(RT 61: 12428.)

Rather than acting with the evenhandedness of expected of judicial officer intent on achieving fairness and the efficient administration of justice, by threatening counsel for retrial with incarceration, more monetary sanctions, as well as demanding work on "weekends, on Thanksgiving, on Christmas," Judge Platt re-created the prejudicial atmosphere generated during the guilt phase of trial before his heart attacks, imposing his iron will on defense counsel. Despite his heart attacks, which at the end of the guilt phase he admitted to jurors and defense counsel were stress-related (RT 52: 10815; 10825-26; 10850), Judge Platt's obsession with "rolling up the sleeves" to make sure the retrial would get "done," evokes Sisyphus rolling up *his* sleeves, oblivious to the futility of employing overbearing methods on a defense attorney with no prior capital case experience and his own stress-related illness, and to the detriment of appellant's constitutional and statutory rights.[81]

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[81] It is hard to imagine a more dramatic change in the courtroom atmosphere than when the Hon. Alfred Delucchi, Judge, presided over the first penalty phase: "I don't work on holidays." (RT 54: 11002: 9-10.) Accepting Judge Platt's rulings on evidence, the veteran jurist, because of the obvious strain on Carol Peoples, half blind from methamphetamine abuse and emotionally distraught, took over as lector of letters between Louis and his family. (RT 56: 11363-11379.) Without weighing rulings, or different ways Judge Platt and Judge Delucchi treated deadlocked jurors, discussed in *Argument IV*, it would have been unthinkable for Judge Platt to take on such a neutral role.

Even when it came to record correction, Judge Platt's prejudice was one-sided. Again, although Judge Platt was upset when neither George Dunlap nor Michael Fox appeared for his first hearing (November 22, 1999) back from medical leave, his abusive remarks were no different in tone or quality from those directed solely at defense counsel during jury instruction conferences (July 27, 1999; May 3, 2000) quoted above. (RT 46: 9524; RT 61: 12424-27; 92: 19441.) After Judge Platt returned to court on November 22, 1999, he not only made record correction a priority, but, as pointed out above (*ante*, p. 17, fn. 12), from November, 1997-November, 1999, he had not initiated correction proceedings as required by Penal Code section 190.9 and California Rules of Court, rule 8.619. Judge Delucchi noticed the problem when he began to review the transcripts to prepare for his new assignment, and he started the correction process on August 25, 1999. (RT 54: 11003-04.) Upon return after his heart attack, Judge Platt announced, "[T]hese will be done prior to any vacations being enjoyed by anybody." (RT 61: 12443: 17-18.) When Fox returned to court for the first time on November 29, as ordered, he explained he "was off sick for the month of October," and returned to the office November 1, 1999. (RT 61: 12448: 27-28; see also, RT 61: 12391-12420 [sealed exhibit-physician letter]; 12511: 3-6 ["stress-related fatigue..."].) Fox explained that he had gone on vacation in the middle of November, had taken transcripts with him, preparing corrections for April-May, 1999, but had not prepared those for June: "I have tried to keep up with the court's requests to have these past transcripts certified ..., [but] I just got back late last night ...,

[and] I've been working on the defense in preparation for retrial." (RT 61: 12448: 12-25.) Judge Platt's response was to swear his clerk in to testify:

> " The Court: When you made contact with Mr. Fox, do you recall what transcripts you told him to, if he was going to Hawaii, take with him and be prepared today?
>
> Ms. [Maryan] Nayer: I did not tell him to take the transcripts with him. He voluntarily said he would be taking the June transcripts with him. And I told him that would be a good idea.
>
> The Court: Thank you.
>
> As I said last Monday, gentlemen, it's nice to know that being off three months, nothing has changed.
>
> .....
>
> [T]he court made it very clear that he [Fox] should get access to them, and that they should be made available and sent in whatever fashion it could be done to Mr. Fox so that he can prepare today, or the Court would impose sanctions.
>
> The Court is going to find counsel in violation of the Court's order and impose a $100 fine.
>
> We are going to proceed with June, if we have to do it one line and one page at a time."

(RT 61: 12449: 9-28 - 12450: 1-17.)

The court immediately began record corrections for trial proceedings held on June 1, 1999, but aside from abusive treatment of defense counsel, a very different standard applied for prosecutors. At the same correction hearing on November 29, Deputy District Attorney Zeigler appeared without Dunlap, and no excuse was offered for Dunlap's absence; Zeigler, however, was clearly at a loss to supply a correction to Dunlap's opening statement to the jury: "I don't know what the word should be." (RT 12453: 3-4.) Judge Platt's reaction was to inquire rhetorically of Ziegler whether Dunlap "went through his normal fit" when he was ordered to appear, but he imposed no sanctions on either prosecutor for lack of preparedness. (RT 12467: 28.) On December 20, 1999, when Dunlap next appeared in court, no explanation was offered and none required. (RT 61: 12482-83.) Similarly, during the penalty retrial, Dunlap was not prepared for record corrections, and the court did not press him or impose any sanctions. (RT 96: 20516.)

B. Transferring Prosecutorial Misconduct onto Defense Counsel

As documented in detail in *Argument V*, Deputy District Attorney George Dunlap's pattern of using hyperbole to deprecate Michael Fox's integrity and credibility before the court and jury, such as, "ludicrous," "bull," "outrageous," "umbrage," "disgust," "shock," "aghast," etc., saturates the trial record. For present purposes, however, Judge Platt's willingness to conflate the prosecutor's improprieties to join Fox as a party to prosecutorial misconduct is of signal importance to appellant's claim of

judicial misconduct. Admonishments to "gentlemen" and "counsel" are usages of guilt-by-association transference and reflect upon Judge Platt's bias in favor of the prosecution and prejudice against the defense. The pattern of transference is so pervasive it is impractical to examine every instance, but a number key examples are detailed following. (See also, RT 1: 164: 17-18; RT 4: 711; RT 4: 715; RT 7: 1322; RT 24: 4841; 29: 5781; 31: 8196; 36: 7574; 38: 7839; 41: 8461; 43: 9050; 49: 10268; 10288; 80: 16705.)

Dunlap consistently made gratuitous and inappropriate comments to witnesses, irrelevant wisecracks, and repeatedly posed improper and argumentative questions in the presence of jurors during the guilt phase of trial: "[Dr. Mayberg] That's the last time I buy you dinner" (RT 46: 9413-9414); "How was lunch?" [called as a defense witness in retrial, upon examination of San Joaquin County Deputy Sheriff William Weston, with whom Dunlap ate lunch]; "Thank You, Billy." (RT 91: 19179-80); "Wow! That's a lucrative business, is it not, Dr. Amen?" (RT 40: 8368); "That's pretty good wages, isn't it [Dr. Wu]?" (RT 38: 8071); "How many hours are you [Dr. Lisak] into them for?" (RT 91: 19133); "[Dr. Wu] So let's not be confusing." (RT 39: 8195); "Let's quit guessing [Dr. Buchsbaum] for awhile and look at the facts" (RT 42: 8633); "I see you grinning there, Doctor [Amen], when I said does everybody agree with it." (RT 40: 8377); "It's a pain in the butt to get these test scores [Dr. Wu] ..." (RT 38: 8077); "[Dr. Mayberg] Did you have a heart attack last night when you looked at the raw data?" (RT 46: 9413-14.) [82]

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[82] The court had granted a defense motion to prohibit the prosecutor from using the legal conclusion "murder" to describe the "homicides" at issue. (See, RT 8: 58-

As presented in greater detail in *Argument V, post,* Dunlap's argumentative questions to witnesses, along with his ingratiating commentary, undermined the dignity of the proceedings in the guilt phase and retrial of the penalty phase, and denied appellant his previously enumerated rights. The selected references above – all in the presence of the jury in the guilt phase and objected to by defense counsel – were presaged in pretrial hearings on change of venue when Dunlap was examining defense witness, Edward Bronson. (RT 3.) Defense counsel objected to improper "editorial" comments during the questioning of Dr. Bronson, but the court proceeded to reprimand *both* attorneys. (RT 3: 474-475.) The next day (December 10, 1999), Fox reminded the court of its admonition on December 9:

> " '*Gentlemen*, it will cease, it will cease now. Last time I looked around the courtroom, gentlemen, there is no jury. Save the theatrics, the voice intonations, the insincere, in my opinion, comments about whether or not one is confused or

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60.) The prosecutor often used the word 'kill' to form his questions, but after a series of questions to a lay witness, Fox interposed an objection to the question, "Isn't it true ..., that you'd be shocked at the conduct of anybody committing such *outrageous murders*?" (RT 29: 5779: 4-6.) The court overruled the objection. (Same at RT 39: 8114; Cf., 8149 [objection to 'murder' sustained].) On another occasion, when a generic "objection" was made by defense counsel to Dunlap's gratuitous comment to a witness, Judge Platt sustained the objection and struck the question, admonishing Dunlap, "Delete the editorialization, please." (RT 40: 8377.) A similar objection to improper "statement by the prosecutor" to a witness -- "That makes sense" -- resulted in Judge Platt admonishing Fox to "make a timely objection, please," followed by the ruling it is "stricken." (RT 40: 8383.)

not confused. And your questions, cross-examine the witnesses.'"

(RT 4: 711: 1-8; emphasis added.)[83]

Fox had also complained on December 10, 1999, that Dunlap slammed books and pencils on counsel table, and engaged in other histrionics, and "the degree that that has occurred since you made that admonition to us is basically to the same extent that it existed at the time that this admonition was given and why it was given." (RT 4: 711: 10-14.)

Judge Platt disagreed with the characterization of Dunlap's "theatrics," but said he had "anticipated this issue," and, after conducting his own research, concluded it was contempt of court, and that what Fox "had objected to today, correctly, was [Dunlap] arguing with the witness, was editorializing and gratuitous comments ...," and "warned by the Court sustaining the rulings, that that type of conduct, those type of editorializing and gratuitous comments that are not part of a question are not going to be tolerated." (RT 4: 712: 7-28.) These were hollow admonitions, as the record demonstrates.

At the very next change of venue hearing, January 4, 1999, for example, Dunlap continued where he left off:

" Mr. Dunlap: Mr. [Michael] Ross, I'm terrible at math ...

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[83] The only feigning of being "a little confused ... little bit," was by Dunlap. (RT 3: 473: 16.) And, as pointed out above, he employed the same improper technique in the presence of the jury: "[Dr. Wu] So let's not be confusing." (RT 39: 8195.) There was nothing improper about Fox's examination of Dr. Bronson; no similar objections or admonitions applied during his examination of witnesses.

.....

Mr. Ross, I know you did a heck of a job here.

Mr. Fox: Objection, Judge. This is narrative –

The Court: Sustained. Limit the editorial comment.

Ask your question."

(RT 4: 736: 25; 739: 17-21.)

Dunlap was warned repeatedly in pretrial hearings that his improper and argumentative questions, gratuitous comments, and "editorializing," would not be tolerated before the jury, and he would be held in contempt. Yet, during an early stage in the guilt phase of trial, June 3, 1999, Judge Platt abruptly recessed the jury *after* a series of sustained legal objections made by defense counsel in order to "lay some ground rules," as follows:

> " *Gentlemen*, one warning, one warning only. There will be no speaking objections. There will be an objection with a legal basis. There will be no editorializing. You will ask a question and wait for the answer. Period.
>
> Bring the jurors back in."

(RT 29: 5781: 27-28 - 5782: 1-4; emphasis added.)[84]

Indeed, after admonishing "gentlemen" out of the presence of the jury, and after terming such improper "editorializing" in earlier rulings, Judge Platt overruled Fox's next objection to Dunlap "editorializing" – leveled within five *minutes* of the recess – and admonished *Fox* before the jury:

> " As to editorializing, *that is no legal objection.*
>
> There is no legal objection that is entitled editorializing.
>
> Overruled.
>
> Mr. Dunlap: *Thank you.*"
>
> (RT 29: 5799: 6-8; emphasis added.)

Within five *weeks* of trial, however, the pattern had been set and it intensified. On July 7, 1999, in examining Michael Quigel, who had sold methamphetamine to appellant, Dunlap exploited the court's restrictive ruling on Quigel's testimony, which Dunlap had sought in order to limit lay opinion, by pushing the witness into a corner:

> " [Mr. Dunlap] Q. Mr. Quigel, that's nonresponsive.
>
> And I think you've been subject to an in limine order.
>
> I ask we strike it. But is that what you really think?
>
> [Mr. Quigel] A. That's what I know, my personal experience

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[84] Also addressed in *Argument V*, the prosecutor's misconduct was so pervasive and defense counsel's objections futile in light of the trial court's failure and refusal to take effective action to cure the misconduct.

with methamphetamine.

Q. Um-hmm. Anything else you want to yell out now,

Mr. Quigel, you've got it all out anyway.

Mr. Fox: I'll object.

The Court: Sustained.

Mr. Fox: That is prosecutorial misconduct.

Mr. Dunlap: It is not.

The Court: The objection is sustained. Ask the next question.

Q. Listen to the question Mr. Quigel ..."

(RT 37: 7768: 27-28 - 7769: 1-13; see also, *Argument VIII.*)

Rather than take action with respect to Dunlap's misconduct in the presence of the jury, however, the next day, after *repeatedly* sustaining objections to Dunlap's blatantly improper commentary while questioning witnesses, Judge Platt admonished *defense counsel* for "requesting prosecutorial misconduct in the presence of the jury ... It will not be tolerated ... I will sanction you." (RT 38: 7839: 13-21.) Without prompting from Dunlap, Judge Platt proceeded back into the courtroom and admonished the jury:

" [S]ignificantly, ladies and gentlemen, there was comment earlier by defense counsel requesting prosecutorial misconduct ..., an improper subject to raise in front of the jury."

(RT 38: 7841: 19-22.)[85]

As might be anticipated under the double standard applied by Judge Platt, Dunlap immediately proceeded to ask more argumentative questions, seemingly immune to objection and insulated by the court from admonition before the jury. (RT 38: 7842-43.) Dunlap inquired of Joni Fitzsimons, "What's this 'abnormal' all of the sudden I'm hearing?" (RT 38: 7843: 4.) An objection was sustained "as to the form of the question." (RT 38: 7843: 6-7.) But a few minutes later, Dunlap continued:

> " Q. Let's talk about the gun because I've got it all out here in front of me.
>
> Mr. Fox: Objection. That's improper.
>
> The Court: Sustained. Delete the editorialization, Mr. Dunlap. Ask the questions."
>
> (RT 38: 7851: 9-13.)

After exceeding the scope allowed by Judge Platt in questioning a defense expert, and sustaining numerous objections in following weeks of trial, the court recessed out of the presence of the jury to again admonish *both* counsel for Dunlap's "editorialization" – the term the court had admonished defense counsel was an improper basis for objection:

> " What concerns the Court, *gentlemen*, is still, this

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[85] Indeed, prior to the commencement of the penalty retrial, Judge Platt threatened to "take [Fox] into custody" if he used the term "prosecutorial misconduct" in the presence of the jury. (RT 75: 15610: 1.)

morning I am seeing considerable editorialization by both counsel. It will cease. Or there will be immediate financial sanctions in the presence of the jury to communicate the inappropriateness of editorialization.

Both counsel have been warned more than sufficiently. Both counsel should not be surprised the next time the court hears the editorialization. The Court will impose an objection and advise the jury of what it is doing and why."

(RT 41: 8461: 12-21; emphasis added.)[86]

What is significant here is how Judge Platt linked Fox to Dunlap's improprieties. In fact, Fox became the scapegoat for Dunlap's misconduct. Judge Platt not only threatened Fox with contempt and incarceration, imposed monetary sanctions, and admonished the jury for raising the "prosecutorial misconduct" objection during the guilt phase, but he admonished defense counsel outside the presence of the jury against raising any "misconduct" claim at more than "a three digit sanction" [$1000?], unless it was "a reasonably arguable ground ... [and] up to this point in time, there has been no reasonable arguable ground ...." (RT 46: 9394: 18-21; 9395: 8; see, RT 75: 15610: 1 [threatening to

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[86] Approximately ten more objections with this same witness were sustained as "argumentative," but the court did nothing meaningful to curb Dunlap's pervasive misconduct. (RT 41: 8461-8488.) The pattern continued with the next witness called by the defense, and the court did admonish Dunlap *sua sponte*, "It's been asked and answered several times ..., That's enough, Mr. Dunlap." (RT 43: 8897; 8909-10.) But that is the rare exception, as discussed in *Argument V, post*.

take Fox into custody if he raised a 'prosecutorial misconduct' objection in the presence of the jury in the retrial.].)[87]

Furthermore, towards the end of the guilt phase of trial Judge Platt advised counsel out of the presence of the jury, "First of all, gentlemen, before we digress ..., what either side finds ludicrous or not, stay away from it ..., I'm fed up with it." (RT 49: 10288: 5-8.) Although Judge Platt not infrequently used the terms "ludicrous" (RT 42: 8764: 8), "frivolous" and "spurious" (RT 8: 43-44; 49; 61: 12496: 22) and "ridiculous" (RT 34: 6995: 16; 21) to describe legal arguments, one would be hard pressed to find Fox using those or similar terms in the voluminous trial transcript prepared from trial.[88] In truth, "ludicrous" is as integral to George Dunlap's lexicon, as are the terms "outrageous," "shocking," "umbrage," and other rhetorical exaggerations woven into his posturing and bullying at every conceivable turn. (See, *Argument V.*) For present purposes, when

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[87] When Fox had sought guidance as to how he should preserve claims of misconduct, Judge Platt advised him to "stop [and] request to approach the Bench." (RT 38: 7839: 22-28.) But when Fox had requested a bench conference with the court reporter earlier in trial, Judge Platt chided him: "We're not going to do the side bar. If you have something to address, address it." (RT 5: 922: 11-20.)

[88] A sampling of Dunlap's use of "bull" before court and jury (RT 4290; 7538; 7792; 9171; 9961; 10022-24; 10027; 10031; 10057; 10126; 12107; 12183; 17868) is similar to Judge Platt's usage of "shit" (RT 46: 9524) and description of scheduling as having "not a rat's chance in hell" (RT 46: 9515-16), as well as phrases such as,"the matter is going to be tried in a professional fashion come hell or high water" (RT 2: 380), or "ain't good enough, Mr. Fox ... If it is by looking into a crystal ball, I ain't gonna do it." (RT 52: 10732: 3; 24-25.)

Dunlap argued Fox's position on constitutional limitations for victim impact evidence was "outrageous" (RT 49: 10287: 26) and "ludicrous" (10287: 3; 10288: 1), the court improperly conflated *his* usage to imply *both* "gentlemen" had offended, and it "just simply is not going to be visited." (RT 49: 10288: 8-9.)

As set forth as a separate ground for reversal, and discussed in greater detail in *Argument IX, post*, during the retrial of the penalty phase and in the presence of the jury, when Fox attempted to challenge the credibility of the prosecution's rebuttal expert (Dr. Mayberg), Judge Platt not only restricted defense counsel's cross-examination of the witness on erroneous grounds, but he improperly "sanctioned" defense counsel for attempting to do so. (RT 93: 19707.) Dr. Mayberg had testified during the first trial that incomplete data provided by a defense expert (Dr. Amen) was "garbage." (RT 46: 9431: 1.) Although her "garbage" characterization had been stricken at the request of defense counsel in the guilt phase, there had been no *in limine* hearing at the retrial of the penalty phase on the subject of her *willingness* – her bias – to form conclusive opinions for the prosecution based upon what she viewed as "garbage" presented by a defense expert. Both counsel admitted during the guilt phase they were confused about "raw data" provided by Dr. Amen, but after the prosecutor's objection to Fox questioning Dr. Mayberg's "garbage" characterization in the retrial had been litigated outside the presence of the jury, Judge Platt returned to the courtroom and misleadingly advised the retrial jury of an "untimely" discovery violation, even though Dunlap had conceded during the guilt

had been no discovery violation. Despite Dunlap's concession, Judge Platt improperly informed the retrial jury it was "extremely improper" for the defense to violate discovery laws and unlawfully attempt to question the credibility of the State's expert because she "felt" data had been "garbage." (RT 93: 19708: 1; 14; 19699: 16-18;19702-03.)

C. Efforts to Preserve the Record and Ameliorate the Abuse for Retrial

Aside from the motions to disqualify Judge Platt, defense counsel made several motions for mistrial on the grounds that appellant was being denied his rights to due process of law and a reliable verdict in a capital case under state and federal constitutional rights by a prejudiced court. (See, *Arguments IV, XV, post*; RT 45: 9283-9292; CT 10: 2672-2673 *[Motion to Videotape Trial Proceedings, etc.*]; CT 13: 3381-3390 [*Motion for New Trial*].) In addition to the instances discussed above, where Fox attempted to preserve the record of Judge Platt's abusive tone and hostile demeanor, other attempts of counsel abound. For example, the court had continued the correction hearing after setting the case for retrial, and Dunlap appeared for the hearing on December 20, 1999. (RT 61: 12482-12487.) Defense counsel (Laub) filed a motion to prevent a penalty retrial on the grounds that to impose the death penalty where one jury had deliberated on the evidence fully presented and eight members voted for life imprisonment, as otherwise authorized by Penal Code section 190.4 subdivision (e), violated state and federal due process guarantees, and demonstrated the arbitrary and capricious nature of the statue and the death penalty. (RT 61: 12487-12496.) Judge Platt's response was predictable:

" I understand the argument that as applied to this case, your argument is the unconstitutionality of the statute. And that is the only thing that saves it from being a frivolous and spurious motion for which the Court would impose sanctions." (RT 61: 12496: 18-22.)

Shortly after argument, Judge Platt moved on to jury selection and other pretrial issues, and defense counsel suggested it was problematic to proceed to select a jury for the retrial in early January, 2000. (RT 61: 12496-12518.) After Fox explained that Dunlap had not been at the previous hearing, but had just provided him with a 56-page list of corrections he needed to review before agreeing to it, Judge Platt referred counsel back to their inability to reach a stipulation as to all corrections for June, 1999:

" I knew ... at the last appearance [November 29] and was assured by both counsel [Fox and Ziegler] that were present that there would be a signed agreement and stipulation to the corrections and changes, that there was not a rat's chance in hell that that was going to happen.

Mr. Fox: No, Judge. It's going to happen.

The Court: I've heard enough .... It's what was represented. It's what was promised. I knew you wouldn't do it. It's done. We're on recess. 1:30, gentlemen.

Mr. Fox: Let me just say –

The Court: We're on recess."

(RT 61: 12518: 25-28 - 12519: 1-10.)[89]

After the lunch recess, Fox suggested meeting "off the record," but Judge Platt properly pointed out "there's nothing in a capital case that goes off the record." (RT 12520: 7-10.) Fox then laid out "before we even get started with this whole journey" the uncomfortable truth *on the record*:

" Well, I wanted to address the issue of what occurred at the last moment before we broke for the recess ... and I think what was reflected on the record is the Court's tone towards counsel, to me personally, was hostile and was abusive.

.....

I treat the Court with respect. I treat the Court with dignity. I just ask the Court to reciprocate when it comes to when I'm advocating for my client and advocating the defense position. I never raise my voice at the Court. And I just feel that it's abusive for the Court to treat me the way that it treated me before we broke for recess.

.....

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[89] Ziegler's last appearance in the case was November 29, 1999.

The Court raised its voice. And then in a very abusive tone, told me to stop whatever I was talking about, and shut me down. And it was curt. And it was insolent towards my advocacy. And I felt it wasn't deserved. I had never raised my voice towards the Court. And I just wish that we could have an understanding that we will have a mutual respect that this whole process demands. So I just wanted to just voice that before we even get started with this whole journey."

(RT 61: 12520: 11-28 - 12521: 1-12.)

After having the court reporter read the requested transcript of proceedings before the lunch recess, Judge Platt responded:

" Nothing at all in the colloquy at all indicates any insolence, any feeling about Mr. Fox or anybody else ... the Court spoke in a louder voice than it did earlier. That is the only thing that was fair. That is the only thing that was accurate.

.....

I will not allow a record to be established that inaccurately portrays anything. I didn't allow it during the first part of the trial. And it is not going to be allowed now. It is that simple."

(RT 61: 12521: 23-28 - 13-16.)

Aron Laub asked to address the court, and was permitted to do elaborate. Laub suggested even though Fox had been "very polite" from "a defense point of view ...," Judge Platt was "angry" and "yelling" at Fox. (RT 61: 12522: 21-27.) Judge Platt claimed "the Court was not yelling at counsel," and what is more:

> " If counsel would like to hearing yelling, come to my house and watch what I do with my children.
>
> .....
>
> Mr. Laub: I think the point, Your Honor, is that defense doesn't wish to be treated like your children.
>
> The Court: Then they shouldn't act like my children, Mr. Laub.
>
> It is not an issue, gentlemen, that is going to be fabricated for the record.
>
> Mr. Laub: I object to the Court saying this is being fabricated for the record.
>
> The Court: The objection is noted.
>
> Mr. Laub: I wish to swear the court reporter as a witness to what occurred in this morning's session.
>
> The Court: The issue has been resolved."
>
> (RT 61: 12523: 1-20.)

The court then proceeded to set dates for motions and certification of the record.

One week later, on December 27, 1999, along with a dozen other pretrial motions, defense counsel filed an "In Limine Motion to Videotape Trial Proceedings to Preserve the Record of Court Demeanor," citing California Rules of Court, rule 980 [1.150]. (CT 10: 2672-73.) At the hearing, January 3, 2000, Fox argued the necessity for videotaping:

> "[B]ecause of all the instances that we have had together in which there [was] a disagreement as to what has existed in terms of reactions by the Court and counsel, demeanor of Court and counsel, the relationship between Court and counsel, and since the Court, I believe, has indicated that it would allow the press to actually videotape proceedings whenever they wish, I filed this motion to get permission from the Court to videotape proceedings, and I believe it would be an augmentation of the record if there was ever a dispute as to what exactly the Court's demeanor was towards counsel or in any other fashion."
>
> (RT 62: 12684: 7-19.)

After filing a brief response,[90] Dunlap called the motion "offensive" (RT 62: 12684:

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[90] The two-page opposition cited *Moustakas v. Dashevsky* (1994) 25 Cal.App.4th 752, for the proposition that California Rules of Court "'do not regard the videotape as part of the record.'" Judge Platt's ruling was not based upon that decision, and this Court has not prohibited the use of videotapes in reviewing a death penalty judgment; moreover, court exhibits,

27), and Judge Platt responded by characterizing it as contemptuous:

> " To advocate that the videotaping is the only means of preserving an honest record, very frankly in my opinion – and I have researched this issue now – is a direct assault on the integrity of the Court, and it will not be tolerated. I think I would be well within my province as the judicial officer to find that you are in contempt with that statement alone and sanction. I am not going to do so. But it crosses the line in about as much a fashion as one can cross."
>
> (RT 62: 12685: 27-28 - 12686: 1-7.)

Ironically, during pretrial proceedings in February 1999, after Dunlap had been admonished for improper examination of defense experts, Judge Platt warned "counsel" of his research on contempt of court for "body language, matters that are not directly reflected in the record, facial expressions, intonations ..., a record does not reflect those particular aspects." (RT 3: 475: 3-9; see also, RT 36: 7574.) In denying the motion to videotape the retrial proceedings in December 1999, however, Judge Platt warned defense counsel "when you advocate that in the future, if you choose to do so, choose your words

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> can be transferred for review, and nothing would have prohibited its use as a potential exhibit in collateral proceedings. (See, e.g., California Rules of Court, rule 8.224.)

carefully." (RT 62: 12686: 12-13; see also, *Argument XV, post.*)[91]

Furthermore, in arguing for the admission of appellant's expressions of remorse to two pastors who had separately visited him in jail while pending trial on the murder charges, defense counsel filed an extensive brief and argued for the relaxation of the hearsay rule under Federal law and California's catchall mitigation factor (k). (RT 51: 10667-10670; CT 10: 2926-2951; 3000-3009; *Argument VI.*) In response, Dunlap filed no written opposition; instead, he characterized the proffer of such testimony during oral argument as "perplexing," referring twice to the proffer as a "perversity" of the rules of evidence (RT 51: 10675-76; 10684), and expressing his personal opinion that admitting evidence of Louis Peoples's crying during his meetings with the two pastors "alone is a perversity ..., perverse way by using the cloak of religion ..." to introduce mitigation evidence in the penalty phase of a capital murder trial. (RT 51: 10675: 28 - 10676: 1-6.)[92]

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[91] Judge Platt informed counsel he had directed his court clerk (Maryan Nayer) and reporter (Rhonda Fideldy), along with three bailiffs, to "prepare declarations of their observations and opinions of the Court's demeanor on that occasion." Noting he had declarations in hand from courtroom bailiffs San Joaquin County Sheriff's Deputies Ken McCullum, Rick Adams, and Willis Smith, he stated that Ms. Nayer and Ms. Fideldy would file their declarations as soon as they were completed, which would then "be made a portion of the record." (RT 62: 12686: 27-28 - 12687: 3-7; CT 10: 2766-2768.) Ms. Nayer and Ms. Fideldy did *not* file declarations to support him.

[92] As separately presented as reversible error (*Argument VI*), Judge Platt initially ruled both pastors could testify to Louis Peoples's expression of remorse, but altered course as the penalty phase was about to begin. Aside from ultimately refusing to allow the witnesses to testify to appellant's remorse and redacting other expressions of remorse from letters to his own family, Judge Platt overruled the objection to the prosecutor's improper closing argument in the penalty phase that appellant had never expressed remorse for the crimes he committed. For

While Judge Platt had previously described his struggle with the issue as a battle between his "brain" and his "guts" (RT 51: 10690), he refused to allow Fox to make a complete record for the admissibility of the evidence after Fox referenced the "progress" made in a series of United States Supreme Court decisions that allowed juries to fully weigh mitigation. Fox argued:

> " I feel like I'm a lawyer in the 60's ... in the deep south, with no disrespect for the court ...,[but] the law had progressed from such a great distance from the 60's and the 70's, until it was declared unconstitutional in the mid-70's."
>
> (RT 51: 10671: 11-17.)[93]

The next morning, before opening statements were given in the penalty phase, and shortly before Judge Platt announced his heart condition to the jury, he admonished counsel for "expressing emotion in argument yesterday ...," and chastised, "It won't be

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present purposes, however, the point is that during a heated exchange on admissibility of evidence, the constitutional foundation for Fox's argument is interpreted by Judge Platt as another "absolute assault on the integrity of the Court." (RT 52: 10699.)

[93] Citations discussed in moving papers (CT 10: 2926-51; 3000-09) include post-*Gregg v. Georgia* (1976) 248 U.S. 153 decisions on the expanding scope of mitigation evidence in capital cases, all originating from trials in 1970's in southern states, *Chambers v. Mississippi* (1973) 410 U.S. 284, *Green v. Georgia* (1979) 442 U.S. 95, *Skipper v. South Carolina* (1986) 476 U.S. 1, *Crane v. Kentucky* (1986) 476 U.S. 683, *McCoy v. North Carolina* (1990) 494 U.S. 433. A number of this Court's decisions on hearsay evidence in mitigation are also cited. (*People v. Edwards* (1991) 54 Cal.3d 787; *People v. Livaditis* (1992) 2 Cal. 4th 759; People v. Alcala (1992) 4 Cal.4th 742; *People v. Ervin* (2000) 22 Cal. 4th 48.)

tolerated further ... or the Court will respond appropriately, period." (RT 52: 10699: 21-28 - 10700: 1-2.) In addition, after informing Fox he wanted jury instructions "done now" (RT 52: 10696: 10), Judge Platt then admonished defense counsel:

> " I found it to be a direct assault on the integrity of the Court to liken this Court to a 1960's southern judicial proceeding. It is an absolute assault on the integrity of the Court. It won't be tolerated.
>
> Mr. Fox: I apologize, Judge."
>
> (RT 52: 10699: 10-14.)

Fox was justified in likening his situation as trial counsel for Louis Peoples before Judge Platt to that of "walking on egg shells." (RT 52: 10818: 9.) While apologizing for his purported offense to Judge Platt's integrity, in context the reference to the period of time before and after *Furman* and *Gregg* is not unjustified. (See, footnote 93, *ante*.) Read by a defensive jurist, one who had demonstrated throughout trial his willingness to minimize his own outbursts, to sanitize the record, and to excessively sanction, to threaten, and to abuse defense counsel for everything and anything, the projection of a "southern" (prejudice) epithet seems neither inapt nor is the response surprising.[94]

The following morning, August 20, 1999, as presented in detail as part of *Argument*

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[94] The dilemma for defense counsel faced with a trial judge bent on humiliating him – and condemning defendant – is how to preserve a record without completely alienating the court or the jury.

VI, post, as a separate basis for reversal of the death judgment, Judge Platt altered course dramatically and ruled the testimony of the pastors was inadmissible. (RT 52: 10921.) The following colloquy ensued:

> "Mr. Fox: Judge, I just want to clarify something.
>
> The Court: We didn't need to clarify.
>
> Mr. Fox: Judge –
>
> The Court: We do not need to clarify a thing.
>
> Mr. Fox: Judge, I need to make a record of –
>
> The Court: The record has been made.
>
> Mr. Fox: There's other issues.
>
> The Court: It is enough.
>
> Mr. Fox: I would –
>
> The Court: The record has been made, period.
>
> Mr. Fox: There's another issue in regards to this.
>
> The Court: File a written motion points and authorities
>
> and we'll have other issues addressed.
>
> Mr. Fox: Judge.
>
> The Court: Period.
>
> Mr. Fox: We're not in front of the jury.
>
> The Court: I don't care where we are. I want it in writing.

I want it timely filed. I want it timely response. I'm not going to be put in a position of responding to arguments and thoughts as they arise in court, period.

Mr. Fox: It is not –

The Court: That's enough."

(RT 52: 10921: 24-28 - 10922: 1-22.)

Defense counsel made every reasonable effort to preserve a record of the judicial abuse which had created a prejudicial atmosphere for appellant's trials. Out of desperation, counsel sought video coverage of courtroom proceedings for an audio/visual record of Judge Platt's hostile demeanor. Supported by an equally abusive prosecutor, at every juncture Judge Platt attempted to rationalize his behavior to create a misleading *cold* record. Defense counsel moved to disqualify Judge Platt for his pattern of prejudice and abuse, repeatedly moved for mistrial, and argued that blatant animosity and veiled threats to "choose your words carefully" or face contempt, coupled with actual monetary sanctions for relatively minor offenses, deprecating reprimands before the jury, and threatening of heavier sanctions and admonitions before the jury for asserting pervasive prosecutorial misconduct – rampant during both trials – individually and cumulatively deprived appellant of his enumerated constitutional and statutory rights.

D. A Prejudiced Judicial Officer Imposed the Death Penalty Without Jurisdiction

When the jury returns a verdict or finding imposing the death penalty, the standard,

as set forth in Penal Code section 190.4, subdivision (e), requires an independent determination of the weight of the evidence and the propriety, in view of all the evidence, of the imposition of the death penalty. (*People v. Mickey* (1991) 54 Cal.3d 612, 704.) The function of the trial judge under subdivision (e) is not simply to review the jury's verdict, but it is to become the ultimate trier of fact in a capital case on the issue of life versus death. A challenge to a trial judge's partiality is reviewable as part of defendant's "appellate attack on the fundamental constitutional integrity of the judgment." (*People v. Brown, supra*, 6 Cal.4th at 333; *Arizona v. Fulminante, supra*, 499 US at 309.)[95]

In the present case, the record establishes that the first jury to hear the evidence presented by both parties was unable to reach a verdict after over twenty hours of deliberations. Indeed, eight jurors had concluded that to imprison appellant to a life term without possibility of parole was sufficient punishment. (RT 60: 12365-12374; 61: 12488; CT 9: 2495-2503.) The prosecution decided to pursue the death penalty in a retrial of the penalty phase, presented the same evidence it had mustered in the first trial, and the defense presented essentially the same evidence as well. A second jury reported it, too, had deadlocked, but without polling jurors, Judge Platt admonished them after one week of deliberations, "20 hours of discussion does not amount to an impasse that we

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[95] Section 190.4, subdivision (e), provides, "the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances are contrary to law or the evidence presented."

cannot justify going further and having further discussion ... It's time again to roll up your sleeves and go back to work." (RT 96: 20502; CT 12: 3196; 3208; RT 96: 20498-20502.) Efforts by the retrial jury that led to another deadlock on punishment constituted a mere "drop in the bucket," according to Judge Platt. (RT 96: 20508.)

Penal Code section 190.4, subdivision (b), provides in pertinent part that if a second jury "is unable to reach a unanimous verdict as to what the penalty shall be, the court *in its discretion* shall order a new jury or *impose a punishment of confinement in state prison for a term of life without possibility of parole*." (Emphasis added.) In this context, Judge Platt's improper instructions, admission of prosecutor's exhibits to the retrial jury, while excluding defense exhibits, are cited as additional prejudice against Louis Peoples, because any discretion the trial court might have had to impose life in prison if two juries were unable to reach a unanimous verdict on the death penalty was foreclosed. Dunlap had informed Judge Platt that the retrial of the penalty phase was the "last bite" his office would take at convincing a jury of the death penalty, and it is evident from Judge Platt's prejudice towards appellant and his counsel throughout trial that he was not going to exercise discretion in an evenhanded manner. (See RT 62: 12743: 23)

Indeed, after deliberating eleven more hours over four more days, under improper judicial admonitions, and with the introduction of demonstrative prosecution exhibits, and the exclusion of requested defense charts, the jury reached a death verdict. (*Argument IV, post*; CT 13: 3348-3350; RT 96: 20629; 20566-20577; *Statement of the Case*, p. 23.)

Nonetheless, in conducting his review under subdivision (e) of section 190.4, Judge Platt opined the death verdict was a foregone conclusion:

> "Based upon considerable detailed analysis and independent reweighing of the evidence, I find the *overwhelming* weight of the evidence supports the jury's verdict of death. The automatic motion for modification is denied." (RT 97: 20670: 19-23.)[96]

The trial court's conclusion that the evidence was "overwhelming" is not only unjustified by 50 hours and three weeks of conflicted deliberations by *two* separate juries, but it further demonstrates Judge Platt's prejudice towards Louis Peoples – and his attorneys – throughout the trial proceedings. (*People v. Brown, supra,* 6 Cal.3d at 333.)

Moreover, as additional evidence of prejudice towards appellant and his attorneys, and a separate ground of error and of misconduct subject to reversal, over objection, Judge Platt sentenced appellant in Stockton, though he had no authority to transfer the case back to San Joaquin County. (CT 13: 3432 [proof of service]; 3472

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[96] To rub salt in the wounds, in denying the motion for new trial and imposing the death judgment against Louis Peoples, Judge Platt informed Michael Fox on August 4 and August 7, 2000, he was "absolutely comfortable with the record showing that the Court was not intolerant ... [but] warned and warned and warned and warned [Fox]," but had now decided to stay seven of the thirteen counts for "discovery" sanctions issued against him. Sanctions, Judge Platt informed counsel, were merely part of his felt need for "shaping conduct" at trial, and he claimed his contempt citations should not be taken "personally." (RT 97: 20643: 24-26; 20703-05; 20712: 12-13.) Though *requested* by Dunlap, Judge Platt refused to stay the two contempt citations issued against him. (RT 97: 20705.)

[Commitment/Judgment]; see also, *Argument XIX, post.*) On or about July 7, 2000, Judge Platt unilaterally transferred the case back to San Joaquin County without notifying the parties or requiring the prosecutor to "establish that the conditions which originally required the order to change venue no longer apply ...." under Penal Code section 1033.1, subdivision (b). The case had been transferred on March 9, 1999 to Alameda County, and afterwards *all* proceedings had been held there. (RT 97: 20592-20593; CT 5: 1371; RT 8: 1582-1583.) Defense counsel objected "to this whole case being transferred back to San Joaquin County" in violation of Penal Code sections 1033 and 1036. (RT 97: 20592: 23-24.) When confronted with the lack of "authority" for the transfer, Judge Platt advised counsel he was relying upon clerical personnel, "assistant court administrator, Sharon Morris," who "was advised that the Court has authority to sit where the Court designates." (RT 97: 20593: 11; 20-28.) The reality of a venue transfer, according to Judge Platt, was now a legal fiction "still under the jurisdiction and authority of Alameda [b]ut the actual place and location of it happens to be here in San Joaquin County." (RT 97: 20593: 28 - 20594: 1-3.) Without notice or compliance with statute, Judge Platt informed defense counsel he had decided to move the defendant back from Alameda County for the convenience of "all the court staff and personnel, the Court's other obligations, the location of the potential witnesses and/or family members, both from the prosecution and the defense [sic] ...." (RT 97: 20594: 4-7.) In short, Judge Platt rebuked, "[t]hat's the authority [and] if you wish to challenge it, writ it." (RT 97: 20594: 10-11.)

Judicial tyranny is not compatible with fundamental notions of due process, rights to fair trial, or heightened reliability for capital cases. Judicial bias – expressed or implied – against a defendant's advocate also chills his right to effective representation:

> " [T]he high court has made it clear that a defendant has a due process right to an impartial judge, and that violation of this right is a fatal fatal defect in the trial mechanism. In view of this established federal constitutional authority, to foreclose appellate attack on the fundamental constitutional integrity of the judgment would be a radical and extreme step."
>
> (*People v. Brown, supra*, 6 Cal. 4th at 333.)

In addition to the "established federal constitutional authority" cited in the *Brown* decision, reviewing courts in California have long condemned judicial disparagement of defense counsel at trial, and have recognized the cumulative prejudicial impact of persistent efforts by a trial court to discredit the defense, or create the impression of bias in favor of the prosecution, as violations of due process. As the court noted in *People v. Fatone* (1985) 165 Cal. App.3d 1164, 1169, in reversing an attempted murder conviction for improper comments to jurors on the conduct of defense counsel: "When the [trial] court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." (See also, *People v. Dickman* (1956) 143 Cal.App.2d Supp. 833; *People v. Zamora* (1944) 66 Cal.App.2d 166; *People v. McNett* (1926) 80 Cal.App. 81.)

In *People v. Fudge* (1994) 7 Cal.3d 1075, 1107-1108, this Court reiterated that a

"trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel ... and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense ....' (*People v. Mahoney* (1927) 201 Cal. 618, 627 [258 P. 607]; see also *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1169 [211 Cal.Rptr. 288].)" Yet in *Fudge* the trial court's refusal to hold side bar conferences were deemed waived because they were not preserved by objection, and trial counsel failed to object to "alleged misconduct" in another instance – one in which defense counsel prevailed on the motion. (See also, *People v. Clark* (1992) 3 Cal.4th 41, 143; *People v. Wright* (1990) 52 Cal.3d 367, 411.) The few "tart" and "condescending" remarks referred to in *Fudge* are a far cry from the pervasive judicial misconduct that occurred in this case. (*Ibid.*; *People v. Carpenter* (1997) 15 Cal.4th 312, 352-353 ["isolated" instances of "irritation" with counsel did not constitute improper behavior or prejudice to defendant.].)

In contrast, Fox repeatedly objected to the trial court's disparaging remarks, objected to vile language and abusive demeanor, and even sought reconciliation, to no avail. Defense counsel was compelled to file motions to preserve and supplement the record, moving to recuse when misconduct had saturated the proceedings; when those motions were denied, he moved for mistrial, and when abuses continued, he justifiably took the radical step of requesting videotaping. In each instance he was met by judicial defensiveness that included charges of "record fabrication," "assault on the integrity of

the court," accusations of "absolutely" or nearly "frivolous" motions, the imposition of monetary sanctions, threats of incarceration, and admonitions to jurors to disregard "improper" conduct when attempting to preserve prosecutorial misconduct. As this Court held in *People v. Sturm* (2008) 37 Cal.4th 1212, 1243-1244:

> " Although no one instance of misconduct appears to, in itself, require reversal, the cumulative effect of the trial judge's conduct requires reversal. We look very closely at the question of prejudice in his instance, where the death penalty was imposed on a penalty phase retrial after the majority of the prior jury would have voted in favor of a sentence of life in prison without possibility of parole.
>
> .....
>
> It was reasonably probable that the second penalty phase jury's verdict would have been different had the judge exhibited the patience, dignity, and courtesy that is expected of all judges. (Citation omitted.)"

(See also, *Argument XIX, post*, at pp. 596-597.)

Similarly, had appellant been afforded a fair judge it is reasonably likely the results would have been different. Accordingly, appellant's previously enumerated state and federal constitutional rights to due process, fair trial, impartial judge, effective representation, and non-arbitrary penalty determinations were violated by individual and cumulative acts of judicial misconduct; both guilt and penalty verdicts must be reversed.

IV.

AFTER THE JURY DECLARED IMPASSE IN RETRIAL OF THE PENALTY PHASE, THE TRIAL COURT CHARGED JURORS WITH IMPROPER SUPPLEMENTAL INSTRUCTIONS, AND ABUSED ITS DISCRETION BY PROVIDING THE PROSECUTOR'S AIDS USED DURING ARGUMENT TO THE JURY DURING DELIBERATIONS, WHILE REJECTING THE JURY'S REQUEST FOR DEFENSE CHARTS, EACH ERROR RESULTING IN A COERCED DEATH VERDICT IN VIOLATION APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY RIGHTS.

In light of the trial court's pattern of misconduct throughout the proceedings below, it is not surprising the court failed and refused to follow precedent designed to preserve the independence of jurors' decision-making authority, but followed its own "plan" in the retrial of the penalty phase. Judge Platt erroneously failed to declare a mistrial when informed by the retrial jury that it had deadlocked 9-to-3 after six votes over seven days and twenty hours of deliberations. Instead, the court refused to poll jurors in defiance of judicial precedent and statutory authority, and exhibited prejudice against appellant by improperly informing jurors their deliberations amounted to a "drop in the bucket" and by ordering them to "roll up their sleeves" and continue deliberating. Despite objections and

motions for mistrial, the trial court also erred by reading inapplicable guilt phase instructions and invaded the province of the jury by suggesting they "role play." Once minority jurors had been pressured by improper admonitions and supplemental instructions, the court improperly allowed the prosecutor's argumentative charts into the jury room over objection, while denying the jury's request for similar charts prepared by defense counsel, after having advised jurors they could have the charts if they requested them. Each error was not only prejudicial separately and cumulatively, and coerced the death verdict, but evidenced to the jury the court's prejudice against appellant.

As a result of the improper conduct, erroneous rulings, and manifest abuses of judicial authority, appellant's federal and state constitutional and statutory rights to due process, to a fair trial, to present a defense, to confrontation, to a reliable, individualized sentence determination, and against cruel and unusual punishment, were denied. (U. S. Const., 5th, 6th, 8th, and 14th Amends; Cal. Const., Art.1, §§ 1, 7, 13, 15, 16 & 17; Pen. Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *United States v. Williams* (9th Cir. 2008) 547 F.3d 1187; *People v. Gainer* (1977) 19 Cal.3d 835; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Miller* (1990) 50 Cal.3d 954, 993; *People v. Pride*

(1992) 3 Cal.4th 195, 265; *People v. Frye* (1998) 18 Cal.4th 894, 1015; *People v. Ochoa* (1998) 19 Cal.4th 353, 456.)

A. Background

As noted above, the first jury to hear the evidence in 1999 was unable to reach a verdict on penalty. (*Statement of the Case, ante*, pp. 16-17.) After deliberating for six days and twenty hours, jurors declared on September 27, 1999, they were deadlocked eight to four for life. Judge Delucchi polled the jury to determine how many votes had been taken, and asked each individual juror, "If this jury deliberated further, do you think there's a reasonable probability that this jury could arrive at a verdict?" (RT 60: 12368: 12-13 - 12369.) Upon a determination that each juror did not believe further deliberations would produce a verdict, the court properly declared a mistrial. (RT 60: 12370; CT 9: 2495-2503.)

The second jury empaneled to determine the appropriate penalty for appellant's murder convictions heard essentially the same testimony presented to the jury in the first trial, receiving all evidence presented by both parties over seven weeks (March 14-May 8, 2000), hearing arguments of counsel during four days, and receiving instructions.[97]

On May 16, 2000, the jury began deliberations by selecting a foreperson in the late

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[97] The court instructed the jury under *California Jury Instructions - Criminal* (West Pub. Co.) prepared by the Los Angeles Superior Court CALJIC Committee, phased out in 2005, and replaced by Judicial Council of California, Criminal Jury Instructions CALCRIM (West Pub. Co.). References to jury instructions are to CALJIC, unless otherwise noted.

afternoon. (RT 96: 20445-46; see also, *Statement of the Case*, *ante*, pp. 19-20.) For seven court days (May 16-25), the jury deliberated the fate of Louis Peoples, and requested to break at lunch time on Friday, May 25, 2000, for the Memorial Day holiday weekend. (RT 96: 20445-20497.)

On May 25, 2000, apparently in response to the jury requesting to break early for the holiday weekend, Judge Platt unilaterally advised counsel of his "plan" to continue jury deliberations: "If they are going to take considerable time, then we are going to continue through until we lose some jurors." (RT 96: 20495: 7-10.) Judge Platt had noted that he telegraphed his "plan" to counsel beforehand: "We told them the end of June was the anticipated date ..., [s]o I don't anticipate, whether or not they have issues, addressing potential hung jury issues until the end of June." (RT 96: 20495: 11-15.)[98]

On May 30, the jury returned from holiday and began deliberations again shortly after 10:00 AM. Judge Platt greeted the jury: "[R]oll-up your sleeves, go back to work." (RT 96: 20499: 8.) At 2:00 PM, on the eighth day of deliberations, the Jury Foreperson, Juror Number 6, advised in writing:

" We are at an impasse. We rerequest [sic] further instructions." (CT 12: 3208.)

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[98] Judge Platt reminded counsel of record correction duties on May 25, having previously fined Fox for not having the right transcript in court: "I don't intend to sit here idly and not work while they [jurors] are working." (RT 96: 20495: 17-18; see RT 61: 12449-12450.) As another example of disparate treatment, when Dunlap was unprepared to proceed on corrections on May 31, Judge Platt excused counsel with the casual remark: "We'll get started on 'em when we get started on 'em." (RT 96: 20516: 24-25.)

Without seeking input from the trial attorneys, Judge Platt assembled the jury in the courtroom and asked the foreperson for a numerical breakdown and number of votes taken; the foreperson advised the court they had taken a vote on the first full day of deliberations (May 17), and "[t]hat was ... six and two, with four undecided." (RT 20501: 1.) In fact, the jury had taken "six different votes," and each vote had been conducted on a separate date from May 17-30, 2000:

> " The next one, number two, was eight, two and two undecided.
>
> .....
>
> Then on 5-23, we had seven and three, and two undecided.
>
> On 5-24, we had eight and two, and two undecided.
>
> On 5-25, we had nine and two, and one undecided.
>
> And then today, we had a nine and three, and none undecided."
>
> (RT 96: 20501: 13-21.)

Without inquiring what was meant in the note by a request for "further instructions" (CT 12: 3208), consulting with counsel, or inquiring of jurors whether they believed a reasonable probability existed that further deliberations would resolve differences, Judge Platt simply advised the jury, "The only instruction I can give you at this point in time is 20 hours of discussion does not amount to an impasse that we cannot justify going further and having further discussion." (RT 96: 20502: 11-15.) Then Judge Platt informed the jury he had "calculated the amount of time that you've actually been in

discussions ..., [and] since the 17th of May, it has been about 20 hours of actual discussion time." (RT 96: 20502: 1-7.) He suggested further, "I'm sure that appears to be a considerable amount of time," but, "I think you owe it to yourselves to continue to talk about the matter and see if there is further discussion ..., if there is any change in any fashion." (RT 20502: 17-20.) The court reminded jurors of the length of the trial "talking about literally life and death issues," but without inquiring whether further deliberations would be productive, Judge Platt directed jurors, "[A]gain ... roll up your sleeves and go back to work." (RT 96: 20502: 11-12; 24-25.)

When the jury returned for further deliberations, defense counsel outlined the history of deliberations in the first trial, which had followed a very similar pattern, i.e., after 10 hours of deliberations and a declaration of impasse, Judge Delucchi sent jurors home for the evening, but at the end of 20 hours, after the second declaration of impasse, Judge Delucchi polled jurors and declared a mistrial. (RT 96: 20503-04.) As the second penalty jury had already deliberated for 20 hours, Fox requested Judge Platt poll jurors, and "ask them if any additional time would be fruitful." As the admonition to "roll-up your sleeves" implies, Fox emphasized, "There's a lot of pressure on them to reach a verdict ..." He argued,"[T]hey should know that a non-verdict is also something that the law embraces ..., [and] I don't think we should mislead them into thinking that they are going to be locked up in that room until they reach a verdict." (RT 96: 20504: 7-17.)

Indeed, Fox had argued on May 3, 2000, for modification of CALJIC 8.88

(*Argument XVI, post*, p. 550), to the effect that a hung jury is a possibility in every trial:

> " In order to make a determination as to penalty, all twelve jurors must agree if you can ... If you cannot, then I will discharge you.
>
> Nothing I have said requires you to reach of verdict of which penalty to impose in this case. The possibility of a hung jury is an inevitable by-product of the requirement that a verdict must be unanimous."
>
> (Proposed Instruction 24, Modified 8.88; CT 12: 3332; Penal Code §190.4(b); *People v. Gainer* (1977) 19 Cal. 3d 835, 852.)

Judge Platt had rejected the proposed modification during the jury instruction conference, but said, "[I]f and when ... this jury addresses the issue of being unable to reach a verdict, we certainly can readdress the issue." (RT 92: 19463: 22-24.) At this juncture during deliberations, however, Judge Platt had rejected the notion that the jury was being misled into believing, "they are going to be locked up in that room until they reach a verdict," stating, "[E]ach individual judge has to decide when that point is reached." (RT 96: 20504: 19-24.)

In point of fact, Judge Platt had polled jurors in the guilt phase of trial when the jury foreperson announced impasse on the attempted murder charge (Thomas Harrison) on August 10, 1999. Judge Platt properly inquired whether "it would be fruitful in the sense of providing any more time for you to speak and address any concerns or discuss the respective positions" by further deliberations, and when jurors responded that it

would, they continued to deliberate until they were unable to reach a verdict on that count. (CT 8: 2045; RT 45: 10228: 11-14; 10240.) In the retrial of the penalty phase, however, Judge Platt ignored the procedure he had followed in the guilt phase, and rejected defense counsel's proposals, including his request to poll the jury; instead, Judge Platt stated that how Judge Delucchi handled jury deliberations or "whether anybody else [did] it in the fashion [Judge Platt did] it [was] not important." (RT 96: 20504: 25-27; 20505: 23-25.)[99] Judge Platt informed counsel he did not believe jurors had been "misled," or were being "locked up in that room until they reach[ed] a verdict," but admitted again that he intended to keep the jury deliberating until the end of June – the time to which they had been told the trial might last – if necessary to reach a verdict, stating, "[W]e told jurors that the end of June was when both counsel expected the trial to last to ... [b]ut at this point I have no pressure of ... losing jurors." (RT 96: 20506: 2-9.) According to Judge Platt, whether "the law accepts a non-verdict" was beside the point, because in his opinion, "20 hours of deliberation on a life and death issue is a drop in the

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[99] As pointed out above, in addition to asking jurors if there was anything the court could do to assist them with further deliberations during the first penalty phase, Judge Delucchi, in conformance with Penal Code section 1140, inquired into whether the jury could reach a verdict, asking: "If this jury deliberated further, do you think there's a reasonable probability that this jury could arrive at a verdict?" (RT 12368: 15-17; see, *People v. Miller* (1990) 50 Cal.3d 954, 993.) This inquiry was conducted after eight votes before the first impasse was declared on 10 hours of deliberations and six-to-six split, and four more votes resulted in the second declaration of impasse and 8 to 4 for life imprisonment after 10 additional hours of deliberations. (RT 60: 12368.)

bucket." (RT 96: 20504: 21-22; 20505: 25-27.)

After deliberating for another 90 minutes, the jury returned to the courtroom and asked to be excused for the day. The court – again without discussion with counsel or inquiry of jurors themselves – reread standard instructions on jury deliberations ordinarily reserved for guilt/innocence phase of a trial,[100] and then admonished jurors:

> " And I think I made a comment to counsel at one point after you folks had left that the 20 hours or so – now 21 hours, 21 and a half hours – that you've spent at this point in time with the issues that you are dealing with is a drop in the bucket.
>
> And until I decide that further deliberations are of no avail, then I'll have you continue to roll up your sleeves and go to work the best you can.
>
> One of the ways that I would suggest you do it – and it is merely a suggestion. Because obviously now there have been some positions taken. During the discussions that you have in the next few days, if

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[100] The court read CALJIC 17.30 [jury not to take cue from judge], 17.31 [all instructions not necessarily applicable], 17.40 [juror duties in deliberations] and 17.41 [juror attitudes]. (RT 96: 20507-08; CT 12: 3268-3271.) At a later juncture in the deliberations, Fox requested that if "the Court actually decides tomorrow what to do, could we have a discussion before the Court actually goes ahead and makes a decision? " Judge Platt curtly rejected the notion, suggesting to defense counsel, "If there are objections to it, you'll make objections on the record." (RT 96: 20522: 9-11; 14-15.)

you take the other side's position, advocate it as if it were yours, see whether or not that changes your own thoughts about your position.

Discuss it again with the other jurors. Do that talking, do that deliberating. And then we'll see where we are."

(RT 96: 20508: 2-18.)

Once the jury had been excused for the day, defense counsel argued Judge Platt's admonitions to the jury improperly invaded the province of the jurors "by suggesting how they may deliberate," and that they "take the opposite view." (RT 96: 20510: 12-19.) Fox also objected to rereading guilt-phase instructions on deliberations, because "it's misleading to tell or to suggest to the jury that this is a factual situation in which they have to discuss the facts," when in truth it is a "moral determination" that "each individual has to decide the case for themselves," a determination undermined by the court. (RT 96: 20511: 3-15.) Finally, counsel argued that "telling the jury that 21 hours or 21 and a half hours is a drop in the buck is not proper," and "you didn't tell them ... that they should deliberate until they can't deliberate any farther." (RT 96: 20511:1-3; 20513:20-23.) Defense counsel moved for mistrial. (RT 96: 20511-13.)

In denying the motion for mistrial, Judge Platt claimed he was not taking an adversarial role, rather "it strictly was a suggestion" for jurors to take opposite viewpoints in the deliberations he ordered to continue because, 21 hours over seven days, "frankly, it is a drop in the bucket." (RT 96: 20512: 3-4; 10-11.) He believed he had adequately

informed jurors "if and when *they* decide *they* are unable to reach a verdict, then it will be the Court that has to make that [mistrial] decision." (RT 20513: 4-6; emphasis added.)[101]

On May 31, 2000, the jury returned and deliberated the entire day. (CT 12: 3200.) Two jurors reminded the court of travel and graduations scheduled for the following week, but Judge Platt suggested to one juror she try to "rustle somebody else up to do that driving ..." for her daughter's planned class trip June 7-9. (RT 96: 20518; 20520: 13-14.) Advising, "I don't want to take any time off ...," refusing to provide the juror with a solution to her conflict, and without any evidence of "momentum" towards a verdict, Judge Platt declared, "Obviously, we're getting to some very critical stages ..." (RT 96: 20520: 22-25; see also, CT 12: 3207.)

On June 1, 2000, the jury returned at 10:10 AM to continue deliberating for the morning session only. (RT 97: 20523-24.) At 10:15 AM, the jury requested "the time line exhibit on poster boards displayed by the prosecution during arguments" to support

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101 Contrary to Judge Platt's recollection of events, in addition to advising the jury that *their* deliberations amounted to a mere "drop in the bucket" (RT 96: 20509: 6), and *their* six votes resulting in a nine-to-three split over seven days "does not amount to an impasse" (RT 96: 20502: 14), he failed to inquire whether jurors themselves thought further deliberations would be beneficial; instead, he ordered them to continue: "Until *I* decide that further deliberations are of no avail, then *I'll* have *you continue to roll up your* sleeves and go to work." (RT 96: 20509: 7-9; emphasis added.) And while advising jurors, "I have no position other than to move you along," Judge Platt reiterated, "'The purpose of the Court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful *verdict*.'" (RT 96: 20507: 14-17; internal quotes and emphasis added; see RT 96: 20506-20508, rereading CALJIC 17.30, 17.31, 17.40, 17.41.)

imposition of the death penalty. (CT 12: 3206; RT 97: 20525.) Defense counsel objected that it is "improper to send anything to the jury that's not admitted into evidence." (RT 97: 20525: 23-24.) Citing *People v. Pride* (1992) 3 Cal.3d 195, the prosecutor argued the court should allow his charts to go to the jury:

> " I believe that *Pride* gives discretion to the Court. And that is our position. I do not think that the time line is inaccurate. It is argument. It does include specific elements of intent and, I think, aggravation, as well as premeditation and deliberation. But's it's a specific item that has been referenced on two prior occasions by the prosecution, both in opening statement and closing argument."
>
> (RT 97: 20527: 19-26.)

Defense counsel pointed out that in the first penalty trial jurors "wanted some of the boards that I had used in defense argument," but Judge Delucchi refused to allow them into the jury room as they were not admitted in evidence. (RT 97: 20528: 9-14.)[102]

Without citing any precedent, and over "strenuous objection" and motion for mistrial on federal and state constitutional grounds, Judge Platt supplied the jury with

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[102] Judge Delucchi properly instructed the jury: "That's not received in evidence. That's part of oral argument. Remember, I told you argument is not in evidence. So that's not something you can have. You just have to remember what was argued. Whatever inferences you want to draw from that, you can do that." (RT 60: 12335: 20-24; see, *In re Zeth S.*, *infra*, 31 Cal.4th at 414, fn.6.)

three posters prepared and used by the prosecutor during his closing argument. (CT 12: 3201-02; RT 97: 20532-20536 [Exhibits OOOO; PPPP; QQQQ.].)[103] As pointed out in *Argument III, ante*, Judge Platt cited "Ms. Kirby, the Court Clerk that had recently attended a seminar in Arizona" as his authority to permit the prosecutor's poster boards into the jury's deliberations after they declared impasse. (See, RT 97: 20535.)[104] As discussed following, the court "could anticipate that potentially" there would be additional jury requests for poster boards "used in argument by either the defense or the prosecution," and "I feel obligated to tell you I will allow those." (RT 97: 20531: 3-8.)

Within 30 minutes (10:49 AM), the jury requested "the poster board exhibits that

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[103] Fox correctly depicted the "improper matter" presented in the three poster boards as "conclusionary statements as to the facts of the case" created by the prosecutor in the form of a "time line" to support his argument for the death penalty, including inflammatory, "colored and highlighted facts," and "circled" portions of Louis Peoples's pretrial statements to police. The purpose of the argumentative and emphasized "facts" was solely to aggravate the circumstances of the crime, and Fox argued the only "proper vehicle" to respond to the jury would have been a read back of requested testimony, not admission of the prosecutor's argumentative "time lines" enlarged on charts to illustrate his theories of premeditation and deliberation. (RT 97: 20532-33.)

[104] Judge Platt told jurors again that he felt "obligated" to "move along discussions," advising, "[I]t is absolutely critical that you limit the use of these boards and anything that was not evidence only as an aid to assist you in your recollection of your ... discussion of what the evidence was that was presented." (RT 97: 20531: 7;12-18.) As discussed following, however, the purpose of arguments of counsel is not to "assist" jurors in the "recollection" of evidence presented but are permitted for whatever persuasive effect they may have. (See, *People v. Gordon, infra*, 50 Cal.3d at p. 1259; see also, CALJIC 1.02; CT 3220.)

the defense used in final arguments explaining the mitigating vs aggrivating [sic] factor." (CT 12: 3205.) The court and counsel discussed various possibilities because of the number of poster boards Fox had used during argument, and the court asked for clarification from the jury. (RT 97: 20536-20540.) At 11:11 AM, the jury clarified what it wanted in a note requesting charts used by defense counsel in his closing argument, "explaining the mitigating vs. aggrivating [sic] factor," and "that basicly [sic] stated: 'While wieghing [sic] aggrivating [sic] vs. mitigating ..... You may ... You may ... You may ... You must ..." (CT 12: 3204-05; RT 97: 20546-47.) As discussed in more detail in section C, the prosecutor objected on the grounds the charts were argumentative, and the jury had been properly instructed, but conceded that the Court had informed the jury "they can have it all." (RT 97: 20547: 3.)

After the court duplicated four CALJIC instructions that defense counsel had enlarged, defense counsel continued to object to "all of this evidence [sic] going back" to jurors. (RT 97: 20540-20550.) Judge Platt allowed four CALJIC instructions enlarged on defense poster boards, but refused to allow counsel's other board because "it is Mr. Fox's argument about what the law allows, depending upon what they find the various factors to be," finding that "significantly different than what has been allowed ... that related to evidence that would assist them in their discussions about whether or not they recall those facts being proven." (RT 97: 20547: 7-17; CT 12: 3202 [Exhibits RRR; SSSS; TTTT; UUUU - admitted; VVVV-excluded].) The chart used by defense counsel

in argument to the jury paraphrased defense Proposed Penalty Phase Instruction No. 27, which the court rejected as argumentative because it proposed special verdicts, not required by law. (RT 92: 19467-19470; see *Argument XVI, post.*) The chart (Exhibit VVVV) used by defense counsel in argument to the jury read as follows:

" MUST vote life if mitigation outweighs aggravation

MUST vote life is [sic] mitigation and aggravation are equal

MUST vote life if aggravation outweighs mitigation, but not substantially

MUST vote life if aggravation outweighs mitigation, but you believe death penalty not appropriate

MUST vote death if aggravation substantially outweighs mitigation and you believe death is appropriate."

According to Judge Platt, jurors could not reconsider the requested defense poster board (VVVV) during deliberations because it was "no more than an argument, and that Mr. Fox has analyzed ..., *not an incorrect statement of law* ... [but] it's in your [CALJIC] instructions that tells [sic] you about your weighing and balancing, what you may or can or cannot do." (RT 97: 20554: 19-23; emphasis added.)

Defense counsel immediately moved for a mistrial on the grounds the court's "bizarre" rulings that allowed the prosecution's boards "stating argumentative positions about what the facts were ..." into the jury room, while excluding defense statements

accurately reflecting the law "as to how to weigh and balance," violated appellant's enumerated federal and state constitutional rights. (RT 97: 20555: 18-20; 20556.) Evading defense counsel's articulated constitutional grounds for mistrial, including any "unreliable" death verdict that might occur, Judge Platt denied the motion for mistrial because his rulings were "not bizarre alone" and "being bizarre is not a legal basis for a mistrial." (RT 97: 20556.)[105]

The jury recessed without a verdict on June 1. Judge Platt excused the jury to Monday, June 5, scheduling jurors to return to court for two hours for deliberations on Monday, and then four hours for Tuesday, June 6, with June 7-9 off: "I know we talked about the end of June [so t]hat still gives a lot of time for you to be able to deliberate or talk about it." (RT 97: 20557; CT 12: 3202.) On June 5, after two and one-half hours of deliberations, the jury recessed for the day without reaching a verdict. (CT 12: 3213; RT 97: 20561-65.)

On June 6, 2000, the jury returned in the morning, and deliberated all day. At 3:40 PM, they announced a verdict. After more than 12 court days and 33 hours in

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[105] Notwithstanding Judge Platt's ire – including a threat to "take you into custody" (RT 75: 15610: 1) – when counsel attempted to enumerate each federal and state constitutional ground at issue during objection and argument, and the trial court's willingness to concede each and every possible "continuing" constitutional basis for objection throughout trial in order to avoid time consuming objections (see, e.g., RT 31: 6316-17; 32: 6494-96; 75: 15600-601; 15609-15610), Fox articulated each basis for his objections and motion for mistrial. (RT 97: 20556.)

deliberations, the jury returned a death verdict. (CT 13: 3348-3350; RT 96: 20566-20577; see also, RT 96: 20629.)[106]

B. The Trial Court Committed Prejudicial Error by Allowing Prosecution Charts Used in Closing Arguments into Jury Deliberations.

Judge Platt's ruling granting the jury's request for the prosecutor's argumentative charts are part of the overall pattern of judicial prejudice against appellant and his attorneys, as described in *Arguments I-III*, and incorporated here as such. Over objection and motion for mistrial the court erroneously allowed the jury to consider during deliberations the visual aids prepared by the prosecutor in his argument during the retrial of the penalty phase, admitting irrelevant material against appellant that does not constitute evidence in violation of his previously enumerated federal and state constitutional and statutory rights. The prejudicial error is exacerbated by the timing – after jurors had declared they were deadlocked and had not been polled – and by the fact

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[106] Defense counsel filed a *Motion for New Trial*, in part based upon judicial misconduct, including allegations of improper judicial intervention, erroneous instructions, and improper inclusion of argumentative charts during the penalty phase. The motion was also accompanied by post-verdict interviews with six jurors, and alleged jury misconduct during penalty phase deliberations. (CT 13: 3379-3411; *Argument XVII, post*; Penal Code §§ 1179-1181; *People v. Nessler* (1997) 16 Cal.4th 561.) In as much as appellant challenges the denial of his fundamental constitutional rights in the penalty phase deliberations based upon judicial misconduct, and did so in his motion for new trial, the trial court's denial of the motion for new trial on these grounds should be reviewed *de novo*. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262; CT 13: 3453; RT 97: 20610-20663.)

that the trial court refused to allow a defense chart into deliberations after permitting jurors to consider the prosecutor's charts and advising jurors it would allow all visual aids used by either counsel in argument. The rulings at issue here demonstrate reversible errors of law, as well as manifest – "bizarre" – prejudice against appellant and his attorneys, and on these grounds alone the death verdict should be reversed. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1258-1260 [overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835]; *People v. Pride, supra*, 3 Cal.4th at pp. 264-266; RT 97: 20556.)

First, in both *People v. Gordon, supra,* 54 Cal.3d 787 and *People v. Pride, supra*, 3 Cal.4th 195 trial courts rejected jury requests for readback or transcripts of closing arguments of defense counsel – *Pride* in the penalty phase; *Gordon* in the guilt phase. In both capital cases, this Court noted that the trial court must satisfy jury requests for rereading *testimony* under Penal Code section 1138, but the "statutory provision has evidently never been interpreted in a reported decision to cover statements or arguments of counsel ... [because t]he Legislature's words include only evidence and law." (*People v. Gordon, supra*, 50 Cal. 3d at pp. 1259-1260.)[107] As this Court said in *In re Zeth S.*

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[107] Section 1138 states, "After the jury have retired for deliberation, if there be any disagreement between them as to testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

(2003) 31 Cal.4th 396, 414, fn.6:

> " It is axiomatic that the unsworn statements of counsel are not evidence. (See, e.g., *In re Heather H.* (1988) 200 Cal. App.3d 91, 95 [246] Cal.Rptr. 38 ['unsworn testimony does not constitute 'evidence' within the meaning of the Evidence Code']; *People v. Lee* (1985) 164 Cal.App.3d 830, 841 [210 Cal.Rptr. 799] [same]; *People v. Superior Court (Crook)* (1978) 83 Cal.App.3d 335, 341 [147 Cal.Rptr. 856 [147 Cal.Rptr. 856] [statements by counsel are not evidence]; see also Rules Prof. Conduct, rule 5-200(e) [attorneys must not 'assert personal knowledge of the facts at issue, except when testifying as a witness.'].)"
>
> (See also, *People v. Kiney* (2007) 151 Cal.App.4th 807, 815.)

Nevertheless, in *People v. Gordon, supra,* 50 Cal.3d at p. 1260, in ruling on the trial court's denial of the jury's request for either a rereading or a copy of the 120-page transcript of counsel's closing argument, this Court stated that "a trial court's inherent authority regarding the performance of its functions included the power to order argument by counsel to be reread to the jury or to be furnished to that body in written form." (See also, *People v. Pride, supra*, 3 Cal.4th at p. 266.) While recognizing the standard on review is one of deference to the trial court for some discretionary rulings, even the exercise of discretion is not without limitations. (*People v. Superior Court (Romero)* 13

Cal.4th 497, 530-531; *People v. Carmony* (2004) 33 Cal.4th 367; *People v. Wallace* (2004) 33 Cal.4th 738.) Moreover, in a capital case, in order to afford meaningful review and due process as required by federal and state constitutional provisions enumerated above, the trial court's decision permitting the argumentative charts of the prosecutor, exacerbated by misleadingly advising the jury it could consider the argumentative aids of the prosecutor to refresh recollection of evidence, and by denying the jury's request for defense charts, were arbitrary and capricious decisions and cannot withstand "heightened scrutiny" on appellate review of the death sentence at issue. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454; *People v. Smallwood* (1986) 42 Cal.3d 415, 430-431.) Indeed, as discussed following, the trial court's decision to permit the prosecutor's argumentative *visual aids* as devices to refresh recollection on admitted evidence to "move" jurors along in their "discussions" was not within the court's discretion, but was clearly erroneous. As the trial correctly advised jurors in *People v. Gordon, supra,* 50 Cal.3d at p. 1259, the statements of counsel are not evidence, but "'may be consider[ed] for whatever persuasive effect they may have.'"

In the present case, the prosecutor conceded that the "time line" used in his charts during opening and closing "arguments" in the retrial of the penalty phase focused on "specific elements of intent and, I think, aggravation, as well as premeditation and deliberation," so there was no question legal concepts were intertwined with his

argumentative interpretation of the *circumstances of the crime* under Penal Code 190.3. (RT 97: 20527: 19-26.) Defense counsel objected to allowing the jury to consider the "improper" legal argument presented in the guise of "conclusionary statements as to the facts of the case," including, inflammatory "highlighted," and "circled" areas alleged to be factor (a) aggravation. (RT 97: 20532-33.)

On other hand, when the jury requested defense counsel's chart on the weighing of mitigating and aggravating circumstances, the court made an arbitrary distinction between "legal" and "factual" arguments. Both offending charts were "argument," plain and simple. The trial court manipulated the issue to rationalize introduction of prosecution charts and its exclusion of defense charts. This manifest abuse of discretion is particularly egregious in the context in which the trial court allowed the prosecutor's argumentative chart to enter deliberations initially, i.e., on June 1, 2000, almost immediately after the jury had declared "impasse" (May 30), and had been informed by the trial court the previous 21 hours of deliberations amounted to "a drop in the bucket." (RT 20512: 3-4; 10-11; CT 12: 3206; RT 97: 20525.) Once the trial court allowed the prosecutor's charts into the jury's deliberations, the jury no doubt inferred a preference for the death penalty by the court. It slanted the charts in favor of the core presentation of the prosecutor for imposition of capital punishment, while refusing to honor the jury's request for guidance from defense counsel's charts in favor of a life verdict.

By contrast, in *Pride* and *Gordon*, upon review of the denial of the requests for

rereading of defense counsel's arguments, this Court approved the caution exercised by the trial courts on the ground that in Pride's case, "as in *Gordon*, the court expressed appropriate concern over diverting the jury's attention from proper consideration of the evidence and instructions." (*People v. Pride, supra,* 3 Cal. 4th at p. 266.) Here, Judge Platt diverted attention away from evidence and instructions at a time he characterized as "very critical" in deliberations. (RT 96: 20520: 25.) As discussed in section C following, Judge Platt's failure – and refusal when prompted by defense counsel – to inquire of jurors who declared an impasse after six votes whether additional deliberations would be productive, compounds the abuse of discretion here. (RT 96: 20503-20505.) At least in *Pride*, the trial court had conducted the proper inquiry *before* ordering jurors to resume deliberations. (*People v. Pride, supra*, 3 Cal.4th at pp. 265-266.)

In point of fact, the trial court agreed with the prosecutor that his charts were nothing more than argument, and, over objection and motion for mistrial (RT 97: 20531-20534), instructed the jury upon submission of the charts:

> " But it is absolutely critical that you understand they are not in evidence. It is not to be considered as evidence. It can be used to assist you in your discussion about the time line and the events as they were argued to have occurred. That is the only purpose for which they can be used.
>
> They are to assist you in your discussion of the evidence and

the evidence that was received. They are not in evidence in any fashion. They are not."

(RT 97: 20530: 21-28 - 20531: 1-2.)

As pointed out above, however, the court did not stop there:

" The other issue – and I'll raise it now, because I could anticipate that potentially coming – is if you have any other items that were used in argument by either the defense or the prosecution that would assist you in your discussions, I feel obligated to tell you that I will allow those. But I need to know what they are.

So if there are other things that you wish that will assist you in your discussion, let me know; and I'll get those coordinated by both counsel and provided back to you.

I think its my obligation at this point to assist you, if you can, in moving along in deliberations."

(RT 97: 20531: 3-13.)

Now, having admitted the prosecutor's three argumentative charts into the jury room, the court reneged on its promise to the jury. When the jury requested defense counsel's chart "explaining the mitigating vs. aggrivating [sic] factor," and "that basicly [sic] stated: 'While wieghing [sic] aggrivating [sic] vs. mitigating ..... You may ... You

may ... You may ... You must ..." (CT 12: 3204-05; RT 97: 20546-47), the court denied the request. Less than an hour after advising jurors he would allow "*any* other *items* that were *used in argument* by *either* the defense or the prosecution that would *assist you in your discussions*," Judge Platt backpedaled on his word to the jury, compounding the abuse of discretion by focusing attention on *the* key argumentative charts of the prosecutor for the jury's consideration, while minimizing critical defense charts and denying use by jurors in "your discussions." (RT 97: 20531: 4-7.)

Indeed, outside the presence of the jury, Dunlap initially objected to the requested defense chart as "argument," but conceded the court had indicated it was "going to allow it," admitted the court "went to great lengths to tell the jury they can have it all," and, therefore, "I don't see how we can stop it now." (RT 97: 20547: 1-4.) As might be expected, however, with a typical lead from Judge Platt, Dunlap exploited the abuse to his advantage. (See *Argument V, post.*)

Judge Platt opined the jury's request for the defense chart was "significantly different" because the "other things [prosecutor's charts] that have been referenced all have been things that related to evidence ...." (RT 97: 20547: 10-15.) In short, even though the defense chart was clearly an "item" requested and "used" by one of the trial attorneys in argument that could have assisted the jury "in [their] discussions" (RT 97: 20531: 4-7), and "not an incorrect statement of the law," Judge Platt rationalized his decision to deny the jury's request for the chart as "pure" argument. (RT 97: 20547: 18-

19.) With that guide from the Court, the prosecutor stretched to keep the chart from the jury, despite his earlier concession that the Court "went to great lengths to tell the jury they can have it all." (RT 97: 20547: 3-4.) He now argued that he had objected to the chart before Fox's closing argument, and "I think this Court needs to tell the jury that Mr. Fox's interpretation of mitigation is not the law." (RT 97: 20548: 16-18.) The court disagreed with the prosecutor (RT 97: 20548), and Fox outlined "the true statement of the law," as depicted in the charts requested by the jury:

> " 'You must vote for life if mitigation outweighs aggravation.'
>
> There's not a doubt about that. That's true. That's the law. You must. If they voted the other way if mitigation outweighed aggravation, it would be a breach of their oath as a juror. The law says 'you must.'
>
> And the same,
>
> 'You must vote life if mitigation and aggravation are equal.'
>
> 'You must vote life if aggravation outweighs mitigation, but not substantially.'
>
> 'You must vote life if aggravation substantially outweighs mitigation, but you believe death is not the appropriate punishment.'
>
> Finally, the last option, 'may vote death.' Which is completely accurate. Completely the law.

'There is never a mandatory vote for death, even if the aggravation substantially outweighs mitigation, and you believe death is inappropriate.'"

(RT 20548: 25-28 - 20549: 1-14; internal quotes added.)

Despite Judge Platt's previous declaration he felt "obligated" to allow "*any* other items that were used in argument by either the defense or the prosecution that *would assist you* in your discussions," at this "critical stage" of jury deliberations (RT 97: 20531: 4-7), he now claimed he did "not mean the flood gates are open and there is no check on now what goes back before the jury ...," and to "argue that that should be the case is falling on deaf ears." (RT 97: 14-17.) Notwithstanding the reintroduction of the prosecutor's highlighted "time line," grounded in the legal concepts of "premeditation," "deliberation," and "intent to kill" emphasized as "circumstances in aggravation" to advocate for the death penalty, and the court's stated promise to jurors it would allow "any other items that were used in argument by either the defense or the prosecution that would assist you in your discussions" (RT 97: 20531), it irrationally discerned defense charts as "not comment or argument about evidence presented ..., [and] places improper significance to counsel's arguments and ... I think this is an inappropriate fashion to tell them how to decide the ultimate issue." (RT 97: 20552: 3-10.)[108]

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[108] Again, it is worth noting, the trial court overruled the prosecutor's objection to use of the charts in argument. (RT 97: 20547-48; 94: 19983-87.) The charts were used during Fox's closing argument in the penalty phase. (RT 96: 20400-20402; see, RT 60: 12219-20.)

After informing the jury that the above request for defense charts had presented legal concepts illustrated in the charts "backwards," the court then informed the jury it would not allow the charts to be received to facilitate further discussion:

> " I've allowed other things to be sent back because hopefully they will be able to prompt discussion about the [prosecutor's version of] facts, the [aggravating] circumstances, and what you ultimately weigh and consider.
>
> But this last [mitigation] board is no more than an argument, and that Mr. Fox has analyzed as. And it's not an incorrect statement of the law. It is a correct statement of the law. And it's in your instructions that tells you about your weighing and balancing, what you may or can or cannot do.
>
> So with that limitation, that is much more getting away from the area of providing you material by which you can discuss the facts and circumstances to arrive at an ultimate issue ... That was argument. You've heard it. You can consider it based on what you had and you recall. But it's not going back as an exhibit now for you to have back there. " (RT 97: 20554: 9-28 - 20555: 1-3.)

Accordingly, each of the trial court's rulings demonstrate abuse of judicial power, manifest prejudice against appellant, in violation of his previously enumerated constitutional and statutory rights, and each cannot be considered harmless error beyond a

reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4rth 1229, 1264, fn. 11.) After more than one week of deliberations, and juror representations of six votes leading to impasse, Judge Platt failed and refused to inquire whether further deliberations would be fruitful, as he had with jurors in the guilt phase. In addition, the court erroneously reread guilt phase instructions *sua sponte*, and misleadingly informed jurors, "I have no position other than to move you along ... with the applicable law so that you may arrive at a just and lawful verdict.'" (RT 96: 20507: 14-17.) When the court overruled defense counsel's objections and denied the motion for mistrial as to the introduction of aids used by the prosecutor during his closing argument in the penalty phase, the court misleadingly advised the jury that "*any other items* that were used in argument by *either* the defense or the prosecution that would assist you in your discussions, I feel obligated to tell you that I will allow those ... [because] I think its my obligation at this point to assist you, if you can, in moving along in deliberations." (RT 97: 20531: 3-13.) Finally, the court allowed the prosecutor's argumentative aids, and with the foregoing statement made in open court to jurors, the prosecutor conceded – initially anyway – "the great lengths" the court had gone to inform jurors "they could have it all" meant in logic and fairness: "I don't see how we can stop it now." (RT 97: 20547: 1-4.) The trial court's attempt to distinguish one "argument" from another, based upon a *post hoc* conflation of "facts" and "circumstances," was facile in context, and it belied the impression the court was acting in an even-handed manner in its so-called "obligation" to assist the jury "in moving along in deliberations." (RT 97: 20531: 12-13.)

With an exhausted jury, informed by the court they must continue deliberating, the court's signal to the jury in favor of death could not have been clearer; indeed, it is reasonable to believe that if the jury had received the requested defense chart they may have voted for life.

In point of fact, the trial court acted in an arbitrary and capricious manner throughout the trial to "get this case done" in the manner it deemed "done," i.e., to avoid a hung jury in the retrial, as is demonstrated by the record of misconduct, bias against appellant and his attorneys, and abuse of judicial power.[109]

C. Failure to Inquire and Improper Instructions to the Jury During Deliberations

1. Failure to Inquire of "Reasonable Probability" that Further Deliberations Might Resolve Differences Followed By Coercive Remarks

The trial court's reaction on being informed by the foreperson the jury was at "impasse" was not only predetermined but improper, and in the particular circumstances of this case, its orders and admonitions resulted in coercion of the death verdict at issue. (*People v. Pride, supra,* 3 Cal.4th at p. 265*; People v. Breaux* (1991) 1 Cal.4th 281, 319-320; *People v. Sheldon* (1989) 48 Cal.3d 935, 959-960; *People v. Rodriguez* (1986) 42

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[109] As pointed out in *Argument III, ante*, pp. 157-161, Judge Platt's decision under 190.4, subdivision (e), declaring "the *overwhelming* weight of the evidence supports the jury's verdict of death" despite the first jury's 8-4 split in favor of a life term, and the second jury's 9-to-3 impasse after 20 hours of deliberations and six votes, demonstrates a prejudiced judicial officer determined to preserve a deeply flawed death judgment. (RT 97: 20670: 21-22; emphasis added.)

Cal.3d 730, 775-776.) When a jury returns from deliberations and informs the court it seeks additional instruction because it has reached impasse, before the court can exercise discretion to order further deliberations, it has a duty to determine whether there is a "reasonable probability" further deliberations would prove useful in resolving differences, and the means to do so is by inquiry of the jurors themselves. (*People v. Miller* (1990) 50 Cal.3d 954, 994; *People v. Pride, supra*, 1 Cal.4th at pp. 265-266.) As pointed above, this was precisely what Judge Platt had done in the guilt phase of trial. (RT 49: 10225-10240.)

The Court in *People v. Miller, supra,* 50 Cal.3d at p. 994, in citing section 1140,[110] recognized that after eight days of deliberations "the [trial] court's inquiry as to whether there was 'a reasonable probability'" jurors might reach a verdict "was not itself coercive," but "authorized" and foundational to the discretionary decision to order continued deliberations. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 775.) The evolution of judicial discretion in ordering deliberations to continue rests upon a sound substructure, and without a preliminary inquiry of jurors, meaningful determination – and review – of "reasonable probability" is impossible. (*People v. Talkington* (1935) 8 Cal.2d 75, 85; *People v. Carter* (1968) 68 Cal.2d 810, 816-820; see also, *People v. Smallwood,*

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110 " Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

supra, 42 Cal.3d at pp. 430-431; *Godfrey v. Georgia, supra*, 446 U.S. at p. 428.)

Nor does *People v. Pride, supra,* 1 Cal.4th at p. 266, cited by the prosecutor (CT 13: 3415), support Judge Platt's decision to order the jury to "roll up their sleeves," and continue deliberations after May 30, without an inquiry first; in *Pride* the trial judge determined the split in the votes first, and then properly polled the jury: "Two jurors told the court they believed a verdict might be reached, and no juror said unanimous agreement was impossible."

Similarly, in *People v. Breaux, supra,* 1 Cal.4th at p. 319, where the jury had deliberated in the penalty phase for approximately six hours during one and one-half court days before declaring impasse, this Court agreed with the trial court that "the jury had deliberated for a relatively short period of time in relation to the complexity of the charges and the nature of the evidence that was present." But at the first declaration of impasse, the trial court conducted the proper inquiry, and three jurors indicated that further deliberations might lead to a resolution of differences. A second impasse was declared within two hours, and, upon further inquiry, the jury revealed the split (10-2). (*Id.*, at ftn. 15.) Even in *Breaux*, however, the trial court conducted a second inquiry of jurors, who reported there was an "extremely slight chance," or they did not "believe" further deliberations would be productive, *before* ordering further deliberations. (*Ibid.*)[111]

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[111] The *Breaux* Court cited *People v. Rodriguez, supra,* 42 Cal.3d at pp. 775-776, as an anomalous case; at each of four stages of impasse, the trial court apparently directed additional testimony be read back to the jury without an inquiry.

The danger of failing to conduct an inquiry of jurors who have declared impasse is that an eventual verdict will be the product of judicial coercion, even in the subtle form of minority jurors's acquiescence to pressure from the majority, and not the result of independent judgment:

> " The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (*People v. Carter* (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353].)"
>
> (*People v. Breaux, supra*, 1 Cal.4th at 319.)

In the present case, Judge Platt not only failed to inquire on his own, but he rejected defense counsel's suggestion for an inquiry. (RT 96: 20504-20513.) As pointed out above, the court had already informed counsel after the jury had been deliberating for several days (May 25), "We told them the end of June was the anticipated date ..., [s]o I don't anticipate, whether or not they have issues, addressing potential hung jury issues *until the end of June*." (RT 96: 20495: 11-15; emphasis added.) Having prejudged any "potential hung jury issue," and without actual inquiry on May 30, the court improperly charged the jury at the declaration of the nine-to-three impasse over 20 hours of deliberations and six votes: "[U]ntil *I decide* that further deliberations are of no avail, then *I'll have you continue to roll up your sleeves and go to work* the best you can." (RT

97: 20508; emphasis added.)[112]

Indeed, even after nearly eight days and 21 hours of deliberations, six votes, and despite an eight-to-four deadlocked jury – for life imprisonment – in the first trial after the same amount of time, and the precedent of Judge Delucchi's proper inquiry of jurors under section 1140 during the first trial, Judge Platt essentially ridiculed the minority jurors's deliberations as "a drop in the bucket." (RT 96: 20508.) Instead of proceeding with caution, and without any feedback from jurors as to the "reasonable probability" further deliberations would be useful to resolve differences under applicable legal precedent, the judge reread guilt-phase instructions *sua sponte* which did nothing to guide jurors in their attempt to reach a verdict on the moral determination of appropriate punishment in the case at hand.[113]

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[112] Judge Platt used his personal mantra to chastize jurors: "Roll up your sleeves and go back to work." (RT 96: 20508.) As will be recalled from *Arguments II-III, ante*, he repeatedly said phrases such as "roll up your sleeves" (RT 52: 10819-10820; 96: 20499), "[This case] is going to be done (RT 61: 12427),"and "I don't care if it meant not eating, not sleeping, not taking a shit"(RT 46: 9524), hardly expressions of judicial circumspection. They are reflections of Judge Platt's unruly temperament.

[113] In *People v. Sheldon, supra*, 48 Cal.3d at p. 960, this Court upheld the trial court's determination that it was reasonably probable the jury would reach a verdict if it reread the *penalty phase* instructions to the jury, which had been made after a serious inquiry of the jurors, several of whom specifically stated that they thought further instructions might lead to a verdict, and after the jury had only taken one vote. Here, as noted, the judge merely read *guilt phase* instructions without an appropriate inquiry, after the lengthy deliberation and multiple vote counts described above. Further, in *Lowenfield v. Phelps* (1988) 484 U.S. 231, 240, cited by *Sheldon,* defense counsel did not object to supplemental instruction, and

Accordingly, in the circumstances of this case, the trial court's failure and refusal to inquire of the "reasonable probability" a verdict could be reached on May 30, 2000, violated appellant's enumerated federal and state constitutional and statutory rights, and the failure to inquire is prejudicial error given the length of deliberations, the number of votes, and the vote split, and the death verdict should be reversed. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4rth 1229, 1264, fn. 11.)

Moreover, coupled with the trial court's derogatory remarks directed at minority jurors ("drop in a bucket ... roll up your sleeves"), rereading of guilt-phase instructions, and its unfounded assumption there was movement or "momentum" (RT 96: 20520) towards a verdict on May 31, the threat to hold jurors another 30 days – end of June – despite previously scheduled family events, was based upon a predetermined 'calendar' strategy, and not upon application of established law, adding additional prejudice to the arbitrary and capricious nature of the court's rulings. (*People v. Carter, supra*, 68 Cal.2d at p. 817 [reversible error to place excessive pressure on jurors to reach verdict, rather than no verdict at all.])[114]

"such an omission indicates that the potential for coercion argued now was not apparent to one on the spot," a critical procedural distinction. The trial court here not only read general guilt-phase instructions *sua sponte* without previewing his intent with counsel, but Fox vigorously objected and moved for mistrial as soon as the jury was excused to continue deliberations.

[114] As pointed out above, the court communicated its predetermined strategy during the first week of deliberations (May 25), informing counsel when jurors requested to break early for the Memorial Day weekend: "We told them the end of June was the anticipated date ..., *[s]o I don't anticipate,*

2. Improper 'Allen Charges' Coerced the Verdict

As pointed out in the landmark decision, *People v. Gainer* (1977) 19 Cal.3d 835, this Court rejected *Allen v. United States* (1893) 150 U.S. 551 [murder conviction affirmed], and reversed Gainer's murder conviction after an exhaustive discussion of the history and controversy surrounding so-called "Allen charges" to a deadlocked jury, the applicability of state law to jury deliberations, and condemned "dynamite" instructions to minority jurors at impasse "as a means of 'blasting' a verdict out of a deadlocked jury ..." (*Id.*, at p. 844.) In point of fact, "[t]he first and most questionable feature [of the *Allen* or 'dynamite' charge] is the discriminatory admonition directed to minority jurors to rethinking their position in light of the majority views." (*Id.*, at p. 845.)

In the present case, in addition to improperly ordering jurors to "roll up your sleeves and go to work," reinforcing the idea that the three minority jurors's twenty-one

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whether or not they have issues, addressing potential hung jury issues until the end of June." (RT 96: 20495: 11-15; emphasis added.) When advising jurors on May 31 they must be entering "critical stages" of deliberations, and prior commitments to family might not be honored, jurors were informed they must try to make other arrangements in June, holding the entire month over their heads to reach a unanimous verdict. Judge Platt never intended to inquire whether further deliberations held the potential for conflict resolution, but reiterated to counsel on May 30, after declaration of impasse, the arbitrary nature of his decision to order further deliberations – the pressure of time: "We are well within the time range ..., [a]nd if they talk until the end of June and don't come back with a verdict, and we start losing jurors, then I have to look at another issue, [but i]f they decide before then that they cannot and will not come back with a verdict, then I have to decide before the end of June." (RT 96: 20506: 1-8.)

hours of deliberations and six votes had been a worthless "drop in the bucket," the trial court directly intervened in the deliberative process "by displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (Citation omitted.)" (*People v. Breaux, supra*, 1 Cal.4th at 319.) The trial court informed jurors before it would consider an impasse valid they should consider the following "suggestion" as they "continue to roll up your sleeves and go to work" again:

> " One of the ways that I would suggest you do it – and it is merely a suggestion. Because obviously now there have been some positions taken. During the discussions that you have in the next few days, *if you take the other side's position, advocate it as if it were yours, see whether or not that changes your own thoughts about your position.*
>
> Discuss it again with the other jurors. *Do that talking, do that deliberating.* And *then* we'll see where we are."
>
> (RT 96: 20508: 2-18; emphasis added.)

In *People v. Gainer, supra*, 19 Cal.3d at p. 849, this Court noted that the "devastating effect" of coercion by "acquiescence" on the independent judgment and the right to trial by jury under California Constitution, art. I, §16, is well established by precedent, "otherwise it [*Allen* charge] would not have been considered efficacious enough to defend through the years despite its obvious flaws." In the final analysis, the "*Allen*-type charge" injects "extraneous and improper considerations into the jury's

debates ... [and] it is error for a trial court to give an instruction ... [that] encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on issues before them ..." (*Id.*, at p. 852.)

In point of fact, in the *Gainer* case the trial court had instructed jurors at impasse, "'[The *Allen* charge] is given to you as a *suggestion* of the theory and rationale behind jurors coming to a decision one way or another.'" (*Id.*, at p. 841; emphasis added.) The offending "suggestion" implies minority jurors should "'seriously ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment ... which fails to carry conviction to the mind of their fellows,'" and it is virtually indistinguishable from what was done by the trial court in this case. (*Ibid.*) As the *Gainer* Court explained: "It matters little that the judge does not know the identity of the particular dissenters; their fellow jurors know, and the danger immediately arises that 'the Allen charge can compound the inevitable pressure to agree felt by minority jurors.' (*People v. Smith* (1974) 38 Cal.App.3d 401, 406 [113 Cal.Rptr. 409].)" (*Id.*, at p. 850.)

For at least three jurors on May 30, the trial court's declaration, "I'm sure that [20 hours] appears to be a considerable amount of time [to you]," followed by the denigrating remark, "it is a drop in the bucket," and order to "roll up your sleeves and go back to work," are coercive remarks that set the stage for the "dynamite charge." (RT 96: 20502: 17-20.) The "suggestion" immediately following is a *de facto* admonition to the minority jurors to eschew their moral determination of an individualized punishment by "*tak[ing] the other side's position* [in favor of the death penalty], *advocate it* [the death penalty] *as*

if it were yours, see whether or not that changes your own thoughts about your position [in favor of life in prison without parole]." (Emphasis added.) The "suggestion" to role play completely undermines the general instruction given "that you are not partisans or advocates ... [but] impartial judges of the facts." (CALJIC 17.41; CT 12: 3271.) More importantly, the suggestion from the trial court to take on the role of an adversary sabotages minority jurors's individualized moral determination repeatedly emphasized in law – and this case – for a constitutionally reliable punishment decision by "'displac[ing] the jury's independent judgment 'in favor of considerations of compromise and expediency.' (Citations omitted.) (*People v. Miller, supra,* 50 Cal.3d at p. 994; *People v. Breaux, supra*, 1 Cal.4th at p. 319; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-604.)[115]

Indeed, the trial court's instruction in *Gainer* on how jurors should deliberate resulted in the reversal and the rejection of the "*Allen* charge," and it was deemed a "miscarriage of justice" within the meaning of the California Constitution, article VI,

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[115] Shortly before closing arguments in the penalty phase, the trial court summarized its view during a belated conference on an instruction in the penalty phase, informing defense counsel, "you have [CALJIC] 8.84.1, 8.84, 8.88, the defense proffered instruction that the Court has given number two, 17.40 and 17.41 that all in various fashions address this particular issue about individualized opinions, moral determinations, deciding the appropriate punishment ... hammered home and discussed with each juror during voir dire, [a]nd they understood their duty and their obligation ... [so] the only issue here for them to decide is the appropriate punishment for this particular defendant, based on these particular offenses and their own individual moral and personal opinion of the appropriateness of that penalty." (RT 96: 20283: 19-26 - 20284: 1-3; see RT 96: 20399-20404; 20408-20413 [defense counsel's closing argument]; CT 12: 3264)

section 13. (*People v. Gainer, supra*, 19 Cal.3d at 855.) Similar instructions in non-capital trials have met with mixed results, but this Court has not addressed the "reverse role-playing" scheme used in the penalty phase of a capital murder case where life and death are at issue.[116] The trial court here was attempting to "blast" a verdict from a jury that had deliberated for more than twenty hours, taken multiple votes over eight days, split 9 to 3, and it is reasonably probable a more favorable outcome – including no verdict at all – would have occurred in the absence of the supplemental "coercive" instruction. For the foregoing reasons, the court's instruction should be condemned, and the death verdict reversed on this separate ground. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4rth 1229, 1264, fn. 11.)

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[116] In *People v. Whaley* (2007) 152 Cal.App.4th 968, the court held the appeal was moot but decided to address the trial's "suggestion" of "reverse role playing,"relying on *People v. Moore* (2002) 96 Cal.App.4th 1105. The majority did not find the "suggestion" offensive in *Whaley*, but the concurring opinion of McAdams, J., rejected it and wrote, "I disagree with the view that such statements cannot be found to be unduly coercive because they are mere 'suggestions' made by the court. These comments are more than friendly and helpful advice. The trial judge is seen by the jury as the central courtroom authority figure, the unbiased source of the law and the same person who previously instructed them in CALCRIM No. 200 that '[y]ou must follow the law as I explain it to you, even if you disagree with it.' Thus the need for utmost caution." (Id., at p. 985; see also, *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976.) In *United States v. Williams, supra,* 547 F.3d at pp. 1202-1204, the court reversed a "coerced" verdict obtained after the jury deliberated only one day when one juror declared her disagreement with all others; the trial court did not poll jurors but reiterated standard instructions as a "supplement" to the originals and then advised jurors, "[T]reat each other with respect ..., [and] talk about the your views about the evidence of the case, and then we'll see what happens from there." The jury returned a guilty verdict later the same day.

D. Cumulative Effect of Errors and Coercive Acts

Although the individual errors alleged require reversal, the cumulative effect of the trial court's errors during jury deliberations was even greater, coercing the death verdict at issue, and resulting in violations of appellant's previously enumerated federal and state constitutional and statutory rights referred to at the outset of this argument. These include: 1) failing and refusing to comply with state-created law designed to poll jurors to determine whether there was a "reasonable probability" a verdict could be reached with further deliberations when they had declared impasse after more than twenty hours and nearly eight days; 2) implying jurors would remain in deliberations for another month or until they reached a verdict; 3) demeaning minority jurors's efforts as little more than "a drop in the bucket;" 4) chastising minority jurors to "roll up your sleeves and go back to work;" 5) improperly instructing minority jurors to reverse role-play and relinquish the moral judgment they had reached; 6) overruling defense objections and allowing the prosecutor's visual aids used in penalty phase argument, erroneously instructing jurors "its my obligation at this point to assist you, if you can, in moving along in deliberations" (RT 97: 20531: 3-13) by consider the charts as aids in the "discussion" of "evidence;" 7) misleadingly advising jurors "any item" of either party used in argument would be allowed, but then excluding defense charts requested by the jury during deliberations on the ground they were "pure" argument; and 8) refusing to recognizing the jury was deadlocked and grant a mistrial. For the foregoing reasons, the death judgment must be set aside. (See also, *Argument XIX, post*, at pp. 596-597.)

V.

APPELLANT WAS DENIED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS DUE TO PROSECUTORIAL MISCONDUCT COMMITTED DURING HIS TRIALS, INCLUDING BUT NOT LIMITED TO IMPROPER EXPRESSION OF PERSONAL OPINION, BAD FAITH QUESTIONS TO WITNESSES, INFLAMMATORY ARGUMENT, DEROGATORY COMMENT DIRECTED AT DEFENSE COUNSEL, MISLEADING COURT AND JURIES, AND REFUSING TO ABIDE BY JUDICIAL ORDERS; DEFENSE OBJECTIONS WERE FUTILE IN LIGHT OF THE PERVASIVENESS OF THE MISCONDUCT AND THE TRIAL COURT'S IMPOTENCE AND REFUSAL TO TAKE ACTION TO PROTECT APPELLANT FROM ABUSES OF THE PROSECUTOR.

As noted, the People of the State of California were represented at appellant's trials by San Joaquin County Deputy District Attorney George H. Dunlap, Jr.[117] Dunlap abused the office of public prosecutor, engaging in a pattern of misconduct during both phases of the first trial, and in the retrial of the penalty phase. His "theatrics," as Judge Platt euphemistically referred to his misconduct (RT 3: 474; 4: 712; 82: 17178), included

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[117] As also noted above, Deputy District Attorney Thomas G. Ziegler (retired), assisted Dunlap during the first trial, but not at the second trial.

sarcastic and insincere "voice intonations" (*ibid.*), staged outbursts, and hyperbolic expressions of "shock," "outrage," "disgust," and "umbrage." The "continual misconduct, coupled with the trial court's failure to rein in [his] excesses, created a trial atmosphere so poisonous" it denied appellant his federal and state constitutional rights, enumerated as follows. (*People v. Hill* (1998) 17 Cal.4th 800, 821.)

Along with a constant barrage of sarcasm, insinuation, and exaggeration designed to disparage defense counsel and to inflame jurors and the court against appellant, Dunlap's contempt for juridical authority is also readily apparent from the trial record. (See, *People v. Hill, supra,* 17 Cal.4th at p. 832.) He slammed books, and displayed figurines of victims on counsel's table despite orders to desist. Whether mumbling under his breath, making disruptive noises, or laughing during defense counsel's presentations, "schmoozing" jurors, making snide remarks about defense witnesses to the audience in the courtroom, or, as the court politely termed it, "editorializing" during examination of virtually every defense witness in total disregard for judicial reprimand, at every turn Dunlap improperly sought to influence jurors and courts by injecting personal opinion, innuendo, and casting aspersions on defense counsel's integrity. (*Id.*, at pp. 833-834 [condemning similar practices]; see, e.g., RT 6: 1237; RT 38: 7851; 44: 9148; 60: 12255; 90: 18729.) His "game playing" and "immature" antics were out of control: "It takes no citation to authority for us to conclude such juvenile courtroom behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defense, and demands censure." (*Id.,* at 834.)

As misconduct occurred at both phases of appellant's trials, it tipped the scales of justice in favor of guilt and death, created the constitutionally impermissible risk that the guilty verdict and the death penalty were imposed despite factors calling for a lesser offense or less severe penalty, and violated both federal and state guarantees against non-arbitrary death eligibility, unreliable guilt and penalty determinations, to due process of law, to a fair trial by an impartial jury, free from impermissible lightening of the prosecutor's burden of proof, to present a defense, to confront and cross-examine witnesses, and to be free from cruel and unusual punishment. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I, §§ 1, 7, 13, 15, 16 & 17; *Darden v. Wainwright* (1986) 477 U.S. 168; *Smith v. Phillips* (1982) 455 U.S. 209; *Beck v. Alabama* (1980) 443 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Lockett v. Ohio* (1978) 438 U.S. 586; *Griffin v. California* (1965) 380 U.S. 609; *Brady v. Maryland* (1963) 373 U.S. 83; *Viereck v. United States* (1942) 318 U.S. 236; *Berger v. United States* (1935) 295 U.S. 78; *People v. Roldan* (2005) 35 Cal.4th 646; *People v. Hill, supra,* 17 Cal.4th 800; *People v. Samayoa* (1997) 15 Cal.4th 795; *People v. Gionis* (1995) 9 Cal.4th 1196; *People v. Espinoza* (1992) 3 Cal.4th 806; *People v. Pitts* (1990) 223 Cal.App.3d 606.)

As this Court reiterated in *People v. Hill, supra,* 17 Cal. 4th at p. 819, citing well-established precedent, because of the "unique function" performed in representing the interests of the sovereign, the prosecutor is held to a high standard of ethics in advocacy: "'A prosecutor's intemperate behavior violates the federal Constitution when it

comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' (Citations omitted.)" The "solemnity and sobriety" of a capital murder trial (*Sheppard v. Maxwell* (1966) 384 U.S. 350, 358) cannot be maintained when a prosecutor's intemperate behavior undermines the dignity of the courtroom. Our "courts are not gambling halls but forums for the discovery of truth" (*People v. St. Martin* (1970) 1 Cal.3d 524, 533), and with a "life at stake, it is not requiring too much that [a defendant] be tried in an atmosphere undisturbed" by an irreverent and immature public prosecutor. (*Irwin v. Dowd* (1961) 366 U.S. 717, 728; see, *People v. Hill, supra*, 17 Cal.4th at p. 833.)

Indeed, prosecutors "are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States, supra,* 295 U.S. at p. 88.) Whether intentional or unintentional, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips, supra*, 455 U.S. at p. 219; *People v. Hill, supra*, 17 Cal.4th at pp. 819-823.) Misconduct committed during the penalty phase of a capital murder case is considered particularly troubling, and as set forth following, the misconduct on the record here permeates appellant's penalty phase retrial, as well as the guilt phase and first penalty trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 326-334; *Lesko v. Lehman* (3rd Cir. 1991) 925 F.3d 1527, 1541.)

As observed in *People v. Haskett* (1982) 30 Cal.3d 841, 866, the duty to prosecute vigorously does not mean the use of deception is permitted: "'Prosecutorial misconduct

implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation omitted.]" In this case, the nature *and* pattern of misconduct is so egregious and pervasive it can hardly be attributed to accident or inadvertence. (*People v. Hill, supra*, 17 Cal.4th 800; *In re Martin* (1987) 44 Cal.3d 1; *People v. Hudson* (1981) 126 Cal. App.3d 733, 741.) Dunlap's misconduct throughout the proceedings below appears to have been part of an overall effort to absolve the prosecution of its *prima facie* obligation to overcome reasonable doubt on all elements of the charged offenses and special allegations, and to improperly encourage jurors to find appellant guilty, and sentence him to death, based on passion, prejudice, and other factors extrinsic to lawful determinations of guilt and punishment. (*People v. Marshall* (1996)13 Cal.4th 799, 831; *People v. Bell* (1989) 49 Cal.3d 502, 538; *Sandstrom v. Montana, supra,* 442 U.S. 523-24.) Both state and federal law require fair, non-arbitrary, and reliable determinations of guilt, death-eligibility, and punishment, and mandate the exclusion from the jury's consideration of irrelevant and prejudicial material; it is the trial court's duty to ensure that the weighing process is not skewed in favor of guilt or death. (*Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Dawson v. Delaware* (1992) 503 U.S. 159.)

As presented following, and in *Arguments I-IV, ante*, however, Judge Platt largely failed and refused to provide meaningful protection for appellant from Dunlap's intemperance, and turned judicial wrath against defense counsel. After chastising defense counsel for "consistently" seeking to "equate" the prosecutor's pervasive pattern of improper examination of witnesses, inflammatory and misleading arguments to court

and jury, and such, with "prosecutorial misconduct," even after sustaining a particularly inflammatory portion of the prosecutor's closing argument to the jury in retrial, the court advised, "Prosecutorial misconduct, at least as I define it, is far greater and far more egregious than misjudgment, improper words, improper comment." (RT 95: 20094: 21-25.) Even when faced with evidence of what Judge Platt described as "absolutely reckless" and "inexcusable" conduct with members of the gallery in the courtroom during the retrial of the penalty phase, Judge Platt refused to label it "intentional" misconduct, but warned of meaningless "sanctions." (RT 88: 18517: 2-25.) As in *People v. Hill, supra,* 17 Cal.4th 800, 831, fn. 3, the trial court's failure and refusal to rein in the prosecutor, and improper chastising of defense counsel, "threatened to bias the jury." As point out in *People v. Bain* (1971) 5 Cal.3d 839, 849:

> " By not reprimanding ... counsel, the trial judge allowed the trial to be conducted at an emotional pitch which is destructive to a fair trial. And by not sustaining the objections of defense counsel, the judge allowed the prosecutor to make an argument based on ... prejudice and the status of the public prosecutor's office – a serious threat to objective deliberation by jurors."

Indeed, as set forth in *Argument III, ante*, the trial court often fused defense counsel's repetitious objections and motions for mistrial into the misconduct, threatening Fox with monetary sanctions and incarceration if he phrased another objection as "prosecutorial misconduct," and admonished jurors to disregard defense counsel's

objection on an "improper [misconduct] subject." (RT 38: 7841.) The trial court intimidated defense counsel and chilled appellant's right to preserve a record and seek curative remedies, and the record demonstrates that although defense counsel continually raised proper objections, any failure to interpose one, or to seek admonition, would not have cured the pervasiveness of the misconduct, and should be excused in light of the futility of such exercise. (*People v. Hill, supra,* 17 Cal.4th at pp. 819-821; *People v. Boyette* (2002) 29 Cal.4th 381, 410; *People v. Hughes* (2002) 27 Cal.4th 287, 388; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333; *People v. Arias* (1996) 13 Cal.4th 92, 159.)[118]

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[118] To the extent any error is deemed waived by failure to object, appellant has received ineffective assistance of counsel because counsel could have had no rational tactical reason to fail to object to acts of misconduct. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34.) Prior to commencement of the retrial, defense counsel filed a written *Motion to Admonish the Prosecutor Not to Repeat Various Specified Egregious Misconduct in Closing Argument Committed in the First Penalty Phase Trial, and to Preclude, At all Times When the Jury is Present, Reference to Louis James Peoples as a 'Serial Killer.'* The motion, though not inclusive, refers to eight areas trial counsel argued constituted misconduct, and sought to thwart reoccurrences of during retrial: "1) Repeatedly telling the jury that the defense in this case was a sham; 2) Disparaging the integrity of defense counsel; 3) Arguing facts not in evidence; 4) Attempting to inflame the jury; 5) Suggestion that any juror blocking a unanimous verdict would be wiping out months of personal sacrifice for all of the jurors; 6) Disparaging the exercise of the right to present a defense; 7) Vouching for a prosecution witness; and 8) Misstating the law." (CT 11: 2641-2651.) In theory, the trial court recognized the validity of defense points, but claimed "zealous advocacy" applied. But it discouraged Dunlap from using words like "gimmicks," "sham," "ploy," "tricks," or "garbage" employed in the first trial, because they create "dangerous issues" on appeal, and "I will not hesitate to deal with it in the fashion I have to deal with it." (RT 61: 12712-13; 12715-16; 12721.) The trial court, however, failed to "deal with it."

Reversal is required under both state and federal constitutional law, because it cannot be demonstrated the misconduct individually or collectively had no effect on guilt, death eligibility, or penalty determinations. (*Caldwell v. Mississippi, supra,* 472 U.S. at 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.) It cannot be said the misconduct was harmless beyond a reasonable doubt, but in fact a miscarriage of justice occurred as a result of prosecutorial misconduct committed in this case. *(Chapman v. California* (1967) 386 U.S. 15, 24; *People v. Hill, supra,* 17 Cal.4th at pp. 844-848.)

A. Improper Language, Gestures, and Other Reprehensible Conduct

1. Disparaging Defense Counsel and Witnesses

The frequency of Prosecutor Dunlap's insinuations, insults, hyperboles, and expressions of personal opinion creates a litany difficult to duplicate. The trial record is saturated with his "theatrics," bullying tactics towards witnesses, efforts to disparage defense counsel and incite the court to impose sanctions, and other improper antics (mumbling, laughing, slamming books, etc.), which contributed to the oppressive environment in which appellant was tried – assisted not only by the trial court's own misconduct but by its refusal to protect appellant from prosecutorial misconduct.

Assuredly, appellant is not complaining of a few isolated incidents of abusive language or a moment of impassioned abhorrence for violent crimes, and recognizes that capital murder trials are not for the weak of heart. Indeed, a prosecutor "may strike hard blows," but, "he is not at liberty to strike foul ones" in the pursuit of a conviction or death sentence. (*Viereck v. United States, supra,* 318 U.S. at 248; *People v. Hill, supra*, 17

Cal.4th at pp. 819-820.) The prosecutor's "improper suggestions, insinuations, and especially assertions of personal knowledge" that occurred here are roundly condemned prosecutorial practices, and the individual acts and cumulative effect create the bases for reversal. (*Berger v. United States, supra,* 295 U.S. at p. 88; *Brady v. Maryland, supra,* 373 U.S. at 87; *People v. Hill, supra*, 17 Cal.4th at pp. 845-846.) As will be demonstrated following, Dunlap was so out of control throughout the proceedings below, his immature behavior and inflammatory rhetoric, coupled with the trial court's inability – or unwillingness – to control him, establishes the futility of objection, though there were many, framed in both federal and state constitutional forms. (See, *People v. Hill, supra*, 17 Cal.4th at pp. 819-821; *People v. Boyette, supra*, 29 Cal.4th at p. 410.)

It is worth noting at the outset, on more than one occasion during pretrial proceedings before the first trial, when Fox raised the specter of prosecutorial misconduct, the court refused to take any affirmative action, merely issuing "warnings" to *both* counsel that "when it gets to the jury, we'll deal with those [misconduct] issues ..." (RT 1: 164: 17-18.) Once again, the court "provide[d] a warning to both counsel" *in camera* with respect to Dunlap's "facial expressions [and] intonations ..." during *his* improper examination of Edward Bronson at hearings on change of venue. (RT 3: 474: 23-25.) On another occasion during the same hearings, the court rejected Fox's allegations – "I didn't see it" (RT 4: 713: 27) – that Dunlap "strutted up to the lectern..., has thrown his book down on the counsel table, smacked his pencil around, waved his hands, smiled ... over and over and over again ..., [and] this is not even in front of a jury,

as you mentioned" (RT 4: 711: 22-28); however, the court concluded *twice* that Dunlap's "voice intonations," "insincere comments," and "arguing with the witness [Dr. Bronson], was editorializing and gratuitous comments ... [which] are not going to be tolerated [before the jury]." (RT 4: 712: 22-28.) This was preceded by the court issuing a "[l]ast warning as to unsolicited gratuitous comments ..., [t]he next transgression will follow a contempt citation." (RT 4: 650: 4-5.)[119]

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[119] As pointed out in *Argument III, ante*, and in *Argument XV, post*, defense counsel's attempt to videotape the second trial are juxtaposed with Judge Platt's recognition of the difficulties inherent in attempting to preserve the non-verbal "facial expressions, intonations" (RT 3: 475) and "incessant noise" (RT 5: 941) of the prosecutor, reported to be "laughing" at defense counsel (RT 90: 18729), issuing a "disrespectful sigh" towards the court (RT 24: 4841), and displaying other "body language, [motions] ... that are not directly reflected in the record, facial expressions, intonations ..., a [transcribed] record does not reflect those particular aspects." (RT 3: 475: 3-9; see also, RT 36: 7574.) But transcripts reveal many instances of the prosecutor's "immature, irresponsible, and unprofessional conduct." (RT 24: 4841: 5-7; see also, RT 36: 7574 ["The Court: Counsel, that's enough ... Not you [Fox] him [Dunlap]."].) For example, in questioning George Woods, M.D., in the guilt phase, the court reporter appears to have attempted to capture Dunlap's antics by noting between the lines: "Dunlap: Q. (Unintelligible sound.) How much an hour. I'm scared. A. Uh. Mr. Fox: I'll object. The Court: Sustained ... Q. (Unintelligible sound.) And that's to tell us that methamphetamine – I mean it affects your mind, correct? Mr. Fox: Judge, I'll object, that's argumentative. The Court: Sustained." (RT 44: 9148.) In retrial, Judge Platt warned Dunlap he would "fine [him]" if "[he] start[ed] it off with a laugh" again in response to defense counsel's argument. (RT 90: 18729: 23-27.) The *In Limine Motion to Videotape Trial Proceedings to Preserve the Record, supra*, for retrial included a request "to augment the record should additional situations arise where there are disagreements regarding the actions, demeanor, attitude, or inflection *of any party* [viz., attorney]." (CT 11: 2673; emphasis added.) The court denied the motion, warning defense counsel *they* were bordering on contempt. (RT 62: 12686: 12-13.)

Indeed, Judge Platt informed "counsel" – though the issue arose solely because of Fox's "correct objection" to Dunlap's improper examination of Dr. Bronson – he "fully intend[ed] throughout the remaining proceedings, to enforce" contempt powers, and "editorializing and gratuitous comments that are not part of a question are not going to be tolerated." (RT 4: 712: 14-15; 23-24.) During the same proceeding, upon examination of defense expert Michael Ross, Dunlap simply ignored the warnings: "I know you did a heck of a job here," and upon proper objection, the court admonished Dunlap, "Limit the editorial comment," but did nothing to enforce the warning previously given. (RT 4: 739: 17-21.) Several weeks later, when Dunlap complained a defense request for discovery of victim impact evidence was "absolutely outrageous," the court reproved Dunlap, "back off" and "choose your words carefully," because – in a rare moment – the court characterized the defense request "not outrageous." (RT 8: 1524: 22-25.) Once, when the parties entered *voir dire* in the first trial, the court "noticed that Mr. Dunlap went back to his chair, in clear disrespect for the Court's ruling ..., disrespectfully sighed," and it fined him $100. (RT 24: 4841: 1-4.) But those are rare exceptions, and had no impact whatsoever on Dunlap's behavior in the courtroom.[120]

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[120] For example, during the guilt phase of trial, the court interrupted its ruling: "Let me tell you, Mr. Dunlap, like the theory or not, it will be the last time that I request not to have a physical reaction, whether its throwing the hands in the air, or guffaw, or another other audible reaction to the theory of opposition counsel." (RT 50: 10341: 26-28 - 10342: 1-2.) Objections to Dunlap's improper questions, and the court's admonitions were so common – and meaningless – one juror quipped during testimony, in the guilt phase of the first trial, "'Objection, argumentative,'" and Dunlap

Dunlap's misconduct was not confined to pretrial proceedings, but was rampant – and tolerated – in the presence of the jury. Hollow "warnings" to Dunlap were ineffectual, and frequently transformed into defense transgressions: "I have cautioned *all counsel* from immature, irresponsible, unprofessional conduct ..., no more warnings." (RT 24: 4841: 5-7; emphasis added; see, *People v. Hill, supra*, 17 Cal.4th at pp. 845-846.)[121]

Consequently, any attempt to categorize the prosecutor's use of inflammatory and

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responded, "Save a hundred dollars." (RT 40: 8393.) A sense of humor is not completely lost even during a capital murder trial, but the real import here is the court's obvious inability to control the prosecutor – a fact not lost on jurors.

[121] Judge Platt said early on he wanted the case "to be tried in a professional manner *come hell or high water* ... " (RT 2: 380; emphasis added.) But in light of the fact he "never worried" about how a judicial officer is "supposed to talk in a different language" in court than while off the bench, and that such "demeanor and manner ... has nothing at all to do with ... composure," apparently, in his view, Dunlap's crude remarks and gratuitous comments could not possibly detract from the dignity and gravity of a capital murder trial. (See, RT 52: 10819-10820; *Argument II.*) It is little wonder rulings on objections to prosecutorial misconduct were so deeply flawed in view of Judge Platt's personal credo, making it even more absurd to expect someone like Prosecutor Dunlap would abide by "warnings" issued against him, e.g., after sustaining one of dozens of "editorial" objections, and striking a gratuitous comment, Judge Platt scolded, "You know how to conduct yourself, Mr. Dunlap." (RT 3: 492: 16.)

By the time of retrial, Judge Platt was still impotently pleading for "professionalism" from Dunlap, who laughed contemptuously at defense counsel's argument. (RT 90: 18729; RT 50: 10341-42.) Even Dunlap proffered untimely rebuttal, Judge Platt's bootless chastisement preceded his ruling: "Mr. Dunlap, change your attitude, because the record will reflect the Court is getting offended by the tone of voice and the attitude ... Mr. Dunlap: I don't believe I have an attitude. The Court: I'm telling you [you] do, and I'm telling you to change it." (RT 92: 19348: 4-12.)

derogatory language in this case meets with the frustration of sheer volume and pervasiveness. (*People v. Hill, supra*, 17 Cal.4th at p. 845.) The most frequently used expressions, discussed in detail in context following, were designed to infuse prejudice against appellant and his attorneys by injecting small doses of extrinsic material and personal opinion; they include: 1) "ludicrous;" 2) "ridiculous;" 3) "preposterous"; 4) "outrageous;" 5) "outrage;" 6) "offensive;" 7) "umbrage;" 8) "aghast;" 9) "shock;" and, 10) "bull." Computerized search of the record shows combined usage of these ten terms alone exceeds 200 references. (See, e.g., RT 224; 416; 1016; 1102; 1174; 1489; 3444; 4667; 4794; 5399; 5401; 5777; 5779; 6616; 6901; 7779; 7837; 7930; 8082; 8342; 10287; 10342; 10655; 11000; 13248; 13297; 19700; 20149; 20296; 20634.)

Dunlap's frequent use of street term "bull"[122] to describe his personal opinion about the testimony of defense witnesses and arguments of counsel in his summations to both juries is used approximately 50 times. (See, e.g., RT 4290; 7538; 7792; 9171; 9961; 10022-24; 10027; 10031; 10057; 10126; 12107; 12183; 17868; 20149.) The more shadowy "umbrage" (*offence*) appears to have been reserved for inciting the court against defense counsel in hearings outside the presence of jurors. (RT 1: 208; 6: 1170; 54: 11000; 97: 20634.) It should be noted, Fox saw the writing on the wall early on in the

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[122] 'Bull' is the shortened form for "bullshit," i.e., slang for a personal opinion something is "nonsense." (*Concise Oxford Dictionary of the English Language* (10th Ed. 1999); *Webster's Third New International Dictionary* (G & C. Merriam Co. 1981). A sampling of trial transcripts shows little regard for when and where Dunlap used "bull" to express his opinion on testimony, other evidence, or argument.

litigation, and requested judicial intervention; typically, he was rebuffed:

> " I think enough is enough with this. Mr. Dunlap is in the habit of constantly insinuating that I'm doing something improper and has always given me sleight and ridicule and castigation.
>
> .....
>
> The Court: I don't care whether you get along ..."
>
> (RT 1: 164: 9-13; see also, *Argument I.*)[123]

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[123] As will be recalled from the *Statement of the Case, ante*, p. 6, perhaps Fox's reference to Dunlap's "habit" of denigration began on November 9, 1998, when the prosecutor's contempt for defense counsel was expressed at the pretrial hearing on the motion to set aside ten non-homicide counts filed in the information – several subsequently dismissed or rejected by the jury – because, as Dunlap informed the law-and-motion judge, "We are not going to waste time to even waste paper" on Fox's "really ridiculous" motion. (RT 1: 102: 26-28.) Judge Van Oss opined in response "[I]f any case does, this case merits a written response," and he appeared incredulous with Dunlap's oral reasons: "That's all you have to say? ... That's not a reason for not complying with the Rules of Court ... " (RT 1: 103: 1-2; 20; 105: 10-12.) In filing a one-page joinder in County Counsel's opposition to motion to recuse Judge Platt heard later the same month, Dunlap felt compelled to express to Judge Martin his personal "umbrage" and "outrage" at Fox's allegations of an appearance of impropriety raised "at judicial officers and officers of the court *I believe* are above reproach." (RT 1: 139: 10; 20-22; emphasis added.) When Fox brought Dunlap's deprecatory remarks to the court's attention on February 26, 1999, Judge Platt evaded the "non-issue," saying, "I don't care about aspersions being cast ... It is no longer an issue of whether counsel get along or not." (RT 7: 1322: 25-26.) But the court's reprimand to "gentlemen" – for Dunlap's mocking laughter at defense argument (RT 90: 18729) – or in discouraging hyperbole – by the prosecutor – "just ludicrous" (RT 49: 10288: 1; 7), reveals the one-sided nature of the "aspersions being cast" on the trial record.

The point here is that the poison was injected by the prosecutor at the beginning, and is so widespread it is not possible to isolate. Sarcasm and insult were not innocent products of a single, impassioned argument, and did not hinge upon an incident during one phase of trial. Dunlap's improprieties saturate the record, and were pointed at appellant, counsel, and anyone else who might be associated with appellant's defense.

Dunlap's efforts to derogate his adversary – assigned the enormous responsibility of defending a multiple-murder defendant in his first capital case – and to personalize the attacks were without compunction. (*People v. Hill, supra,* 17 Cal.4th at p. 832-833; *People v. Wash* (1993) 6 Cal.3d 215, 265 [derogatory comments disapproved].) As discussed in *Argument III, ante*, Judge Platt's refusal to accept Michael Fox's absence for the first few hearings after the judge's heart attack, despite the fact that Fox was on a validated medical leave himself, was fueled by Dunlap, who, as mentioned, was never asked to account for his own non-appearances. (See, RT 61: 12421-12424; 12446-12449.) Between the trials, before another court (Hon. Terrence Van Oss), Dunlap claimed on October 18, 1999, to be "aghast" at Fox's non-appearance: "Judge, I don't mean to be disgusted. I am." (RT 61: 12405: 19-20.) Without Fox present to defend himself, Dunlap took the opportunity to dishonestly vilify his adversary with another judicial officer, attempting to mislead the court by falsely claiming the letter by Fox's physician (Hashimoto) submitted to the court must be from a "family nurse practitioner" (RT 61: 12407: 24), and part of "a pattern of conduct that has been routine ... repetitive."

(RT 61: 12406: 15-16.)[124]

The prosecutor continued his personal attacks on Fox to the point before the retrial of the penalty phase began where his associate, Aaron Laub, second chair for motions, sought some intervention and reconciliation:

> " [I] just want to request the Court to admonish the prosecutor to keep the – any arguments that are made in this courtroom at a professional level.
>
> The – yesterday, counsel for the People went ahead and assailed Mr. Fox's character. He talked about bad faith and made numerous statements, all of which indicated on the record that somehow he has a fundamental distrust of the motivations of Mr. Fox, of Mr. Fox's representations. That Mr. Fox, in essence, is a liar.
>
> This is entirely contrary, of course, to the behavior of counsel off the record, and where he's cordial and friendly,

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[124] The record belies Dunlap's claims. First, Judge Van Oss found defense counsel had complied with his directive, "[T]his is what I had requested that Mr. Fox provide the Court ... a form signed by an MD ... And the excuse does indicate that he's not available until the end of this month." (RT 12415: 4-9.) Second, with the exception of the period between trials, when Judge Platt was back on the bench, only Ziegler appeared for prosecution, and Fox was not absent again. As discussed in *Argument III*, Fox was rarely absent from court during two lengthy trials, and only Dunlap's disappearances were unexplained – and excused.

as if we're all part of a professional team that's doing a job.

.....

Well, if counsel wants to say he believes that the defense attorneys in this case are scoundrels, that's fine. But he should do it off the record. On the record, counsel should be treating us with the kind of respect that's required by the rules of professional conduct. Off the record, if he wants to go ahead and challenge our integrity, I don't have a problem with that. On the record, I have a problem with it."

(RT 76: 15737: 1-22.)

The court, which previously ignored Fox's pleas for decency – from the prosecutor and the court – and claimed it was seeking "professionalism" from all counsel, responded:

" First of all, I don't find that Mr. Dunlap's in court or on the record statements should be taken personally. And I don't find that they assail in any fashion the integrity of defense counsel."

(RT 76: 15737: 27-28 - 15738: 1-2.)

Indeed, Judge Platt once again scolded *all* counsel as "sprinkled along a course of immature, irresponsible, unprofessional conduct, in the Court's opinion ...," but as long as the attorneys "compl[ied] with the Court's orders," then the court explained it did not "care whether counsel like[d] each other." (RT 76: 15738: 3-25.)

Despite the one-sided nature of the "immature, irresponsible, and unprofessional conduct" demonstrable from the record below, the trial court refused to accept its exclusive source, George Dunlap. Fox and Laub showed not similar disrespect towards the prosecutor; however, they refused to accept Dunlap's abuse as somehow acceptable. At no time did Fox sneer at his adversary, show disrespect for his office, or examine witnesses with running commentary in willful violation of the Evidence Code and professional ethics, and at no time did the trial court admonish Fox for "theatrics." Defense counsel sought judicial intervention from abuse, and were met with hapless neutrality, meaningless transference, or they were cut off. (See, *People v. Boyette*, *supra*, 29 Cal.4th at 410-412 [trial court criticized for cutting off defense counsel's objections.].) As set forth following, with virtually every defense witness, seemingly with the intent to goad them into an inflammatory outburst, and in the effort to mislead jurors, Dunlap repeatedly dishonored ethical canons, ignored judicial admonition, and violated appellant's enumerated rights. (See, e.g., *American Bar Association Project on Standards for Prosecution Function and Defense Function* (1971), 5.2, p. 113 ['rudeness and intemperance have no place in any court ...']; see also, *People v. Hill, supra,* 17 Cal.4th at pp. 832-833.) The trial court failed and refused to protect appellant from the prosecutor's misconduct with witnesses, issuing meaningless "warnings" and transference of blame.[125]

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[125] During one pretrial hearing on change of venue, after Fox's numerous objections to Dunlap's "editorializing" with Dr. Bronson had been sustained, the court held a hearing in chambers to warn "counsel" (RT 4: 715: 1-18):

A. 2. Improper Questioning of Witnesses - "Editorialization"

As outlined above, during the examination of witnesses, Dunlap consistently provided "editorial" comments, and repeatedly expressed opinions in the form of improper questions to witnesses.[126] As briefly summarized in *Argument III, ante*, and reiterated here, a brief selection of improper expression of opinion, gratuitous comments,

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> " It's not a game, it's not a stage ... My drawing of the line in the sand on these issues is to fashion future conduct in these proceedings only. And I believe I have absolute authority to do so, and I will do so, and its my expectation that both counsel will adhere to what I expect the professional tenor in court to be."

[126] The trial court appears to have taken up the term "editorialize" early on in the proceedings as shorthand for Dunlap's "unsolicited gratuitous comments" (RT 4: 650: 4; 712: 23; 739: 21), after conducting his own research into materials "The Judicial Education and Research Center provides on this type of issue for contempt." (RT 4: 712: 8-10.) The court's use of the term followed Fox's initial "editorial" objection to Dunlap's examination of Dr. Bronson on December 9, 1998. (RT 3: 473: 27-28.) As pointed out in *Argument III, ante*, sometimes the court would accept an "editorialization" objection, and at other times would not accept it as a "legal" objection or would interrupt Fox and admonish him. (RT 29: 5799; 82: 16962; *People v. Boyette, supra,* 29 Cal.4th at p. 410-412.) Aside from the trial court's inconsistent rulings to the form of the objection, its own use of the term to admonish the prosecutor, and the futility of objecting under various *proper* objections to an argumentative, narrative, or other *improper* question form (*Jefferson's California Evidence Benchbook 3d* (2008), §§ 27.11-27.12, citing Evidence Code §765 and *People v. Cummings* (1993) 4 Cal.4th 1233, 1305), "editorialize" aptly describes the nature of prosecutor's misconduct in the active verb form: "to express opinions." (*Concise Oxford Dictionary, supra.*; *New World Dictionary of the American Language* (World Publishing Co., 1974.) Expression of personal opinion is proscribed prosecutorial conduct. (*Darden v. Wainwright, supra*, 477 U.S. 168.)

ingratiating remarks, irrelevant wisecracks, and repeatedly posed improper argumentative questions, includes: "How was lunch?" [at the conclusion of testimony, during examination of San Joaquin County Deputy Sheriff William Weston, with whom Dunlap ate lunch], "Thank You, Billy." (RT 91: 19179-80); "Wow! That's a lucrative business, is it not, Dr. Amen?" (RT 40: 8368); "That's pretty good wages, isn't it [Dr. Wu]?" (RT 38: 8071); "How many hours are you [Dr. Lisak] into them for?" (RT 91: 19133); "[Dr. Wu] So let's not be confusing." (RT 39: 8195); "Let's quit guessing [Dr. Buchsbaum] for awhile and look at the facts" (RT 42: 8633); "That makes sense" [Dr. Amen] (RT 40: 8282-8383); "I see you grinning there, Doctor [Amen], when I said does everybody agree with it." (RT 40: 8377); "It's a pain in the butt to get these test scores [Dr. Wu] ..." (RT 38: 8077); "[Dr. Mayberg] That's the last time I buy you dinner" (RT 46: 9414); "[Dr. Mayberg] Did you have a heart attack last night when you looked at the raw data?" (RT 46: 9413.)[127]

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[127] Fox's objection to the "improper colloquy" between Dunlap and Dr. Mayberg illustrates an important point. (RT 46: 9414: 19.) Dunlap simply ignored objections and continued the same pattern throughout both trials because he knew the Judge Platt would not take any meaningful action to curb his abuse. After the court sustained the "argumentative" objection to whether Dr. Mayberg "had a heart attack" while reviewing raw data the night before testifying, Dunlap rephrased the question in the identical improper form: "Did you have significantly elevated anxiety and blood pressure, Doctor, when you looked at the raw data of Mr. Peoples? Mr. Fox: Judge, same objection. The Court: Sustained." (RT 46: 9413: 23-27.) The next question, "let me ask you, did Dr. Wu and Dr. Buchsbaum screw up when they made the comparisons ...," objected to on the same ground, and sustained. (RT 46: 9414: 1-8.) The court pleasantly reminded

These examples are drawn from examination of expert witnesses and are far from inclusive; the sheer volume of expert witness testimony, and Dunlap's extended examination makes it virtually impossible to cover within the limitations of a brief. In some ways his offensive behavior while examining lay witnesses called by the defense for shorter duration is even more egregious. Nonetheless, an attempt to focus a presentation of misconduct during the questioning of expert witnesses follows.

First, as described in some detail above, Dunlap's improper examinations of Dr. Bronson and Michael Ross during pretrial venue hearings reveals the writing on the wall for trial. The court had the opportunity to rein in the prosecutor's improper expression of personal opinion and "voice intonations" while questioning witnesses during pretrial hearings, but essentially deferred on the ground such behavior would "not be tolerated" once a jury was empaneled. (RT 1: 165; 3; 474; 4: 650; 4: 712; 4: 750.) Similar misconduct can be seen during the *in limine* testimony of Richard Leo, Ph.D., on the voluntariness of appellant's statements to police November 12-13, 1997, and that of Brent Turvey, a profiler retained by the defense after he had briefly consulted with Stockton detectives in attempting to identify the individual responsible for the unsolved homicides in October-November, 1997, as well as Public Defender Investigator Michael Kale.

During pretrial examination of Dr. Leo, Dunlap's sarcastic inquiry as to whether

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Dunlap, "Counsel, questions and answers." And, Dunlap, issued his standard feckless reply, "Thank you, Judge, I apologize." (RT 46: 9414.) The pattern is repeated throughout both trials.

Leo had relied on any police manuals in forming his opinion, and whether he had brought them to court, led to this demand: "Bring it out. I got to see this." (RT 7: 1458: 8-9.) Although the court interceded and asked Dunlap to form the question in terms of a "request," it hardly matters. (*Ibid.*) The same rude behavior would continue in the presence of jurors. Dunlap's contempt for anyone associated with the defense of Louis Peoples was blatant:

> " $6,000 dollars of wasted taxpayer money ... We hear Dr. Leo come in and chastise these officers as good-intentioned as they may be, in a patronizing tone, that their tactics are coercive. Bull." (RT 7: 1491: 12-15; see, post, *4. Improper Arguments to Jurors.*)

Similarly, when Brent E. Turvey was proffered as a defense witness on what he opined were random, poorly planned robberies to counter the prosecution's theory of premeditated "serial" crimes, Dunlap turned his bombast on defense counsel. (RT 36: 7367-7379.) Fox argued Turvey, who had been consulted by Stockton police before the crimes had been solved, should be allowed to testify to what amounted to appellant's random and very "bizarre" behavior from the *Cal Spray* incident in September, 1997, to his arrest on November 12, 1997, as illustrated by the crimes themselves. (RT 36: 7546; see also, *Argument X, post.*) The court was "not taking issue with the argument" (*ibid.*), but "the opinion of the forensic analyst about whether there is an escalating or... deterioration of the mental state and the ability to effect planning is absolutely beyond the

province of this witness." (RT 36: 7547: 22-27.) Dunlap's response was typical:

> "This witness (Turvey) should not be testifying. We're asking for sanctions against counsel. The only bizarre behavior here is counsel's."
>
> (RT 36: 7547: 13-15.)

When defense counsel attempted to reply to the court's additional questions, Dunlap had created a sufficient disturbance to prompt the court to interrupt Fox, though the court did nothing to reprimand the prosecutor:

> " The Court: That's enough.
>
> Mr. Fox: Okay.
>
> The Court: Not you, him [Dunlap]."
>
> (RT 36: 7574: 11-13.)

During a hearing outside the presence of the jury in the guilt phase of trial, Dunlap objected to Public Defender Investigator Michael Kale's proffered testimony as a former police officer on law enforcement techniques used during interviews with several lay witnesses as "a bunch of – that's not relevant." (RT 38: 7792: 1.) When pressed by the court for a legal reason why the testimony was not relevant, Dunlap responded sarcastically: "[Because] I don't think so, Judge." (RT 38: 7792: 3.) The court overruled the objection: "Well, I don't care what you think." (RT 38: 7792: 4-5.)

The first expert witness called by the defense in the guilt phase of trial was Joseph

Wu, M.D. The "confusion" Dunlap had feigned with Dr. Bronson (RT 3: 473: 16) surfaced once again. Though admonished during pretrial proceedings against using this precise "insincere comment" (RT 3: 474; 4: 712), Dunlap's ignored the admonition; the misconduct was not limited to hearings outside the presence of jurors:

> "Mr. Dunlap: So [Dr. Wu] let's not be confusing ....
>
> .....
>
> And this study has other problems as well, is that not true?
>
> Mr. Fox: Objection, that's argumentative.
>
> The Court: Sustained.
>
> .....
>
> A. I'm not sure what statement you're referring to specifically. Can you direct me?
>
> Q. First page, bottom paragraph on the left-hand side, Doctor. You can read it verbatim or you can read it to yourself, I don't care.
>
> Mr. Fox: Objection. That's improper.
>
> The Court: It is. Enough editorializing, *gentlemen*. I've listened to it all day long. It's not going to happen again. There's a question, there's answers answer."

(RT 39: 8195: 15; 8196: 17-26.)[127]

In point of fact, the prosecutor began his attack on Dr. Wu by assaulting defense counsel's integrity before Dr. Wu took the witness stand. Terming 18 smaller copies of PET scan photographic exhibits proffered for distribution to jurors during testimony "pretty much outrageous," Dunlap asserted, "quite frankly," that defense counsel must have proffered them in "bad faith." (RT 38: 7930: 3-8.) When the court informed the prosecutor it was not much different from his use of transcripts during presentation of appellant's videotaped statement to police, Dunlap flippantly queried, "[W]e can have those [victim family] photographs replicated for individual packets to the jurors so they can follow along with the witness's testimony?" (RT 38: 7931: 7-8.) The court admonished Dunlap, "Don't play games with me ... Don't play games with me." (RT 38: 7931: 9-12.) Dunlap was not deterred:

> " Q. Is this a new procedure that you've implemented to safeguard yourself from prosecutors like myself?
>
> Mr. Fox: Objection. Argumentative.
>
> The Court: Sustained.

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[127] In the presence of the jury in the guilt phase, Dunlap also used the ploy with a lay witness: "Mr. Quigel, I'm confused." (RT 37: 7714: 11.) As an indication of Dunlap's improper "intonation" during his cross-examination of Dr. Woods, the prosecutor was warned about "posturing" (RT 91: 18995) with witnesses in the retrial; after Fox's objection to an "unintelligible" question, Dunlap informed the court *twice*, "I'll strike it," but then added in the presence of the jury – insincerely no doubt – "I don't want to confuse [Dr. Woods]." (RT 91: 19057: 9-15.)

Mr. Fox: Ask it be stricken from the record.

The Court: Stricken."

(RT 8054: 4-9.)

.....

Q. [Referring to $100 paid to test subjects]

That's pretty good wages, isn't it?

A. Dr. Wu: You know, I think that it's standard compensation.

Mr. Fox: Judge, I'll object. It's argumentative, 352.

The Court: Sustained."

.....

Q. It's a pain in the butt to get these test scores —

Mr. Fox: I'll object. That's improper.

The Court: Sustained."

(RT 38: 8077: 15-18.)

The same kind of outlandish behavior occurred during the retrial, starting with his first question:

" Q. Thin ice on a pond.[128] Do you recall that, Doctor?

A. Yes, Mr. Dunlap.

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[128] Dr. Wu had testified on direct examination that in his opinion appellant's PET scans revealed abnormal functioning, and that additional stressors could cause "catastrophic failure," akin to "thin ice on a pond," a metaphor suggested by Fox. (RT 85: 17781-82.)

Q. Thin ice on a pond.

A. Yes.

Q. So what does that make James Loper?

Skating on thin ice on a pond, Dr. Wu?

Mr. Fox: Judge, I'll object. That is argumentative.

The Court: Sustained.

Q. Let's talk about some things. You said 490 per hour.

That's not four dollars and ninety cents, is it?

A. No.

Q. 490 for your testimony."

(RT 85: 17784: 11-25.)

Moreover, knowing full well that witnesses Wu, Amen, Buchsbaum, and White, were not consulted by defense counsel to render a diagnosis from the *Diagnostic and Statistical Manual*, Dunlap was fond of waving the book around during cross-examination. (See, RT 38: 8038; RT 42: 8687.) During penalty phase of the first trial, in his examination of Gretchen White, Ph.D., relating to family dynamics and appellant's childhood and adolescence, the prosecutor took his book waving one step further:

" Mr. Dunlap: Why didn't you ask him why he always

wanted to kill someone?

A. I think I just answered the question, which was that I was

looking into the background of what might have contributed to this degree of rage.

Mr. Fox: Judge, I'm going to object to the conduct of the the prosecutor, throwing books down on counsel table.

The Court [Judge Delucchi]: Yes. Mr. Dunlap, try to control yourself, [do] not throw books down on counsel table."

(RT 57: 11597: 5-18.)

Although Dunlap was somewhat more subdued in the retrial of the penalty phase in examining Dr. White on her reasons for not rendering a diagnosis (RT 90: 18817), when the trial court inquired whether the prosecutor wanted to conduct *voir dire*, Dunlap responded with the improper comment:

" Same objection, Your Honor. There's no ultimate opinion [DSM diagnosis] of this individual as it relates to the psychological evaluation.

The Court: She will qualify as a psychologist and will be allowed to testify as an expert in that area [social history/ childhood development/family impact, etc.]"

(RT 89: 18666: 25-27 - 18667: 1-2.)

Similarly, when Dr. Lisak was presented during the retrial, Dunlap did not attempt to challenge the qualifications of the defense witness proffered as an expert, but

used the opportunity to inject an improper subject:

"Mr. Dunlap: Just a few questions.

Q. Dr. Lisak, in relationship to your testimony what have you reviewed to prepare as it relates to the facts of this case?

Mr. Fox: Well, Judge, I will object. That's not voir dire.

The Court: That's not proper voir dire. Any voir dire questions, Mr. Dunlap?

Mr. Dunlap: I will reserve for cross, Your Honor.

The Court: Court will accept Dr. Lisak in those areas as an expert. Please proceed."

(RT 91: 19099: 5-17.)

With Dr. Woods during the retrial, Dunlap played the same game, presenting improper commentary in the guise of taking up the court's opportunity to challenge the qualifications of the proffered defense expert:

" Mr. Fox: Judge, at this time I would like to offer Dr. Woods as an expert in the field of psychiatry.

The Court: Any voir dire, Mr. Dunlap?

Mr. Dunlap: Same objections as before, Your Honor.

Mr. [sic] Woods' credentials we have no objection to. But there is no offer of proof as to mental diagnosis by this doctor.

The Court: Objection is overruled. Goes to the weight.

Mr. Dunlap: Thank you, Judge."

(RT 90: 18870: 6-13.)

Indeed, Dunlap's cross-examination of Dr. Woods on retrial was filled with improperly formed questions, and, as the court termed it, "arguing and jousting back and forth and the posturing" between the prosecutor and the witness. (RT 91: 18995: 6-8.) Dunlap also attempted to inject "facts not in evidence" on several occasions, objections were sustained, as were questions "asked and answered," designed to repeat the gruesome facts of each homicide through examination of the expert. (RT 91: 19003; 19020; 19022; 19024; 19040; 19054-55; 19057; 19059; 19060.)[129]

Further, the prosecutor's cross-examination of Dr. Amen during the guilt phase is replete with sustained objections and admonitions to "delete the editorialization, please." (RT 40: 8377.) Again, as raised in *Argument XIII, post*, the court erroneously permitted the prosecutor to repeat the details of each murder to defense experts to challenge their opinions; here, however, it is the prosecutor who makes a farce of judicial authority:

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[129] As discussed in *Argument XIII, post*, unlike Judge Platt, who erroneously permitted Dunlap to go through the gruesome details of each homicide with every witness called by the defense, Judge Delucchi sustained defense counsel's first objection under Evidence Code section 352 to the line of examination, ruling the prosecutor's question to a witness must be limited to a general inquiry as to whether appellant's convictions for four murders affected that witness's opinion of him, as the jury "knows what he's been convicted of. They know the details of the crime." (RT 56: 11407; see motions for mistrial at RT 38: 7874-75; 40: 8418; 41: 8461.)

" Q. Did you see the video image of Steven Chacko there on November 4, 1997, Dr. Amen?

Mr. Fox: Judge, I'll object, its cumulative, it's argumentative, it's prejudicial.

The Court: Sustained.

Mr. Dunlap: As to which one? Argumentative.

The Court: Doesn't make any difference. Its sustained now. Its cumulative. All it needs to be is sustained to a single objection, and move to the next question."

(RT 41: 8446: 11-21.)

But, clearly, the message was lost on Dunlap, who continued to dismiss the court's rulings:

" Q. Most people can't get the 15th [bullet into a gun] because its very difficult [to load], according to Department of Justice Mike Guisto, did you hear that testimony?

A. No, Sir.

Mr. Fox: Objection. 352.

The Court: Sustained. Answer stricken."

(RT 41: 8447: 17-19; see also, RT 40: 8448 - 8488.)

Subsequently, Dunlap pursued an entirely objectionable and improper line of inquiry with regard to case materials provided to Dr. Amen:

"Q. So you were told [by Fox] that the – you could cut out the middle 200 pages [of appellant's 400-page statement to police] and it's really not much.

A. Well –

Mr. Fox: That's argumentative.

The Court: Sustained."

(RT 41: 8477: 25-28 - 8478: 1.)

Explaining that defense counsel placed some time constraints on the review of materials, and excised portions of the repetitive denials for Dr. Amen's review, Dunlap ignored the court's ruling, and pursued the same line of improper examination of Dr. Amen, casting aspersions on defense counsel:

"Q. So he [Fox] said you don't need to read the middle eight hours or something like that because it's a bunch of denials.

A. Wasn't in quite those words, but I think that was sort of the gist of it.

Q. It was more eloquently put to you, not to read the middle portion of the confession?

Mr. Fox: Objection, that's argumentative.

The Court: Sustained."

(RT 8478: 14-22.)[130]

The pattern was repeated in the retrial of the penalty phase, where eight of ten "argumentative" objections were sustained while Dunlap examined Dr. Amen. (RT 84: 17591-17625.) On two occasions, Dunlap asked the improper question whether "people with abnormal brain scans are going to go out and commit serial killings ...," and both times the objections were sustained. (RT 84: 17593: 26-28; 17620: 1-4.)[131]

As might be expected, the same pattern of improprieties continued in the guilt phase when Monte Buchsbaum, M.D., was called as a defense witness. (RT 42: 8584-8754.) Dunlap began by improperly challenging Dr. Buchsbaum to consult with Dr. Wu:

> " A. I'm not in Dr. Wu's laboratory and I don't know his procedures in that microscopic detail ....
>
> Q. Well, you're going to talk with him over the weekend, correct?
>
> A. I could.

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130 Dunlap refused to accept the court's rulings on his argumentative questioning of Dr. Amen with improper use of the word "confession." The court eventually admonished the jury to disregard Dunlap's questions when they referenced "a confession." Such references "will be stricken ... It's the jury's province to decide – the instruction was previously given ... about what is or what is not a confession or admission ..." (RT 41: 8481-8482: 1-10.)

131 As discussed post, Section 3, the court apparently ruled – over objection – the prosecutor could *argue* to the jury in the retrial that the killings were "serial" in nature, but the prosecution did not produce expert testimony to establish the killings were considered "serial," even though he claimed he intended to do so.

Q. Well, ask him. 'Cause we did that on the stand. Ask him if there's any type of verification attempts to ensure the individual's medication or drug levels?

Mr. Fox: I'll object, that's an improper question.

The Court: Sustained."

(RT 42: 8675: 14-15 - 23-28 - 8676: 1-3.) [132]

The record demonstrates that the prosecutor was not deterred from committing improprieties in the retrial because of judicial warnings or admonitions at the first trial. For example, during the prosecutor's examination of witnesses on March 22, 2000, the court admonished *both* counsel, "[T]here appeared to be a good deal of editorializing and gratuitous comments in questions, prefacing questions this morning. Avoid it." (RT 80: 16705.) But this related solely to Dunlap, because he asked all the questions, objections were interposed by defense counsel, and most of them sustained as "argumentative" or "improper." On one occasion, this time with Department of Justice Laboratory Director, Kathleen Ciula, during re-direct examination, the court's admonition followed several objections by defense counsel to the prosecutor's argumentative, leading and loaded questions:

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[132] As pointed out, Dr. Buchsbaum was not called to testify in the retrial. Dunlap offered his personal opinion in summation to the jury in the guilt phase: Dr. Buchsbaum's opinions are "bull." (RT 48: 10029-10031; 10057; see also, *post*, Section 3.)

" Q. Okay. So when counsel asked where was the shooter exactly, that's a misleading statement, isn't it?

Mr. Fox: Judge, I'll object, that's argumentative.

The Court: Sustained."

(RT 80: 16661: 14-18.)

.....

Q. Counsel says you don't have any idea of how long a person is standing there and could be waving their arms, I think you begin to explain it – do you recall cast-off?

Mr. Fox: Judge, that misstates what I said.

The Court: Overruled. It's subject to recross.

Mr. Dunlap: That's what he said. A person could stand right here and –

The Court: Counsel, save the editorializing. Ask your question."

(RT 80: 16664: 9-18.)

.....

" Q. You have no idea if they're talking or begging at the time –

Mr. Fox: Judge, I'll object, all of this is argumentative.

The Court: Sustained."

(RT 80: 16666: 4-8.)

" Q. You have the victim, the victim, running, for his or her life?

Mr. Fox: Judge, I'll object, this is leading, it's also argumentative.

The Court: It's also cumulative. Sustained."

(RT 80: 16669: 22-26.)

Two days later, in questioning Stockton Police Officer Brian Swanson, who arrested appellant on November 12, 1997, after several inappropriate leading questions were objected to and sustained (RT 82: 16958; 16960; 16962), the prosecutor, holding up to the witness a newspaper clipping of a headline "Stockton Tow Truck" found in appellant's backpack, improperly announced to the jury:

" Q. Shot to death.

Mr. Fox: Judge, I'll object. It's editorializing. It's improper.

It's not a question.

The court: Sustained. Phrase it in the nature of a question, Mr. Dunlap.

Mr. Dunlap: Thank You, Judge."

(RT 82: 16962.)

Dunlap did not ask a follow up "question." He had made his improper point to the jury.

Moreover, Dunlap's misconduct in examining witnesses did not end with expert witness testimony. As discussed in *Argument VIII, post*, the prosecutor moved to exclude the testimony of Michael Quigel in the guilt phase, successfully convincing the trial court to erroneously prohibit Quigel and other lay witnesses from expressing their opinions on the mental effects of methamphetamine formed from personal experience. Despite these and other favorable rulings, Dunlap provoked several witnesses to the edge.

Quigel, a drug dealer and convicted felon (robbery), was serving out a sentence at

the time he was called by the defense to testify in the guilt phase. Quigel lived in the *Paris Court* apartments around the time as Louis and Carol Peoples resided there with the children, and admitted to dealing methamphetamines to several persons in the housing complex. (RT 37: 7624-7628.) While appellant argues in *Argument VIII, post*, that the trial court erroneously restricted Quigel's testimony – and other lay witnesses – so he could not express his personal experience with the mental and emotional side effects of methamphetamine, for present purposes the examination demonstrates prosecutor's bullying tactics with lay witnesses, and the improper comments, and results of provocation.

On July 7, 1999, in cross-examining Quigel, who testified on direct examination he had sold methamphetamine to appellant approximately two nights before the final robbery and homicides at *Village Oaks Market*, Dunlap goaded Quigel into a violation of the court's restrictive ruling. Dunlap pushed Quigel into a corner with an aggressive and accusatory examination:

> Q. Okay. So this wired it's not necessarily a bad thing, is it?
>
> A. Depends on the person ... in certain cases if you don't get enough sleep, you start seeing things, and you get paranoid and think people are after you. You get homicidal or – it's a weird drug.
>
> Q. Mr. Quigel, that's nonresponsive.
>
> And I think you've been subject to an in limine order.

I ask we strike it. *But is that what you really think*?

A. That's what I know, my personal experience

with methamphetamine.

Q. Um-hmm. *Anything else you want to yell out now,*

Mr. Quigel, you've got it all out anyway.

Mr. Fox: I'll object.

The Court: Sustained.

Mr. Fox: That is prosecutorial misconduct.

Mr. Dunlap: It is not.

The Court: The objection is sustained. Ask the next question.

Q. Listen to the question Mr. Quigel ..."

(RT 37: 7668: 20-28 - 7669: 1-13; emphasis added.)[133]

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[133] Prior to re-direct examination an *in camera* hearing resulted in the court admonishing Dunlap, "[D]o not, do not, inform the jury or engage in conversation with the witness about being in violation of a Court's order or not. If there is an issue, bring it to the Court's attention outside the presence of the jury." After affecting an apology, and admitting it was "improper," Dunlap claimed it happened in the "heat of the moment" and "was not intended," but he was trying to show "Mr. Quigel was a hostile witness, and I wanted to show the aggravation Mr. Quigel shows." The court pushed Fox as to why it should not sanction Quigel for violating the ruling; Fox responded that he reminded Quigel of the court's order, but the prosecutor "baited him" repeatedly in his examination and Quigel was "egged on by the prosecutor's cross-examination, but there was a challenge which he responded viscerally." (RT 37: 7682: 6-8.) The court admonished Quigel, struck the offending testimony, and though rejecting the notion Dunlap had "baited" Quigel, told Dunlap, "don't do it again." (RT 37: 7682: 20.) None of this deterred Dunlap pretending to be "confused" (RT

Similarly, Dunlap inquired of Joni Fitzsimons, another neighbor at *the Paris Apartments* called by the defense in the guilt phase, "What's this 'abnormal' all of the sudden I'm hearing?" (RT 38: 7843: 4.) The objection was sustained "as to the form of the question." (RT 38: 7843: 6-7.) A few minutes later:

> " Q. Let's talk about the gun because I've got it all out here in front of me.
>
> Mr. Fox: Objection. That's improper.
>
> The Court: Sustained. Delete the editorialization, Mr. Dunlap. Ask the questions."
>
> (RT 38: 7851: 9-13; see, RT 88: 18332-18333.)

Mary Redvelski, another lay witness called by the defense in the guilt phase, who had lived in the apartment complex, had allowed appellant to supervise her children, though she did not know he was using methamphetamine. After the court sustained objections to improper questions relating to other crimes she knew nothing about (RT 55: 11214; 11216), the prosecutor injected the following inflammatory question:

> " Q. Ms. Redvelski, isn't it true that you really sit here, and you're just glad that your children weren't hurt by this individual that as you started to learn what an animal ....
>
> Mr. Fox: Objection. That's argumentative.

37: 7714: 11) with Quigel or from arguing his testimony was "bull." (RT 48: 10024.)

The Court: Yes. Sustained.

Mr. Dunlap: I'll strike the question. No further questions."

(RT 55: 11219: 16-23.)

In the retrial of the penalty phase, Dunlap continued undeterred by rulings from the guilt phase. He rephrased another objectionable question for a similar purpose to Mary Redvelski:

" Q. Do you think that's loving and caring to use methamphetamine?

Mr. Fox: Judge, I'll object. That's argumentative.

The Court: Sustained."

(RT 88: 18364: 19-23.)

Again, in the retrial of the penalty phase, Dunlap's highly inflammatory and argumentative style continued with Michael Quigel, after the court admonished Quigel, "I will make your life miserable if I have to." (RT 88: 18411: 11.) An objection to, "You're going to tell me that he [District Attorney Investigator Rosenquist] didn't ask what's your observation ...," was sustained, along with other repetitive and argumentative objections. (RT 88: 18439: 14; 18429; 18442.)[134]

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[134] Rather than take action with respect to Dunlap's pervasive misconduct in the presence of the jury, as pointed out *Argument III, ante,* after *repeatedly* sustaining Fox's objections to Dunlap's improper commentary during questioning witnesses, Judge Platt admonished *defense counsel* for "requesting prosecutorial misconduct in the presence of the jury ... It will not be tolerated ... *I will sanction you.*" (RT 38: 7839: 13-21.) Without

Similarly, with Roy Gratzmiller, who had supervised appellant at a plant in Florida, the prosecutor injected inflammatory material with a bad faith question in the retrial of the penalty phase:

> " Q. So he didn't murder anybody on your shift?
>
> Mr. Fox: Judge, I'll object. This is argumentative.
>
> The Court: Sustained."
>
> (RT 87: 18207.)

A few minutes later, with Carol Peoples, he simply ignored the court's rulings:

> " Q. Are you telling us that after Stephen Chacko was
>
> murdered, was butchered, shot five times –
>
> Mr. Fox: Judge, I'll object. This is argumentative.
>
> The Court: Sustained."
>
> (RT 87: 18287.)

In short, the prosecutor refused to abide by court rulings in the guilt phase and both penalty phase trials by repeatedly asking improper questions on bad faith, injecting

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> prompting from the prosecutor, Judge Platt proceeded back into the courtroom and admonished the jury, "significantly, ladies and gentlemen, there was comment earlier by defense counsel requesting prosecutorial misconduct ..., an improper subject to raise in front of the jury." (RT 38: 7841: 19-22.) As might be anticipated under the double standard applied by Judge Platt, Dunlap immediately proceeded to ask more argumentative questions, seemingly immune to objection, and certainly insulated by the court from admonition before the jury for continuing the pattern of asking improper questions. (RT 38: 7842-43.)

personal opinion by way of "editorializing," and poisoned the trial by this misconduct alone. (See, RT 38: 7874-75 [defense counsel argues for mistrial on prosecutor's "whole litany of questions ... done to inflame the jury."]; RT 40: 8418 [defense counsel moves for mistrial for "prejudicial litany of questions ...."]; RT 41: 8461 [same]; CT 10: 2641-2651: [*Motion to Admonish Prosecutor, etc.*]; CT 13: 3381-3390 [*Motion for New Trial*], *People v. Hughes, supra*, 27 Cal.4th at 388 [improper for prosecutor to ask questions harmful to defendant absent good faith belief such facts exist].)

B. Deceptive Practices and Refusal to Abide By Rulings

A prosecutor commits misconduct when he uses "deceptive practices or reprehensible methods," including using unprofessional and unethical means to achieve improper ends. (*People v. Hill, supra*, 17 Cal.4th at p. 845; *People v. Haskett, supra,* 30 Cal.3d at p. 866 [reversed death penalty for deceptive argument of prosecutor in penalty phase].) As will be recalled, the court had granted a defense motion to prohibit the prosecutor from using the legal conclusion "murder" to describe the "homicides" at issue. (See, RT 8: 58-60.) The prosecutor occasionally abided by the ruling, using the word 'kill' to form his questions, but, as can be seen above, he felt no compunction about creating an inflammatory form of question to incite the passions of the jurors. After a series of questions to Michael Liebelt in the guilt phase regarding the *Cal Spray* shooting, for example, Fox interposed objections to several questions about the pending homicides, using the word "murder" instead of "kill," such as, "Isn't it true ..., that you'd be shocked at the conduct of anybody committing such *outrageous murders*?" (RT 29: 5779: 4-6.)

Inconsistent with its rulings, the court overruled the specific objection to "using the word murder ..., argumentative." (RT 29: 5777-78.) The same flagrant violation of court orders regarding the use of the speculative and argumentative term "murder" to describe other homicides may have been fostered by judicial error or misconduct, but it does not excuse the prosecutor from his own misconduct. (See, RT 39: 8114 [cross-examination of Dr. Wu]; Cf., 8149 [objection to 'murder' in argumentative question sustained during cross-examination of Dr. Wu]; RT 87: 18287 [objection to "Stephen Chacko was murdered, butchered ...," sustained during cross-examination of Carol Peoples].)

Similarly, during the guilt phase of trial, the prosecutor ignored an in limine ruling with regard to the proffered testimony of Rodney Dove, co-owner of *Charter Way Tow*. (RT 32: 6531.) The court had ruled the prosecutor could not enter into an examination of drug test results conducted of *other* employees, particularly without providing discovery, but Dunlap did anyway:

> " Q. At the point of the dirty test by Mr. Peoples, had other employees at Charter Way Tow also been tested?
>
> A. Yes. We've tested all of them within a week's span.
>
> Q. It was basically a testing week for you, wasn't it?
>
> A. Yes.
>
> Q. Any of your other drivers fail?
>
> A. No.
>
> Q. So they all – none of them received a suspension?

A. No.

Mr. Fox: Judge, I'm going to object. This is part of the in limine objection I mentioned this morning.

The Court: Objection sustained.

Mr. Fox: I'd ask that the prosecutorial misconduct be assigned to Mr. Dunlap.

The Court: We'll address it."

(RT 32: 2-16.)

This incident occurred before the court admonished Fox not to use the term "prosecutorial misconduct" in an objection, and the court rejected Dunlap's explanation – "I think its [sic] highly relevant" – finding him "in violation of the Court's order, and impose a fine of $100." (RT 32: 6558: 7; 6559: 4-5; RT 38: 7841.) When Dunlap protested, "Just cuz I don't understand ..." the fine if "it's not going to find prosecutorial misconduct ..." (RT 32: 6569: 9-11.) Judge Platt reassured Dunlap that if for one moment he thought it "intentional [and] gone into against the court's order, I'd be assigning prosecutorial misconduct, and we'd be addressing mistrial issues." (RT 32: 12-15.)[135]

The following day, however, the prosecutor disobeyed another in limine ruling,

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[135] As noted above, the other monetary sanction ($100) imposed against Dunlap was for disrespect shown to the court in a pretrial hearing. (RT 24: 4841.) Like all other "warnings" to the prosecutor, the fines had no effect on prosecutor, and as discussed following, the court refused to find "misconduct" after terming Dunlap's actions demonstrated "reckless disregard."

eliciting from Detective Clifford Johnson, who had conducted the search of appellant's apartment, an item excluded by the trial court upon defense motion. (RT 33: 68560.) After describing "numerous items ... that were later retained," and introduced at trial, the following occurred:

Q. What type of weapon [was found]?

A. I think it was a – I'm not sure of the gauge, but it was a shotgun.

Mr. Fox: Judge, I'll object. This was a violation of an in limine order.

Mr. Dunlap: That's correct, Your Honor. We're willing to concede it has no significance, as far a relevance to this case."

The Court: All right. Move to the next area please.

Mr. Dunlap: Thank you, Judge."

(RT 33: 6872: 10-22.)

During the recess, Fox moved for mistrial, reminding the court it was "the second time that the prosecutor has failed to adhere to a Court order ... last time with ... Rodney Dove." (RT 33: 6878: 18-20.) The nonfunctional shotgun had been the subject of a pretrial ruling excluding the weapon as more prejudicial than probative, and Dunlap admitted "that was my fault," but denied there was any prejudice to appellant. (RT 33: 6878.) Fox disagreed, and moved for mistrial:

" It is more egregious than that. I'm asking the Court to assign prosecutorial misconduct to the prosecutor for not instructing this witness at this time not to mention the gun.

The damage has been done. The bell has been rung ...

This is a very critical incident in which there's an allusion to another weapon. The officer said something as to gauge. I had to object. I didn't want to stand up here and say I want a mistrial in front of the jury.

I have been extremely prejudiced by this mistake. It's an error. It's prosecutorial error. And I would ask for a mistrial." (RT 33: 6878: 13-28.)

The court denied the motion on the grounds it was neither "intentional" nor prejudicial (RT 33: 6905), but admonished the jury:

" [A] moment ago, there was a question posed to Detective Johnson, who was going through his inventory in the search. And mentioned a shotgun was found.

That was specifically an order of the Court that that not be mentioned in any fashion. And it was a violation of the Court's order to have that question asked.

What you need to understand is that court made its ruling because it was a nonfunctional firearm. Had nothing to do with this case. It was of antique value. It was in the house. Had nothing to do with evidentiary value, which is why I excluded

it. It was gone through by Detective Johnson, and in an inadvertent fashion, presented in his testimony. That's why I have to deal with that. You are to not consider it any fashion. And understand that the question was asked in violation of the Court's order.

Mr. Dunlap: Thank you, Your Honor." (RT 33: 6881: 28.)

In a variation on the theme, in the retrial of the penalty phase, Dunlap apparently discovered during the testimony of Michael Liebert, and had confirmed with Officer Happel, three additional cars in the *Cal Spray* parking lot were equipped with car alarms that had not been vandalized. After the prosecutor advised defense counsel and the court of three potential "new" car-owner witnesses, defense counsel refused to stipulate to the hearsay testimony of Stockton Police Officer Dean Happel, and the prosecutor decided to ignore the Evidence Code and his own admission to a lack of foundation for the hearsay (RT 79: 16341-43):

"Q. Did you receive any information regarding the last three vehicles as to the status of their alarms?

A. On this vehicle here –

Mr. Fox: Judge, I'm going to object. This was an in limine ruling, it's ... It's hearsay and we just litigated this this morning.

The Court: It's hearsay. Sustained.

Mr. Dunlap: That's fine, Your Honor."

(RT 79: 16383: 1-8.)[136]

As another part of the overall pattern, Fox repeatedly objected to 14-inch wooden figurines – representing each of the five victims – being placed on counsel's table in plain view of the jury. On June 19, 1999, Fox had objected in the guilt phase of trial to the "figurines that are just right in front of the TV set on top of the bench in plain view of the jurors at all times." (RT 34: 6994: 15-17; see also, RT 8: 1571.) The court inquired of Dunlap with respect to the need, and he responded: "We're entitled to have all our evidence out," including charts and the "figurines have been placed on a daily basis [to] ... represent the victims in this case." (RT 34: 6994: 24-28.) Judge Platt rejected Dunlap's argument as "absolutely ridiculous," and instructed the prosecutor to "take the figurines and put them over behind the witness box here and under where they are accessible." (RT 34: 6995: 21-23.) On July 13, 1993, however, the court overruled the

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[136] Outside the presence of the jury, defense counsel corrected his assessment of the "in limine ruling" prior to Officer Happel's testimony; there had been none. Fox's frustration with the Dunlap is evident and not surprising; he argued: "It's purposeful misconduct to elicit an answer that he knows is hearsay ... which I had assumed ... we would litigate outside the presence of the jury at some future date, and I believe that was Court's understanding." (RT 79: 16424: 28 - 16424: 1-6.) The court reviewed the transcript of the earlier proceeding and ruled that it had indicated it would cross the bridge of new-witness testimony only if it became necessary, but the question to Happel was "not in violation of any court order," and "was appropriately objected to as hearsay ... and sustained as hearsay." (RT 79: 16428: 22-24.) Whatever else may be said for the court's liberal interpretation of the incident, Fox argued correctly it was a kindred in "the type of pattern of misbehavior of Mr. Dunlap, where the court makes rulings, and then Mr. Dunlap specifically violates them in an innocuous way, asking the question as if he doesn't realize what he's getting into." (RT 79: 16425: 15-19.)

objection to the figurines being in plain view of the jury, even though they were not used to examine a witness (Dr. Wu), who was examined all day. (RT 39: 8091.)

During the retrial of the penalty phase, Fox had to bring the matter again to the court's attention: "I'd ask that the prosecutor remove these dolls from the table, they're nonevidence [sic] at this point, they're not being referenced at this point [and i]t's prejudicial to keep these dolls on the table at this particular stage." (RT 79: 16424: 11-15.) The court agreed with defense counsel, and granted the motion to remove the figurines, "Unless they are being specifically referenced, dolls will not come out until you are ready for another witness." (RT 79: 16433: 1-3.) The court ordered Dunlap to remove one of the figurines displayed that had nothing to do with the witness testimony planned for the day. (RT 79: 16433.)

However, that was not the last time Dunlap would place figurines prominently on counsel table after being ordered not to do so. With Dr. Wu, Fox complained to the court to enforce its order:

> " Again, this is the third day I've seen those dolls on the prosecutor's desk. He has not referred to them once in asking one of my experts any significance to it. And he held one up today and he says, 'Do you know James Loper?' But it – clearly, this is inflammatory. And we went through this again, and again, and again. I don't know how many times I have to object to it. But there's no relevancy to these dolls to the testimony of the cross-examination."

(RT 85: 17852: 1-9.)

The court equivocated on the violation, believing "this was more than just being held up at the time the questions were asked," but even if Dr. Wu admitted he was unfamiliar with homicide facts, "I still do not see the significance of having all five dolls lined up for the entire afternoon ...," and ordered the dolls removed again. (RT 85: 17852: 16-21.)[137]

This is simply another example of the prosecutor ignoring the court's orders to cease from improper conduct. Dunlap knew the court's "sanctions" were without force or effect, and when Fox noticed the display on the table a few days later, he pointed it out to Judge Platt, who reminded Dunlap of the previous "ruling of the Court has been that the dolls will not come out." (RT 90: 18944: 28 - 18945: 1.) After cross-examining Dr. Woods that afternoon (RT 90: 18946-18974), the next day (April 27, 2000), Dunlap cross-examined Dr. Woods extensively on the facts of each homicide (200 pages), but waited until the very end before showing Dr. Woods's the figurines that had stood on counsel's table for two days; showing each to Dr. Woods, the examination culminated in questions on the so-called "shooting pattern" of each wound, which Dr. Woods could

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[137] As discussed in *Argument XIV*, *post*, during the penalty retrial, Dunlap displayed the "doll" of James Loper before Loper's mother (Hazel Loper) during her 'victim impact' testimony, and over objection, the court allowed it: "She'll be allowed to make reference to the doll ... It's before the jury in a number of different fashions. It isn't any more or less prejudicial through Mrs. Loper. I don't think it's particularly necessary. But victim impact is an area that there is some latitude." (RT 84: 17446-17449; 17449: 12-18.)

describe only as indicative of "paranoia and aggression." (RT 91: 19059-19060.) When he finished examining Dr. Woods, defense counsel had to apply again to have the figurines removed from the table. (RT 91: 19060.) Dunlap's deception was not the result of innocent lack of recall of a judicial order, but part of his overall pattern of deception and duplicity.[138]

Furthermore, as set forth in detail as a separate ground for reversal in *Argument IX*, *post*, and incorporated here as if fully set forth, during the retrial of the penalty phase the prosecutor objected to defense counsel's cross-examination of rebuttal expert, Helen Mayberg, M.D., with respect to her consideration of Dr. Buchsbaum's opinions in the guilt phase. As pointed out in the *Statement of Facts*, *ante*, pp. 50-56, Dr. Buchsbaum was not called as a defense witness in the retrial of the penalty phase, but Dr. Wu and Dr. Amen testified to appellant's abnormal brain scans. While the court erroneously sustained the prosecutor's objection to questioning Dr. Mayberg about Dr. Buchsbaum's opinions, and improperly restricted cross-examination, Dunlap then moved for "sanctions against [defense] counsel" for attempting to show bias in Dr. Mayberg's derogatory comment in the guilt phase that Dr. Amen's work product was "garbage." Dunlap disingenuously

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[138] Dunlap was well aware of the powerful impact of the figurines. Ironically, Judge Platt said during an unnecessary display of the dolls at the retrial, "They're not there for simple disgust." (RT 85: 17853: 8-9.) Regardless of judicial proscription, Dunlap understood their inflammatory value and exploited the figurines to improperly stir up jurors as often as possible, including during his opening statements (RT 28: 5503-5504; 52: 10776; 77: 15971-72) and closing arguments at both trials. (RT 59: 12126; RT 95: 20014; 20116; 20030; 20031; 20064.)

claimed he had made "the discovery requests for raw data numerous times ..." in the guilt phase, and thus Fox's examination of Dr. Mayberg was "outrageous." (RT 93: 19701-19702.) In point of fact, Dunlap misled Judge Platt in the retrial of the penalty phase on May 5, 2000. The issue of Dr. Amen's "raw data" arose on July 23, 1999, during the guilt phase when both attorneys learned of a difference between computer-generated images supplied by Dr. Amen – turned over by defense counsel in a timely fashion to the prosecutor – and "raw data." Neither Dunlap nor Fox knew there was a distinction, and Dunlap had advised the court during the guilt phase that he was "not making a [discovery] complaint," because he admitted it was his own "inexperience with imaging that is the problem." (RT 46: 9389; 9392.) In the retrial of the penalty phase, however, Dunlap's misrepresentation of fact was accepted by the trial court, and, over Fox's objection and motion for mistrial, Judge Platt improperly instructed the jury that defense counsel's examination of Dr. Mayberg was "extremely improper" in light of "Mr. Dunlap['s] ... numerous discovery requests as to this specific information, which was not provided." (RT 93: 19707-19708; see *People v. Hill, supra,* 17 Cal.4th at p. 823 [misstatement of fact not excused by vigorous argument]; *People v. Haskett, supra*, 30 Cal.3d at p. 866 [deceptive methods condemned in attempt to persuade court or jury].)

C. Improper Arguments to Juries

Aside from the many examples of prosecutorial misconduct, including deprecatory comments designed to malign counsel and mislead the court and jurors, and by injection of extraneous material and personal opinion in examining witnesses, all in the effort to

obtain unlawful convictions and sentence of death against appellant, the prosecutor's arguments to jurors in both trials were equally misleading and deceptive.

As set forth in *Section C.2.a.* following, and in *Arguments VI, X* and *XI, post*, as reversible judicial error in excluding defense evidence, the prosecutor urged exclusion of mitigation evidence of appellant's remorse and molest as a teenager in both penalty phases, and expert testimony on crime scene reconstruction in the guilt phase on lack of intent. The prosecutor's arguments to juries in these specific areas were misleading and improper, and as such were not "fair comment" but constitute separate grounds of misconduct necessitating reversal. (*People v. Lawley* (2002) 27 Cal.4th 102, 156; *People v. Hill, supra*, 17 Cal.3d at pp. 823, 845.)

C. 1. Guilt Phase and the Penalty Phase of First Trial

C.1. a. Guilt Phase Argument Misconduct

All the types of misconduct employed by the prosecutor during pretrial proceedings and the testimonial part of trial, and which the court allowed to occur, were carried over to Dunlap's arguments to both juries, including denigration of defense counsel, appellant, defense witnesses, and the defense presented, as well as injecting inflammatory personal opinions into the case. Although defense counsel did not object to the prosecutor's guilt phase argument, it is abundantly clear any objection would have been futile; the trial court would have "fail[ed] to rein in [his] excesses" (See, *People v. Hill, supra*, 17 Cal.4th at pp. 820-821), and any attempt by the court to do so would have been ignored by Dunlap as it been all along. As noted above, defense counsel attempted to preempt the prosecutor

from committing misconduct during the retrial, and the court agreed to some prophylaxis, but, as discussed following, ended up admonishing *both* counsel. (See, *Motion to Admonish the Prosecutor Not to Repeat Various Specified Egregious Misconduct in Closing Argument, Committed in the First Penalty Phase Trial [sic], etc.*; CT 11: 2641-2651; RT 62: 12698-12728; RT 94: 19960.)

For instance, during the guilt phase of the trial, Dunlap repeatedly expressed his personal opinions, including vouching for Dr. Mayberg, in closing argument:

> " Dr. Mayberg is so much more capable [than Dr. Wu, Dr. Amen and Dr. Buchsbaum], with no agenda, and serving the bottom line to you." (RT 48: 10028: 21-22.)[139]

In context, this vouching for Dr. Mayberg is even more egregious because it was prefaced by expressions of personal opinion regarding "scarey [sic]" defense witnesses (Dr. Wu, Dr. Amen, and Dr. Buchsbaum), who "sell some good stuff ... twisted for personal gain" (RT 10028: 8; 12-13), and followed by reference to "this man [defense counsel] trying to shove down your throat" expert opinion in the form of "scarey [sic] science" on brain scans, which, "quite frankly, *I found it to be insulting*." (RT 48: 10029: 7; 16-17; emphasis added.) Indeed, not only did Dunlap personally conclude the testimony "insulting," but he informed the jury in his opinion the testimony was "bull ... I

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[139] Three objections were interposed to "argumentative" portions of Dunlap's opening statement and two were sustained. (RT 28: 5504: 5509-5510.)

mean it's absolutely frightening." (RT 48: 10031: 4.)

This is no different in form or content from what occurred during the course of trial, i.e., a prosecutor expressing his personal opinions – "editorialization" – by a constant stream of "gratuitous comments," laughing, and bullying his way through the examinations of Dr. Wu, Dr. Amen, Dr. Buchsbaum, and other witnesses, including ingratiating himself with those called by the State (Dr. Mayberg, DOJ Ciulla, etc.)

Similarly, in commenting on lay witness testimony – no one had ever observed violence from appellant, who was withdrawn and quiet – the prosecutor posited that was "*my* favorite part" of the defense case; "Are you being misled [by defense counsel]? Yes." (RT 48: 10; 17.) And, "You have to sit here and grin. You do. It's a joke." (RT 48: 10025: 26-27.) In point of fact, as discussed above, the prosecutor's closing in the guilt phase of trial is peppered with improper personal opinions regarding defense counsel and evidence as "bull," "frightening," and "misleading." (RT 48: 10022; 10024; 10025; 10031; 10034; 10057.)

Furthermore, the prosecutor misstated the law by repeatedly telling jurors defense counsel had been "misleading" them with brain science testimony: "Bull. This evidence had no business in this stage of the trial ... Bull." (RT 10022: 22-26.) As pointed out elsewhere, Dunlap never attempted to exclude evidence proffered in the guilt phase to raise a reasonable doubt about appellant's capacity to form the specific intent to kill. Multiple issues surrounding evidence proffered were litigated, but not once did the prosecutor attempt to convince the trial court that evidence to support a defense was

altogether inadmissible in the guilt phase of trial. (See, RT 34: 7140; see also, *People v. Hill, supra*, 17 Cal.4th at pp. 829-830.)

Moreover, to summarize the prosecutor's rebuttal in the guilt phase, on the one hand he said, "this isn't a personality contest ..., I don't like personal attacks," but claimed defense counsel had made it into one – "that's offensive" – and reassured the jury, "the prosecution has not misled." (RT 48: 10121: 25; 10122: 24-25; 10136: 22.) On the other hand, "they [Michael Fox] get up here and talk with a voice smooth, silk, to talk about poor Louis ... you almost want to get up and apologize ... [W]e just sat through two hours of bull." (RT 48: 10122: 27-28 - 10123: 1-2; 10126: 25.)[140] He concluded by telling the jurors "you're tired" (RT 10226: 24), and, "I will not talk to you again until after the verdicts, if we choose to move onto a new stage based on your findings." (RT 48: 10136: 23-28 [Fox objected to the latter improper statement; objection sustained].)

C.1.b. First Penalty Phase Argument Misconduct

Dunlap's misconduct continued during the retrial of the penalty phase, and began

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[140] Fox commented on the prosecutor's improper expression of personal opinion in opening: "[H]e attacks the defense or the defense witnesses as insulting to you. Well, I submit to you the only insult is the arrogance in which the prosecutor has treated this whole process. This [deliberations] is a very sacred task for you." (RT 48: 10063: 28 - 10064: 1-4.) It is worth noting, prior to closing argument in the penalty phase retrial Fox moved for a 10-foot buffer zone because Dunlap's "style is very inflammatory," and requested the prosecutor "[n]ot come over and directly point his finger at counsel or the defendant like he did in the first penalty trial." (RT 94: 20006: 22-26.) Judge Platt declined to do so, inviting Fox, "[i]f it gets that disturbing, raise it; I'll rule on it." (RT 94 20007: 1-2.) Dunlap disingenuously remarked, "I don't mind if counsel stands behind me. He's welcome in our neighborhood any time." (RT 94: 20007: 6-7.)

with his opening statement and continued into his closing argument in the penalty phase of the first trial.[141] For instance, after Dunlap's opening statement in the first penalty phase, Fox argued to Judge Platt that the prosecutor had presented "a very calculated, specific opening statement with facts that detailed the lives of each and every one of the victims and their families ..., [constitutes] a violation of my client's due process rights ..., [and] would not render any verdict of death reliable under the 8th Amendment to the Constitution." (RT 52: 10810: 16-28.)[142] As discussed in *Argument II, ante*, any motion that might have followed the next morning was buried beneath the motion to recuse Judge

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141 As discussed in *Section 3.B, post,* p. 264, Dunlap's arguments in the first penalty trial were combed by defense counsel and flagged by the trial court for areas of potential misconduct in the retrial of the penalty phase; the court admonished the prosecutor twice – during pretrial hearing and the day before closing arguments – with respect to his closing argument presented in the first penalty trial in order to short-circuit "argument by the prosecution that can be argued as prosecutorial misconduct" on appeal in event of a death verdict in the retrial. (RT 94: 19960; see also, RT 62: 12698-12728.) Consequently, citations to first penalty phase summation given by the prosecutor, and objected to by defense counsel, are highlighted below as prelude to the retrial, and as further documentation of the prosecutor's unrepentant abuse of appellant's due process rights.

142 The offending passages include: "And you're going to learn that Mr. Peoples knew James Loper, knew his wife, knew he had two small boys. We're going to show you. When you talk about mercy, you get to think about the victims. Mr. Fox: Judge, I'll object. That's improper for opening statement. The Court: Sustained." (RT 10770: 18-25.) Similarly, in improperly attempting to generate "mercy ... about the victims," Dunlap continued with Besun Yu,"You have [sic] get to consider what she was thinking and the impact to her family. Mr. Fox: Judge, I'm going to object. That's improper. The Court: Sustained." (RT 52: 10772: 4-8.) Two other improper statements by Dunlap to another victim family member (Karen Tan) followed, were objected to, and one sustained. (RT 52: 10775-10776.)

Platt. However, the court admonished the first jury at defense counsel's request, and over the prosecutor's objection:

> " [T]he evidence that we are about to move into that Mr. Dunlap is about to present ... is admissible only on the issue as to the first of the factors that was talked about by Mr. Dunlap ... in his opening statement about aggravation ..., obviously an emotional issue. But you have to set the emotional portion of it aside as best you can and look at it as a factual scenario as it relates to the consequences of the facts and circumstances of the crime."
>
> (RT 52: 10826: 27-28 - 10827: 1-16.)

Finally, although Judge Platt ruled "serial killer" was not improper argument for the retrial, its power as an inflammatory rhetorical device is clear in the closing argument of the prosecutor in the first trial. Dunlap used the term – by his own admission 40 times – in arguing to the jury in the guilt phase and for the death penalty during the first penalty trial, though no expert testimony was presented to support its use as a term of art. (RT 62: 12699-12702.) [143]

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[143] For example, in the guilt phase he improperly referred to Louis as "a hunter [and] a serial killer" (RT 48: 9998-1), but the court ruled prior to retrial, "regardless of the negative connotations ..., 'serial killer' means somebody who kills more than once and in a serial fashion ..., a very easy definition to get to, [and] I'm not going to allow a 402 hearing on that issue." (RT 62: 12722: 16-25.) Dunlap informed the court "just for the

record, I do intend to supplement the witness with Inspector Chief – I can't remember his last name..," and the court responded, "I'm sure there will be objections to it and we will litigate it."
(RT 62: 12723: 20-24.)

In truth, its forensic value is problematical, as any multiple murder, according to Judge Platt, qualifies under his definition. Various authors and organizations, including the F.B.I., have attempted to define "serial killer" with little uniformity of opinion. The F.B.I. has used "three or more separate events in three or more separate locations with an emotional cooling-off period between homicides," while the *National Institute of Justice* has defined it as a "series of two or more murders, committed as separate events, usually, but not always by one offender acting alone ...." Both definitions have been criticized as outdated and too general "to distinguish between different types of multiple murder." (The Encyclopedia of Serial Killers, Newton [Checkmark Books, 2000].) Similarly, in Serial Murder, Dolan [Chelsea House, 1997), p. 19, the author points out:

> " In recent years law enforcement professionals and behavioral scientists have recognized that serial killers – wherever they are found – act from fundamentally different motivations than do other murderers. For the serial murderer, killing is *not a crime of passion* or *a means to get money* or the unintended consequence of another crime. Rather, it is the culmination of an over-powering urge that has been growing – sometimes for years – until the ritual of murder has been integrated into the killer's life. It is as though the serial murderer lives to kill." (Emphasis added.)

The crimes charged in this case did not arise from an overwhelming urge to kill; they were not ritual murders, but related to robberies charged with each count of murder, the *Bank of the West* robbery, automobile burglaries of *Cal Spray,* passion over work-related suspensions, etc. (CT 3: 585-581). Older definitions also attempted to distinguish the "organized [serial] killer" from a disorganized "sloppy" killer to provide additional characteristics. (See, Crime and Criminology 6th Ed., Reid [Holt Reinhart and Winston, 1991], pp. 268-70; see also, Mindhunter, *Inside the F.B.I.'s Elite Serial Crime Unit*, Douglas and Olshaker [Scribner, 1995]; Encyclopedia of World Crime, *Dictionary*, p. 333 [Crime Books, Inc. 1989].) According to Brent Turvey, an informal consultant to the Stockton Police Department and forensic expert, later retained by defense counsel but not called as a witness after unduly restrictive rulings by the court on his

In the first penalty phase trial, the prosecutor did not cease to present an improper closing argument. The number of times (30) he used "bull" in the first trial, hardly complies with the high ethical standard expected of a public prosecutor: "We reiterate ... such 'offensive personality' is not appropriate from a representative of the state's interests. (*People v. Kelly, supra*, 75 Cal.App.3d at p. 690.)" *People v. Hill, supra*, 17 Cal.4th at 838-39.) The term was used repeatedly in the retrial, but suffice to say, Fox objected to a number of improper arguments presented by Dunlap during the first penalty phase trial. (RT 59: 12097:12-28 -12098:1-4; 59:12108: 2-18; 59:12126: 20-28 -12127: 1-8; 59:12147: 20-28-12148:1-7; 59:12158: 7-28-12159:1-20; 60:12183; 60:12187:1-11.)[144]

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proffered testimony, appellant acted in an increasingly random and reckless manner from late October through November 11; according to Fox, Turvey explained to him, "there are serial killings in serial fashion ... [but] no such thing a serial killer." (RT 42: 8858; see *Argument X, post.*) Though Dunlap claimed he would call "three witnesses" to support his "serial killer" theory, the court's erroneous ruling appears to have made it unnecessary for his presentation of improper arguments to both juries. (RT 62: 12722: 9-10; 95: 20019-20.)

[144] Fox's "misleading" objection to Dunlap's argument that several potential mitigating factors listed in Penal Code section 190.1, and read to the jury in CALJIC 8.85, did not apply, was overruled. (RT 59: 12140.) Dunlap took "umbrage" with Fox's alleged "speaking objections," but Judge Delucchi correctly ruled, as Fox had attempted unsuccessfully to convince Judge Platt, "defense counsel's responsibilities representing the defendant is a little bit different than yours. He has an obligation to object when he feels that the district attorney's exceeded the bounds of propriety in his argument. If he doesn't do that, on appeal, that's deemed to have been waived. It's a mine field for defense counsel.I don't think defense counsel's objections were off the charts. As I pointed out to the jury, if I find that you're out of line, I will certainly correct you." (RT 59: 12156: 2 - 20; RT 59: 12148.)

C. 2. Retrial of the Penalty Phase

The penalty retrial presented a virtually identical case to the second jury sworn in to determine the appropriate punishment, including all witnesses called by the prosecution to establish the "circumstances of the crime," as evidence in aggravation under factor (a). As discussed following, the prosecutor continued to flaunt figurines in violation of the court's orders, disparage defense counsel at every opportunity, gratuitously comment on witness testimony, ask improper questions, and, as the court characterized it, repeatedly "offended by the tone of voice and attitude" (RT 92: 19348), demeanor and actions completely inconsonant with the professional duties of a public prosecutor. (*People v. Hill, supra*, 17 Cal.4th at 819-820, 833; *ABA Standards, supra*, 5.2, pp. 113-114].)

As pointed out in *Section C.1.b.* above, Judge Platt had taken it upon himself to review the arguments of both counsel presented in the penalty phase of the first trial, and took issue with a number of arguments presented. The court advised Dunlap – and Fox – of potential areas of improper argument (RT 94: 19934-19941),[145] referring to transcript page and line number:

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[145] As noted, Judge Platt informed counsel that he had taken this step: "So both counsel know and the record reflects why the Court has gone through the previous closing arguments, I view my role at this point in the trial and argument as assuring that if a death verdict is returned, that there is nothing in argument by the prosecution that can be argued as prosecutorial misconduct, and nothing that is missed or placed in defense argument that can be argued as ineffective assistance of counsel." (RT 94: 19960: 7-14.)

- "'I hate October 29'," was an improper "injection of the personal emotion, personal opinion," citing RT 12,102: 24-28;
- "'I'm sorry, Anice [Chacko],'" improper, citing RT 12,113: 19-23;
- "'It's shameful what the family was put through to come here,'" and any reference to "'shameful, disgraceful nature, cowardice,'" was inappropriate comment and improperly "passes moral judgment" on the defense presentation of evidence, citing RT 12,147: 23-28;
  - Prohibits the argument, "'the cowardice, of that serial killer to allow his children in the courtroom is amazing,'" citing RT 12,154: 19-21; or,
  - "'It is unfortunate that the defendant hides behind the cowardice of calling those two children,'" termed "absolutely reprehensible," citing RT12,155: 7-8; and,
  - Reference to public passion, "'Society says we as a people are tired of serial killings. It's gotten to the point you're afraid to open up the paper. It's gotten to the point you say, oh, my God and you go hold your children," prohibited, citing RT 12, 187.[146]

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[146] Due to earlier sanctions, admonitions to jurors, and the threat of taking Fox into custody if he phrased an objection as "prosecutorial misconduct," the court accepted that any and all "objections" during the prosecutor's closing argument would be deemed misconduct under federal and state constitutional provisions, but in light of the preemptive rulings on Dunlap's first penalty phase arguments, the court "assured" defense counsel there would be "nothing in argument by the prosecution that can be argued as prosecutorial misconduct ... " (RT 94: 19960; see, *People v. Boyette, supra,*

Whether Judge Platt considered this critique part of his *sua sponte* "role" (RT 94: 19960), or, as a belated attempt to reiterate some of the rulings on the pretrial defense motion to *Admonish the Prosecutor*, etc. (CT 11: 2641-2651; RT 62: 12698-12728), Dunlap was not deterred by judicial injunction.

Indeed, in Dunlap's opening statement to the jury in the retrial of the penalty phase he immediately sought to inflame jurors, and despite admonitions from the court, he continued to argue throughout the opening statement in the retrial of the penalty phase:

> **1)** " Serial killer. Systematic, repeated, intentional, premeditated and deliberate killing of another person.
>
> Mr. Fox: Judge, I'm going to object. This is argumentative, and also prior to the ruling in limine.
>
> The Court: "Rephrase your question or your comments, Mr. Dunlap. It's opening statement."[147]

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29 Cal.4th at 410 [objections cut off by trial court not waived on appeal].) When Fox informed the court day before closing arguments of his intention to raise objections to the prosecutor's improper arguments, Judge Platt appeared to change course: "As long as you say the words prosecutorial misconduct, I don't have a problem with that. My concern is to try to minimize the number of times that has to be done." (RT 94: 19960: 23-24.)

147 The purpose of an opening statement "'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect' (*People v. Arnold* (1926), 199 Cal. 471, 486 [250 P. 168], and the use of matters which are admissible in evidence, and which are substantially in fact received in evidence, may aid this purpose." (*People v. Green* (1956) 47 Cal.2d 209, 215.) As pointed out in *Section 3.A.2*, *ante*, the ruling on use of the term 'serial killer' was not definitive because it had not been

(RT 77: 16001: 22-28);

2) " Mr. Peoples has five special circumstances.

I want to remind you, clarify something. It's not the

aggregate of all five that make Mr. Peoples eligible

for the death penalty. Each and every individual

special circumstance –

Mr. Fox: Judge, I'm going to object. This is

improper opening statement.

The Court: Stay with an opening statement, Mr. Dunlap.

Mr. Dunlap: That's fine, Your Honor."

(RT 77: 16007: 18-28);

3) "There's no sign of forced entry. It's a skilled job.

Someone knew what they were doing.

Mr. Fox: Judge, I'm going to object, this is argument.

The Court: Sustained. Stay within the parameters of

opening statement."

(RT 77: 16010: 1-6);

4) " When you decide about intoxication, intent,

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especially when the prosecutor had not identified a witness for the purpose of explaining the term and had opposed the defense testimony of Brent Turvey. (See also, RT62: 12722-12723; *Argument X, post.*)

planning, those are the things we want you to look at.

Mr. Fox: Judge, I'll object. This is argument.

The Court: Overruled.

Mr. Dunlap: Nine shots ..."

(RT 77: 16021: 12-18);

5) " We go first. The defense may or may not put on case. I assume they will. Seen it before. Typical story. Bad life. Bad childhood. Drugs. Poor me. What you're going to hear. Guaranteed.

Mr. Fox: Judge, I'm going to object. That's completely argumentative.

The Court: Stay with opening statement, Mr. Dunlap, and not argument."

(RT 77: 16053: 27-28 - 16054: 1-6.)[148]

Accordingly, the opening statement of the prosecutor was peppered with improper argument, and failed to "[s]tay within the parameters of [proper] opening statement." (RT 77: 16010: 6; *People v. Green, supra,* 47 Cal.2d at p. 215.)

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[148] Though the subject of other arguments presented in this appeal, it is noteworthy here to contrast the seven "argumentation" objections by the prosecutor to defense counsel's opening statement in retrial; five were "sustained" – two overruled – without any cautionary admonition from the court, such as, "stay with an opening statement," as afforded the prosecutor. (RT 77: 16062; 16065; 16083; 16084; 16109; 16115; 16129.)

The presentation of closing argument in the retrial of the penalty phase is egregious for many reasons, but paramount is the prosecutor's exploitation of rulings he sought to exclude expressions of remorse by appellant, including remorse expressed in redacted letters to his family and directly to Pastors Skaggs and Kilthau. (See, *Argument VI, post.*) Knowing full well that Louis Peoples had repeatedly broken down in interviews with family, friends, pastors, and admitted to his wrongdoing, expressing deep remorse for the families of the victims, the prosecutor fought every inch of the way to exclude *any* evidence of remorse; he wanted to force appellant to testify, and nothing else would suffice. Dunlap abused the process to mislead and misrepresent what he knew to be a distortion of fact and law.[149]

The following references, along with annotations, apply to closing argument on retrial:

> **1)** " Does he get additional punishment for Stephen Chacko ...
>
> Do we walk out and tell Anice Chacko that her husband's death
>
> is a freebie? That it has no value?
>
> Mr. Fox: Judge, I'm going to object. This is improper argument for
>
> the prosecutor to make. Nothing is a freebie.
>
> The Court: Give me a legal basis.

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[149] Judge Platt advised the jury before closing arguments, "I have indicated to both counsel what the parameters of their arguments appropriately can be to you. And I expect that that is going to be adhered to." (RT 95: 20012: 27-28 - 20013: 1.)

Mr. Fox: It's improper, Judge.

The Court: Objection's overruled."

Mr. Dunlap: Freebie. No value. No value, no additional punishment. Nothing. Tell Anice Chacko that her husband is worth no value. Nothing. Freebie. Died for nothing. Okay?"

(RT 95: 20016: 4-19);[150]

2) "Serial killer, ladies and gentlemen. I mean, serial killer. What is it? Systematic, routine, premeditated, intentional killing of innocent people.

Mr. Fox: I'm going to object. We litigated this issue of serial killer. There's no evidence as to the definition –

The Court: Argument, counsel. It's appropriate argument.

Mr. Dunlap: That's all right. Serial killer."

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150 As discussed following, Dunlap's convoluted and improper argument runs for several pages. Dunlap suggests that in his opinion each victim's death would be a "freebie" if life imprisonment were imposed, "Because we know for James Loper alone – alone – the best possible verdict for Mr. Peoples under the law is life without possibility of parole" (RT 95: 20015; 20017), but "each and every one of these homicides independently carries a death verdict." (RT 20017: 23-24.) There was, however, only one verdict form for the entire case (CT 13: 3348), and a verdict must be based upon a weighing of all the factors in aggravation and mitigation; Dunlap misstated the law and improperly argued appellant would "get a lot of freebies" if he were sentenced to life imprisonment. (RT 20018: 15-16; see also, RT 20075: 13-17; 20144-45; 20221-20222; [same argument]; *People v. Hill, supra*, 17 Cal.4th at 829, 837.)

(RT 95: 20019: 23-28 - 20020: 1-4);

3) "As you sit here and you think about robberies, you'll see definitions of fear. Imagine what Stephen Chacko was thinking when he saw this gun pointed at him. Imagine. Imagine the noise in that store. You want to talk about mercy for this man, this killer, this systemic [sic], routine killer. Imagine the noise that this gun would create inside a room such as this. And, now, imagine that it's being fired at you. Imagine that for Stephen Chacko.

Mr. Fox: I'll object. That's improper argument. He's placing the jurors in the position that they have fear, and that's improper.

The Court: Overruled."

(RT 20026: 1-14.)

4) "He comes back. He sees nobody there, and here comes Jun Gao. He pulls this gun out. This gun is unloaded. It is safety strapped and checked by these bailiffs.

If I pointed this gun at one of you, you would be upset. You would be scared because guns kill. If I took this gun and pointed it at someone, you would be offended.

Mr. Fox: Judge, I'll object to that. I think this is improper argument.

The Court: Sustained.

Mr. Dunlap: Guns kill ..."

(RT 95: 20080: 17-28.)[151]

5) "That's Dr. Kent Rogerson. He's testified upwards of several hundreds of times. He advises the defense routinely.

Myself and Mr. Fox know –

Mr. Fox: Objection, Judge. That assumes facts not in evidence.

The Court: Sustained.

Mr. Dunlap: He knows me."

(RT 95: 20148: 16-22);

6) "Jim Esten, retired custodial officer, comes in here ...

[and opines] the best indicator of behavior is your prior incarceration ...

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[151] After initially overruling the objection to Dunlap pointing the gun at jurors, ostensibly because the court thought Dunlap had placed it in the context of "mercy" for appellant (RT 95: 20038-20039), the court relented, and on the second objection to the improper prosecutorial argument, the court admonished jurors:

> " [A] portion of Mr. Dunlap's argument or comments to you was where he made comments to the effect of this gun is unloaded, it is safety-strapped, and has been checked by the bailiffs. If I pointed this gun at you, you would be upset, you'd be scared, because guns kill. If I took this gun and pointed it at someone, you would be offended.
>
> If you recall, Mr. Fox objected as improper argument. I sustained the objection. It was improper argument. And that is not something that you would do or could do in regard to anything that relates to your functions as jurors. So you are to again disregard it. I have stricken it from the argument. It is not proper."
> (RT 95: 20098: 4-17.)

That's bull ... That's bull."

(RT 95: 20148: 25-26 - 20149: 1-9);

7) "In the last trial he [James Esten] got tore up or got questioned extensively about that. So what does he tell you this time? I read your opening statements, so I know the facts a little better. That was his testimony."

(RT 95: 20151: 10-13);[152]

8) "Number one, we have no proof of a molest. God forbid there is a molest. Absolutely no relevance to this case. Dr. Lisak drew absolutely no parallels. Dr. Liskak absolutely made no diagnosis."

(RT 95: 20153: 25-28);

9) " I want to start out by saying that is very, very clear Mr.

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[152] No contemporaneous objection was interposed to 6-10, but defense counsel moved for mistrial the following day on grounds appellant's rights had been violated by prosecutorial misconduct in closing argument under the United States Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments, and California Constitution, Article 1, Sections 15, 16 and 17. Defense counsel argued: 1) the prosecutor had fought successfully to exclude molest evidence proffered, and, therefore, improperly exploited the court's ruling; 2) reference to Esten being "tore up" at the prior trial was improper; 3) attacking "the child" misled the jury into believing family history and background were not valid areas to consider in mitigation; and, 4) citing RT 95 "20,162; 20,184; 20,185; 20,187; 20,195; 20,198; 20,207; 20,210; 20,212 and 20,218," the prosecutor improperly and "repeatedly claimed that Louis had no remorse after successfully convincing the Court to remove all evidence of remorse from the trial." (RT 96: 20228: 1-25.) The court summarily denied the motion. (RT 96: 20230.)

Peoples, the boy, is not on trial, Mr. Peoples, the man, who made choices is on trial. Counsel wants to talk about childhood ..., Here the man who is on trial is Louis Peoples, the 37 year old."

(RT 95: 20127: 12-26);

10) "Dr. Woods came in and said Mr. Peoples expresses genuine remorse. That's the only remorse you hear from, from a defense expert. Because there's no remorse in those crimes. There's no remorse when he guns down James Loper and shoots him nine times and then calls Cal Spray [sic] for his job back.

There's no remorse when he guns down Thomas Harrison and laughs about it to Michael Liebelt. There's no remorse whatsoever about Stephen Chacko when he laughs about it to his wife.

There is no remorse when he leaves Besun Yu on the floor to die with two bullets in her back fighting for her life. And has the audacity to write in the book ha ha. It's not consistent. "

(RT 95: 20187: 2-15).[153]

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153 As set forth in *Argument VI, post*, appellant's expressions of remorse were litigated extensively. Appellant objected to the use of the Exhibit 578, "Biography of a Crime Spree" before retrial of the penalty phase as written "after the fact" and not a "circumstance of the crime" [CT 10: 2702], but the court overruled the objection, stating the prosecutor could argue it showed lack of remorse. (RT 76: 15721; see *Argument XV, post.*) Even up to and during the prosecutor's closing argument, defense counsel argued the prosecutor improperly exploited the court's erroneous rulings

The prosecutor committed misconduct in closing argument to the jury in the retrial of the penalty phase by using the murder weapon to frighten and inflame jurors, by improperly incorporating his personal opinions into his argument, and by misleading the jury into believing that appellant should receive the death penalty because otherwise he would receive some sort of legal "freebie ..., no additional punishment" because there were multiple victims. In essence, Dunlap vouched for the death penalty on the ground that he felt multiple felony-murders were more deserving of greater punishment than other death-eligible murders, even though only one verdict form was submitted to the jury. As the high court said in *United States v. Young* (1985) 470 U.S. 1, 18-19:

> " Such comments can convey the impression that evidence was not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to

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that excluded evidence of remorse. For present purposes, it is clear Dunlap distorted the evidence, repeatedly arguing appellant showed no remorse at any time, knowing full well that he had expressed deep remorse. Dunlap's hearsay objections were adamant, and he may have been successful in getting Judge Platt to eventually exclude evidence of remorse, but to then claim appellant showed none – exhibiting misleading portions of redacted letters on exhibit boards of victim photographs – was essentially fraudulent, and counsel's objections and motions for mistrial were erroneously denied. (See, RT 95: 20009-20010; 20113-20119; RT 96: 20228-20230.)

trust the Government's judgment rather than its own view

of the evidence."

Although the trial court attempted to cure the prosecutor's inflammatory use of the murder weapon in closing argument, it did nothing to correct the prosecutor's other misconduct, and in any case the admonition did not cure the prosecutor's wielding of the murder weapon to improperly instill fear and to incite jurors to return a death verdict. (*People v. Loker* (2008) 44 Cal.4th 691, 740 [court immediately admonished jury regarding prosecutor's improper argument].) Moreover, as raised in *Argument XVI, post*, the trial court erroneously rejected a proffered defense instruction on the prosecutor's objection it was "bizarre" (RT 92: 19429) which would have properly guided jurors. Relying on *People v. Gates* (1987) 43 Cal.3d 1168, 1189, defense counsel proposed an instruction that would have accurately reflected the law: "A finding of a multiple murder special circumstance makes the death penalty no more mandatory than any other finding of any other special circumstance," and the jury "must weigh the factors in aggravation and mitigation to determine penalty," because "defendants with multiple murder special circumstances are subject to no greater chance of receiving the death penalty than any other defendant against whom a special circumstance finding has been made." (See, CT 12: 3320; Proposed Instruction No. 8; RT 92: 19428-19430.) Instead, the trial court exacerbated the prosecutor's misconduct by failing to sustain objections and by not admonishing jurors to disregard the prosecutor's misleading and improper arguments on multiple felony-murder.

C.2.a. Improper References to Alleged Lack of Remorse, "Serial Killer," and Absence of Corroborative Evidence of Molest and to Support Dr. Amen's Opinion.

Furthermore, as demonstrated by his arguments to jurors as outlined above, the prosecutor emphasized appellant's alleged lack of remorse, absence of evidence to corroborate molest as a teenager, lack of corroboration for Dr. Amen's opinion, and the so-called "serial" nature of the killings. As set forth in *Arguments VI, IX, X* and *XI, post*, as separate grounds for reversal for judicial error, the prosecutor urged exclusion of evidence of appellant's remorse, his molest as a teenager, expert testimony on crime scene reconstruction in the guilt phase, and restrictions on cross-examination of Dr. Mayberg. Because of the detailed background to each alleged error presented in *Arguments VI, IX, X* and *XI, post,* appellant incorporates each argument as if fully set forth here, and submits the prosecutor's arguments were misleading and improper, as he exploited the erroneous rulings and misled jurors in both phases of trial.

As this Court pointed out in *People v. Lawley, supra*, 27 Cal.4th at p. 156, a prosecutor does not commit misconduct if his arguments constitute "fair comment on the evidence ..." The Court in *Lawley* distinguished *People v. Daggett* (1990) 225 Cal.App. 3d 751 and *People v. Varona* (1983) 143 Cal.App.3d 566, as "involv[ing] erroneous evidentiary rulings on which the prosecutor improperly capitalized during his closing argument." (*Ibid.*) In the present case, it is precisely the erroneous rulings on evidence of remorse, molest, crime scene reconstruction, and restriction of cross-examination of Dr.

Mayberg, that were improperly exploited by the prosecutor:

> " The prosecution may argue all reasonable inferences from the record, and has a broad range within which to argue the facts and the law. (*People v. Terry* (1962) 57 Cal.2d 538, 21 Cal.Rptr. 185, 370 P.2d 985.) The prosecutor, however, may not mislead the jury. The prosecutor asked the jurors to draw an inference that they might not have drawn if they had heard the evidence the judge had excluded. He, therefore, unfairly took advantage of the judge's ruling. Vigorous advocacy is admirable, but when it turns into a zeal to convict at all costs, it perverts rather than promotes justice."
>
> (*People v. Daggett, supra*, 225 Cal.App3d. at p. 759.)

As in *Daggett*, where the prosecutor successfully urged the trial court to erroneously exclude evidence of the complaining witness's prior allegations of molest, and then misleadingly exploited error in argument, in *People v. Varona, supra*, 143 Cal.App.3d at p. 570, the trial court erroneously excluded defense evidence of the prostitution conviction of the complaining witness; the prosecutor in *Varona* not only advocated exclusion of the evidence, but then argued to the jury that the defendants had failed to produce corroboration for their story that the witness had solicited sex, and "compounded that tactic by actually arguing that the woman was not a prostitute although he had seen the official records and knew that he was arguing a falsehood." (See *Napue*

v. Illinois (1959) 360 U.S. 264, 269-270 ["A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."])

Perhaps the most egregious of the prosecutor's misleading arguments in the retrial of the penalty phase occurred when he urged the exclusion of admissible evidence of remorse, and then repeatedly and improperly argued appellant showed no remorse for his crimes. To summarize his argument to the trial court, set forth in detail in *Argument VI, post*, Dunlap presented no authority, and without any foundation he accused appellant and his attorney of "manipulating" the trial court with evidence of remorse through letters and conversations with two Christian pastors, and in letters written to his family. (RT 51: 10652-10662.) He asserted a "perversity" that included: 1) "Mr. Peoples manufactured contact [with Pastor Kilthau]" (RT 51: 10653: 11); 2) "a perverse angle that the defense is taking ... [with] this monster ... is outrageous" (RT 51: 10655: 3-8); 3) "to get in the issue of remorse without the defendant taking the stand is absolutely perverse, using these two pastors" (RT 51: 10655: 25-26); 4) it "troubles me greatly," and "yells out at the judge this is manipulated ... this soul-searching moment of God, this moment of forgiveness seeking out this pastor, gets back to his defense lawyer" (RT 51: 10657: 10-15); 5) Fox "should be right now grinning, because he has a chance to get in remorse through an improper vehicle ... because the pastor approached the defendant gives it a cloak ... of reliability" (RT 51: 10658: 10-12; 15); 6) "I have no clue what Mr. Peoples was thinking when he's manufacturing tears in front of a pastor ..." (RT 51: 10659: 9-11); and, 7):

"He's chuckling to that pastor thinking,'Boy, I got me one on the line now..., wait it until I tell my defense lawyer.'" (RT 51: 10658: 17-25.) Once he obtained the erroneous ruling excluding appellant's expressions of remorse, he improperly repeated the arguments to mislead the jury: "Counsel will talk about [erroneously redacted] letters and mercy ...," (RT 95: 20152); but, "This man has no remorse. He likes to kill. And its that simple." (RT 95: 20198; see also RT 95: 20162; 20183; 20185; 20186-20187; 20195; 20207; 20210; 20212; 20218; 20043; 20056; 20104; 20110; 20146.)

Similarly, as set forth in *Arguments IX, X* and *XI, post*, during the retrial of the penalty phase the prosecutor: 1) opposed appellant's proffered evidence of molest when he was fifteen years old by a juvenile probation officer in Florida, and after an erroneous ruling, Dunlap then improperly argued "we have no proof of molest" (RT 95 20153; 2) he opposed expert testimony to show the haphazard nature of crime scene reconstruction to rebut the planning and premeditation theories of the prosecutor, and after an erroneous ruling, improperly argued appellant was a "serial killer;" and, 3) he opposed defense counsel's effort to cross-examine Dr. Mayberg about Dr. Buchsbaum's opinions, and after an erroneous ruling, improperly argued, "Dr. Amen's work is not corroborated," despite Dr. Buchsbaum's corroboration of his findings. (RT 95: 20204.)

In each instance, the trial court erroneously excluded the evidence, and then did nothing to protect appellant against the prosecutor's misleading and improper arguments on lack of remorse, absence of corroborative evidence of molest, and that he was a "serial killer." For each of the misleading and improper argument, appellant's sentence of death

should be reversed. (*People v. Hill, supra*, 17 Cal.4th at p. 823, 838, 845; *Berger v. United States, supra,* 295 U.S. at p. 88; *Caldwell v. Mississippi, supra,* 472 U.S. at pp. 340-341 [improper arguments in penalty phase cause for reversal of death verdict]; *People v. Haskett, supra*, 30 Cal.3d at p. 866 [improper penalty phase argument cause for reversal].)

D. "Reckless" Behavior In Courtroom Environs

In addition to a relatively benign response to a juror – "save one hundred dollars" – who had spontaneously commented on the "argumentative" nature of Dunlap's examination of witnesses, defense counsel brought to the attention of the court the fact that on more than one occasion Dunlap was glad-handing jurors as they left the courtroom during the first trial. (RT 40: 8393.)[154]

On August 10, 1999, during guilt phase jury deliberations, the prosecutor was creating an atmosphere of prejudice in the courtroom:

> " Mr. Fox: Just for the record, I was going to bring forth a motion. Because I was very perturbed at the prosecutor running back and forth to the family members of the victims, telling them exactly what has transpired and what will happen.

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[154] During the first penalty phase, Fox objected to Dunlap's behavior before the newly assigned Judge Delucchi; Fox observed Dunlap talking with jurors about local eateries as the court prepared to instruct the jury. Judge Delucchi described it as "schmoozing" with the jurors, and asked Dunlap to move away from the jurors. (RT 60: 12253-12255.)

And it's within very close earshot of the two alternate jurors.

The Court: Right. The alternate jurors were not, nor was anybody else affected by what I just made reference to ..., [but] if alternates or main body jurors are present it is absolutely forbidden.

.....

Mr. Fox: I'd ask for an order that counsel shouldn't talk to any witness in the audience, number one when there's other family members from the opposing side; and number two, when there's any member of the jury that's present.

The Court: Clearly, when there's any member of the jury present, that is a standing order of the Court, as it always is."

(RT 49: 10268 - 10269.)

Once again the court conflates "counsel," but in fact it was the prosecutor who was creating an atmosphere of prejudice in the courtroom:

" First thing I wanted to address, and I should have prior to this morning, but didn't because of the size of the courtroom, and the limitations placed where both the defendant's and victims' families are present.

I will first request counsel not discuss their various strengths or weaknesses or impact of what has just occurred in front of members of the other side's family.

It just isn't courteous. And it's left with causing potential issues. We're limited in the area, we're limited in the space.

I don't have a problem speaking with the respective family sides about what is or isn't the strategy, or what is or isn't meant by the findings. But it just is not good taste to do it in earshot of the other side's family members."

(RT 49: 10268.)

During the retrial, the court was not so sanguine about the prosecutor's behavior in and out of the courtroom when no testimony was being received by the court. On April 20, 2000, after the testimony of Gerald Ball, the manager of *Cal Spray*, who had also testified at the first trial, and who was called by the defense as a witness in mitigation in the retrial, the jury was excused for the day. (RT 88: 18461-18476.) The court then held a hearing outside the presence of the jury with regard to potential jury misconduct; a woman, who had apparently befriended one of the victim (Besun Yu) family members (Tans), was sitting near the family with a former juror from the first trial. Defense counsel pointed out that he could overhear Dunlap speaking in a loud voice to victim family members and others in the courtroom audience about "Mr. Quigel, his testimony, making comments, about issues in the case ... completely improper if in fact that woman is related to someone on the jury." (RT 88: 18478: 19-24.) [155]

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[155] Dunlap called "Fox's allegations ... unfounded and reckless." (RT 88: 18484.)

The court had the victims' family members and others removed from the courtroom while it inquired of the "woman," who turned out to be the wife of one of the present jurors (Number 7). (RT 88: 18479.) The court had observed the prosecutor talking with family members as well, and the juror's wife, who denied speaking with her husband about anything she overheard, informed the court the prosecutor spoke to them about "what would be happening between now and I guess when you're done here." (RT 88: 18480: 14-16.)[156]

The Tan family member testified Dunlap did speak to them about scheduling, and a friend of the family, Kwei-Yu Chu, explained that Dunlap commented "just I think how [he] dislikes Mr. Quigel." (RT 88: 18493: 15-16.) Public Defender Investigator Michael Kale was called by the court and recited what he observed; he had seen Juror Number 7 and his wife walking together during the lunch break, and upon return after the recess:

> " [T]he woman was seated to their [Tans] right [in the courtroom]. Mr. Dunlap was standing here, having a conversation with what looked like the Yu [sic] family. And I heard Mr. Dunlap say that he was still so angry with Quigel. And then referred to him as either being very slimy or very sleazy."
>
> (RT 88: 18494: 17-22.)

After receiving additional statements from a former juror, who had been a

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[156] Juror Number 7 testified that he did speak with his wife at lunch, and they agreed "'the man in the jumpsuit [Quigel] was interesting.'" (RT 88: 18484: 6-7.) His wife denied making any comment. (RT 88: 18513.)

spectator in the audience, Investigator Kale, and the wife of Juror Number 7, the court concluded the proceedings, admonishing the juror's wife – and Juror 7 – not to discuss the case in any fashion. (RT 88: 18495-18516.) Dunlap attempted to attack the credibility of Kale, but to no avail. (RT 88: 18505.)

The court denied the defense motion for mistrial based upon prosecutorial misconduct, because "the issue is as to any damage or prejudice to the defendant by any of the activity had disseminating to a juror. And there was none." (RT 88: 18516: 26-28.) Defense counsel was not convinced, especially after Juror Number 7's wife denied what he testified they had talked about during the lunch recess. (RT 88: 18518.) The court decided not to remove Juror Number 7, because "I do not find any prejudice, although the great potential certainly was there." (RT 88: 18519.)

However, of greater importance here is the prosecutor's contempt for judicial orders not to engage in casual conversations about evidence with victim family members or others in the gallery (RT 49: 10268-10269), and the culmination of defense counsel's frustration with the pervasive nature of Dunlap's misconduct:

> " Mr. Fox: "The DA sloughs it off as it's a minor thing. This is prosecutorial misconduct at its very worst. Mr. Dunlap has the habit and custom of talking to his constituency. Judge, you've seen it. I've seen it. This is no big secret. Mr. Dunlap, against court orders, has socialized with these people in the audience loudly. It's not even quietly. He goes over there and starts to pontificate.

Mr. Dunlap: Outside the presence of the jurors.

.....

Mr. Fox: This is contempt for the whole court process. I mean, excuse my language, Judge, but this is almost like saying, 'Fuck this. I'm going to do what I want.'

I mean, that's the prosecutor's attitude in this trial. And its disdainful. It's contemptuous. I just can't put it more bluntly ... and I'm saddened that I can't do anything about it.

I've tried numerous times to bring it to the Court's attention. There's always been some explanation. This has gone on repeatedly in your presence, the last trial and this trial now, and I just – I don't know what else I can say."

(RT 18506: 8-15; 18509: 10-22.)

Although the court denied the motion for mistrial because it found no prejudice, it categorically rejected Dunlap's claim ("Fox's allegations ... are unfounded and reckless" [RT 88: 18484]), and made the following observations – admonishing *both* attorneys in the process – and delivered a meaningless warning:

" I find it absolutely reckless. It was not an idle motion. It was absolutely reckless to make any comment related to the case or otherwise about the time of day, the weather, or anything else in the presence of persons whom you do not know the identity of.

It absolutely is inexcusable. Absolutely. It is not a small error and it came so close to being sufficient conduct to justify a mistrial had any information been exposed to or disseminated unintentionally to the jury. And it is absolutely inexcusable.

I don't find it intentional. I have observed *counsel* make far too much contact after court has been concluded with far too many people present ... And what is innocuous comment by others is not an innocuous comment *by either counsel* or court staff, including myself. It will not be tolerated in any fashion under any circumstance for the remainder of the trial, and I will sanction significantly if I find my order violated."

(RT 88: 18517: 2-25; emphasis added.)

The trial court's willingness to square up "absolutely reckless" conduct with "unintentional" behavior is symbolic of its failure to protect appellant.

E. CONCLUSION

The death sentence in this case must be reversed because the trial was so unfair it deprived appellant of his previously enumerated constitutional rights. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181-182.) A death sentence must not be based upon extrinsic factors "constitutionally impermissible or totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 879, 885.) As a result of a pervasive pattern of misconduct in the guilt and penalty phases neither objection nor admonition

could have cured the prejudice, and because of the trial court's failure to protect appellant, individual the claims of misconduct should result in reversal of the guilt and penalty verdicts, but, collectively, misconduct is so pervasive it resulted in a miscarriage of justice, and judgment must be reversed. (*Chapman v. California, supra,* 368 U.S. at p. 24; *Caldwell v. Mississippi, supra,* 472 U.S. at pp. 340-341; *People v. Hill, supra,* 17 Cal.4th at pp. 844-848; *People v. Boyette, supra*, 29 Cal.4th at pp. 410-412; see also *Argument XIX, post*, pp. 596-597.)

VI.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF HIS REMORSE, AND THE PROSECUTOR'S EXPLOITATION OF THE ERRONEOUS RULING EXACERBATED ITS PREJUDICIAL EFFECT.

As a result of the trial court's exclusion of appellant's proffered evidence of remorse, his state and federal constitutional rights to due process, to fair trial, to the effective assistance of counsel, to confront and cross-examine witnesses, to present a defense, and to a reliable, individualized sentence determination, and against cruel and unusual punishment, as well as his state statutory rights, were denied. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §1, 7, 13, 15, 16, 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Penry v. Lynaugh* (1989) 492 U.S. 302; *Stringer v. Black* (1992) 503 U.S. 222; *People v. Boyd* (1985) 38 Cal.3d 762, 775; *People v. Ochoa* (1998) 19 Cal.4th 353, 456; *People v. Bennett* (2009) 45 Cal.4th 577, 604.) For reasons set forth following, it cannot be said the error was harmless beyond a reasonable, and judgment must be reversed. (*Chapman v.*

California (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4rth 1229, 1264, fn. 11.)

Evidence proffered in mitigation must be afforded liberal scope under the Eighth and Fourteenth Amendments, and in "all but the rarest kind of capital case, [the sentencer must] not be precluded from considering, *as a mitigating factor*, any aspect of defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605; *Stringer v. Black, supra,* 503 U.S. at p. 230.) In *People v. Boyd, supra*, 38 Cal.3d at p. 775, this Court upheld Section 190.3, enacted by the 1978 *Briggs Initiative*, writing that it complies with "the constitutional requirement of *Eddings v. Oklahoma, supra,* 445 U.S. 104, and *Lockett v. Ohio, supra,* 438 U.S. 586, incorporated in factor (k), [in] that the jury may be permitted to consider any aspect of defendant's character or record that he offers as a basis for a sentence less than death ...." Without such consideration, any death sentence returned is considered unconstitutionally unreliable and arbitrary. (*Furman v. Georgia, supra*, 408 U.S. 238; *Godfrey v. Georgia, supra*, 446 U.S. at p. 427; *Tuilaepa v. California* (1994) 512 U.S. 967, 974-75; *People v. Whitt* (1990) 51 Cal.3d 620, 647; *People v. Frye* (1998) 18 Cal.4th 894, 1015.) The right to present all relevant mitigation evidence proffered as a basis for a sentence less than death is the direct result of the state's decision to seek the death penalty:

> " Given that the imposition of death by public authority
> is so profoundly different from all other penalties, we
> cannot avoid the conclusion that an individualized decision

> is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."
>
> (*Lockett v. Ohio, supra,* 438 U.S. at 605; see also *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233.)

As the high court reiterated in *Tennard v. Dretke* (2004) 542 US. 274, 285, relying on *Payne v. Tennessee* (1991) 501 U.S. 808, 822, there does not need to be a nexus between mitigation evidence and the crime committed, and any effort to "screen" or limit such evidence is fraught with problems,:

> " '[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.'"

Remorse, "as mitigating factor sometimes warranting a less severe punishment or condemnation is universal," and lack of remorse may be argued by the prosecutor to show "the absence of that particular mitigating factor." (*People v. Ghent* (1987) 43 Cal.3d 7, 39; *People v. Wharton* (1991) 53 Cal.3d 522; *People v. Cox* (1991) 53 Cal.3d 618; *People v. Bemore* (2000) 22 Cal.4th 809, 854-855.) As pointed out in *Brown v. Payton* (2005) 544 U.S. 133, 142-143, factor (k) directs the jury to consider "any circumstance that might excuse the crime, and [because] it is not unreasonable to believe that a post-crime character transformation could do so ..., remorse, which by definition can only be

experienced after a crime's commission, is something commonly thought to lessen or excuse defendant's culpability." (See *Ayers v. Belmontes* (2006) 549 U.S. 7, 15-17.)[157]

The majority of reported California cases cited above, however, grapple with the limits of the prosecutor's arguments. As presented in *Argument V, ante*, and described in detail following, the prosecutor's duplicitous exploitation of appellant's excluded expressions of remorse in argument to the jury in the retrial of the penalty phase here, exacerbated the trial court's erroneous exclusion of vital evidence of remorse proffered in mitigation of punishment. (*Brown v. Payton, supra,* 544 U.S. at pp. 142-143; *Ayers v. Belmontes, supra,* 549 U.S. at pp. 15-17; see *People v. Dyer* (1988) 45 Cal.3d 26; *People v. Ervin* (2000) 22 Cal.4th 48, 103; *People v. Combs* (2004) 34 Cal.4th 821; *People v. Pollock* (2004) 32 Cal.4th 1153; *People v. [Sergio] Ochoa* (2001) 26 Cal.4th 398.)[158]

In *Brown v. Payton, supra,* 544 U.S. at pp. 142-143, the United States Supreme Court recognized that "a post-crime character transformation" may result in the

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157 Although not defined by this Court in the referenced citations, in the retrial of the penalty phase, defense counsel (Aaron Laub) offered a definition of remorse as "the recognition one has done wrong and the acceptance of the responsibility of shame for having done it." (RT 82: 17030: 9-11.) Another definition is "deep regret or guilt for a wrong committed." (*Concise Oxford Dictionary, supra.*) In any case, as discussed following, it was considered "critical" and "indispensable" to determination of punishment by both parties and the trial court. (RT 50: 10350: 25; 50: 10402: 21; 51: 10668: 3.)

158 As with *Argument V, ante*, the issues presented in the first penalty phase are not irrelevant, but in fact the proffer of evidence and rulings by the trial court in the first penalty phase carried over to the retrial, and, therefore, are considered in detail here.

experience of remorse while in custody and expressed to others, such as family, friends, and clergy, and the like. Those individuals most closely associated with the defendant awaiting trial on capital murder charges create the vehicle or "mechanism" (RT 51: 10604) through which remorse is frequently communicated:

> " Although respondent did not take the stand, defense counsel was able to elicit through *other testimony* that he had expressed remorse for the killings."
>
> (*Bell v. Cone* (2002) 535 U.S. 685, 690; emphasis added.)

In *People v. Bennett, supra,* 45 Cal.4th at p. 604, for example, this Court reiterated evidence the defendant was "concerned about how his family was doing was relevant as mitigation 'because it constitutes indirect evidence of the defendant's character.' ([Lester] *Ochoa, supra,* 19 Cal.4th at p. 456.)" The "expression of concern," offered as hearsay under a state of mind exception (Evidence Code §1250), appears to have been less important than the significance of remorse as mitigation. Indeed, the fact that Bennett's "concern" was expressed to "an elder [Rick Wentworth] in the Jehovah's witness church," who also testified in the penalty phase to Bennett's religious studies in jail, did not present a problem of trustworthiness or reliability for this Court in reaching its conclusion that the trial court erred in excluding the proffered mitigation evidence, because "what is ultimately relevant is a defendant's background and character ... (*Ochoa, supra,*19 Cal.4th at p. 456.)"

Bennett is in line with the high court's decisions on mitigation evidence, as

outlined above. A state of mind exception for remorse is not only consonant with state-created rules of evidence, but to the extent any conflict appears to exist between the state-created rules of evidence in the guilt phase, and the broader rights embodied by the Fifth, Sixth, Eighth and Fourteenth Amendments in the penalty phase of a capital murder trial, there is little room for doubt as to which should give way:

> " Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio* [citation omitted] .... In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'
>
> *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973) [fn. omitted.]"
>
> *Green v. Georgia, supra*, 442 U.S. at 97.

The proffer of the testimony of Pastors Kilthau and Skaggs, and appellant's heartfelt expressions of remorse to his children and other family members, provided more than ample evidence of reliability and trustworthiness, the twin elements for traditional analysis of hearsay testimony, and should not have been excluded by "mechanistic" application of the hearsay rule in the context of the case for mitigation of punishment.

(*Chambers v. Mississippi, supra,* 410 U.S. at 302; *Green v. Georgia, supra*, 442 U.S. at 97; *Crawford v. Washington* (2004) 541 U.S. 36; *People v. Edwards, supra*, 54 Cal.3d at p. 837.) *Bennett* is consistent with the purpose of factor (k) mitigation evidence, and any inconsistencies between it and this Court's earlier decisions are superficial and distinguishable. In other cases, the hearsay rule has been relaxed to admit anecdotal evidence of childhood abuse, as well as remorse, because there is greater need for allowing the capital sentencing jury to consider all mitigation evidence in reaching a reliable decision on punishment under state and federal constitutional law. (*People v. Bennett, supra*, 45 Cal.4th at p. 604; see *People v. Lucero* (1988) 44 Cal.3d 1006, 1026-1029; *People v. Edwards* (1991) 54 Cal.3d 787, 837-38; *People v. Gates* (1987) 43 Cal.3d 1168, 1210-1211; *Tennard v. Dretke, supra,* 542 US. at p. 285; *Brown v. Payton, supra,* 544 U.S. at pp. 142-143.)

Finally, although Judge Platt ultimately relied upon dicta in *People v. Livaditis* (1992) 2 Cal.4th 759, to exclude compelling evidence in mitigation proffered on appellant's behalf (RT 52: 10918-10919), the case is distinguishable from this one for a number of reasons, and in light of the more recent decisions cited above, it is not controlling case law. For instance, unlike Livaditis, whose family members were asked from the witness stand during the penalty phase whether he felt sorry for what he had done, appellant proffered extensive evidence before trial of two independent sources – a jail minister and minister of James Loper's congregation – who had accepted Louis's expressions of remorse as honest and sincere. Procedurally, this Court pointed out that

Livaditis "did not attempt, by offer of proof or otherwise, to lay the proper foundation" for an exception, but in any case he may have had a "motive" to fabricate that affected the reliability of expressions of remorse "when awaiting trial." (*Id.*, at pp. 778, 780). In light of *Brown v. Payton, supra,* 544 U.S. at 142-143, which recognizes that remorse can only be experienced after the crime has been committed, and that it is "not unreasonable" to expect expressions of remorse to occur in custody, such evidence should be considered admissible as "something commonly thought to lesson or excuse defendant's culpability." *People v. Bennett, supra,* 45 Cal.4th at p. 604, would also appear to have approved such expressions of remorse because "what is ultimately relevant is a defendant's background and character ... (*Ochoa*, *supra*,19 Cal.4th at p. 456.)"

Indeed, as the record demonstrates here, the trial court at one point was so convinced the testimony of the two ministers was "absolutely permissible" (RT 57: 10746), it was hard pressed to find the "source" for "unreliability" when it flip-flopped and excluded all evidence proffered in remorse, i.e., was it Louis or the pastors who were "unreliable." As discussed following, the prosecutor wrenched remorse from its moorings "at the very heart of a penalty phase... " by misleading and unscrupulous argument determined to make a mockery of mitigation as mere "perversity" of justice. (RT 51: 10655: 13-15; 10656: 15.) Indeed, Judge Platt erroneously deprived jurors of significant mitigation evidence in the form of appellant's expressions of remorse to others, "something" he disclosed from his own experience as a prosecutor to have been "very critical to [a capital case] jury," and an issue he considered "monumental" to the outcome

of this case. (RT 50: 10350: 25; 51: 10668: 3.) Accordingly, the trial court erred by excluding powerful evidence of remorse, it cannot be said the error was harmless beyond a reasonable. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4rth 1229, 1264, fn. 11.)[159]

A. Erroneous Exclusion of Remorse Through Steven Kilthau and Troy Skaggs

1. Pastors Kilthau and Skaggs - Offer of Proof[160]

Defense counsel provided extensive offers of proof and argument as to why

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[159] With the exception of Judge Delucchi's intercession under Evidence Code §352 to prohibit the prosecutor from regurgitating the inflammatory details of each homicide with *every* witness called by the defense in the penalty phase (RT 56: 11407), he refused to reconsider any *in limine* rulings of Judge Platt: "I don't want to be a court of appeal from Judge Platt ..., [and] rightly or wrongly, I expect to be bound by Judge Platt's rulings ..." (RT 53: 10962: 2-7.) As Dunlap depicted Judge Platt's rulings on remorse, "the hearsay statements of the defendant [to members of the clergy] as they related to the crimes with the statements of remorse were not reliable." (RT 53: 10958: 17-19.) Judge Delucchi responded, "That's a real mine field ...," but refused to reconsider earlier rulings. (RT 53: 10958: 25; 10962; 54: 10992.) Fox respected Judge Delucchi's decision to "not act as a court of appeal for previous rulings," but moved for mistrial for the "continuum" of errors by Judge Platt, including rulings on mitigation, denying appellant his enumerated federal and state constitutional and statutory rights; the motion was denied prior to commencement of the defense mitigation case in the first penalty phase. (RT 54: 10992: 10-16; 20-21.)

[160] "Reverend" [title or form of address for a member of the clergy] and "Pastor" [minister in charge of a congregation] were used interchangeably below to describe both ministers of the Christian gospel. (See, *Oxford Concise Oxford Dictionary, supra.*) For the sake of simplicity, the term "Pastor" will be used here. Pastor Kilthau, a Baptist minister at Stockton Baptist Church, and Pastor Skaggs, a nondenominational minister whose "congregation" was composed of jail inmates over four decades of service, were both residents of San Joaquin County.

evidence of remorse was admissible in the first penalty phase, relying on federal law to support state factor (k) mitigation, and then elaborated in writing in anticipation of the retrial. Responding to hearsay objections to the evidence, Fox argued trustworthiness, relevance, and the deeply probative nature of the mitigation evidence for "state of mind," "demeanor," "characteristics," "relationships with others," and "humanity." (RT 50: 10402: 21-25; RT 51: 10670-10673.) Before commencement of the retrial of the penalty phase, written memoranda also provided an extended offer of proof as to what Steven Kilthau and Troy Skaggs would testify to and why the evidence was so critical to a reliable jury determination of the appropriate punishment under federal and state law. The following briefly summarizes the offers of proof. (CT 11: 2926-2951; 3000-3009; 3050-3051; RT 50: 10397-10405; RT 51: 10668-10673; 76: 15815-15852; 79: 16343-16532.)[161]

Pastor Kilthau had baptized James Loper in the Stockton Baptist Church he had founded in the 1980's. He led his congregation for twelve years, and Loper was a parishioner he knew well. When Loper was killed, Kilthau was devastated. To compound his misery, the violent deaths of Besun Yu and Jun Gao occurred in the same building (Village Oaks Market) where his congregation first met. A supporter of capital punishment, he was now filled with anger and fear, and in the grip of a spiritual crisis. (CT 11: 2926-2928; 2931-2932; RT 50: 10097-10402; 76: 15828-15831.)

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[161] The summaries are derived from defense counsel's and Dr. Woods's interviews with both pastors, three letters written by appellant to Pastor Kilthau and described during hearings, and from statements of counsel during in limine hearings.

Six months after appellant's arrest, Pastor Kilthau decided to confront his demons after hearing a sermon on forgiveness by another preacher. In April, 1998, Pastor Kilthau took the extraordinary step of writing a letter to Loper's alleged killer, explaining the war waging within himself, and he included *The Holy Bible* with his correspondence. He did not expect a reply, but Louis did reply. Louis explained his own inability to understand what he had done, and his incapacity to forgive himself for having ruined the lives of the victims and his own family; he invited Kilthau to visit. Pastor Kilthau read portions of Louis's letter to his congregation, but he did not visit; his struggle to come to terms with his faith had not subsided. (CT 11: 2932-2933; RT 50: 10397-10404; 76: 15829-15832.)

Another six months passed, and in November, 1998, an article appeared in the *Stockton Record* on the one year anniversary of James Loper's death. Louis wrote Pastor Kilthau a letter after reading the article, and expressed feelings of overwhelming guilt and remorse for what he had done. Pastor Kilthau decided on his own to visit Louis in San Joaquin County jail. (CT 11: 2927; 2933; RT 76: 15832.)

The following month Pastor Kilthau made an unannounced appearance. After he arrived at the facility, he wavered, but eventually went inside. Kilthau was shocked to find a "broken" man, one suffering from the guilt of incomprehensible violence, who cried during their meeting, expressing deep remorse for his actions. Louis wrote a third and final letter to Kilthau. Still angry over the loss of James Loper, Pastor Kilthau believed, however, Louis's feelings of guilt and remorse were genuine; he was placed under subpoena, a reluctant defense witness. (CT 11: 2927-2928; 2933; RT 76: 15833-15834.)

Pastor Skaggs approached appellant as part of prison ministry shortly after his arrest in November, 1997. Louis was reticent at first, but after several attempts by Pastor Skaggs, Louis met with Skaggs, and they began a correspondence and scriptural study program; as their spiritual engagement evolved, so did their friendship. In forty-six years of service Pastor Skagggs had been asked to testify five times, but he had only agreed to do so twice because he felt he could not provide positive character testimony in the three other cases. Pastor Skaggs reported that during the two-year relationship Louis often wept during their meetings, expressing grief for the many lives he had ruined and remorse for his actions. He formed a strong opinion Louis was sincerely remorseful, and he was willing to testify as a witness for the defense. (CT 11: 2928-2929; 2933-2934; RT 76: 15835-15837.) [162]

2. The Trial Court's Erroneous Rulings on Pastors Kilthau and Skaggs

After the jury returned guilty verdicts on August 11, 1999, the court excused jurors to August 18, for commencement of the penalty phase. (RT 50: 10256-10258.) On

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[162] Dr. Woods was allowed to testify to Louis's tears shed during each of seven meetings, save the last. (RT 90: 18936.) The trial court permitted the testimony as limited to Dr. Woods's opinion on the symptoms of "clearing" the effects of methamphetamine from Louis's body beginning in April, 1998. Dr. Woods also testified Louis "accepted responsibility ..., having appropriate pain for the families, the victims, as well as for his own family, to where I see Louis now, and what I really believe is a true remorse ...[and] able to talk about that in a way that is different than December, 1997" (RT 90: 18936:11-18;18944-18947; 91: 18985), but, as discussed in more detail following, the prosecutor attacked Dr. Woods as a paid and biased defense consultant, misleadingly arguing to the jury: "[T]hat's the only remorse you hear in this case." (RT 95: 20186-20187; see *post*, pp. 324, 334.)

August 12, 1999, the parties met and conferred in open court regarding disclosure of defense discovery and for *in limine* hearings on a variety of issues presented by the penalty phase. (RT 50: 10320-10453.) During the initial conferences, discussion focused primarily upon admissibility of victim impact evidence and voluminous correspondence between Louis and his family, and the proffered testimony of Pastors Kilthau and Skaggs. (RT 50: 10326-10327; 10344-45.) With respect to the mitigation evidence, the court acknowledged a defendant's statements provided in letters could be admissible in the penalty phase, after defense counsel (Slote) cited *Green v. Georgia, supra*, 442 U.S. 95 (RT 50: 10345):

> " I'm not disagreeing with that. A relaxed ... rule of evidence does not mean an elimination of the Rules of Evidence ..., [but] it is on the Fifth, Sixth, Eighth and Fourteenth Amendments as well. It is an issue of due process."
>
> (RT 50: 10346: 4-10.)

Judge Platt expanded upon his position in response to the prosecutor's arguments that appellant's expression of remorse in letters to Pastor Kilthau and family members "are rampant, just rampant with self-serving statements of remorse, of finding God ..., nothing but self-serving hearsay statements that, quite frankly, are inadmissible without some kind of foundation from Mr. Peoples ..., without the ability of the prosecution to cross-

examine" (RT 50: 10349: 21-26):[163]

> " I'm drawing on what my knowledge of case law as well as my experience. And, frankly, letters written by the defendant to other persons, it's going to be very difficult to keep those out. Self-serving as they may be, and I can draw a specific example where a person I was prosecuting for a capital offense in the penalty phase had two letters read that he wrote to his children – not to the children of the victim, but to his children – apologizing for how he ruined their life.
>
> And when the court allowed those in, I went back to my office, I threw things around, I hit the wall, I knew what was going to happen, how it was going to be argued. And that was something that was very critical to the jury.

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[163] As was typical throughout the proceedings below on the admissibility of evidence in the penalty phase, Dunlap presented no law. Instead, he railed against "rampant" and "self-serving" statements provided by defense counsel (RT 50: 10349; 49: 10312), casting aspersions on the "perverse way [defense counsel is] ... using [pastors under] the cloak of religion to come in here and testify for Mr. Peoples" (RT 51: 10676: 4-5; 51: 10675: 15), and misstating the purpose of mitigation as an unlawful effort to "parade a bunch of stressors – is the key word that counsel likes to use ..., that quite frankly is just ludicrous." (RT 49: 10262: 6-11.) Using personal standards, and not constitutional law, the prosecutor ranted during in limine hearings: "I find it ludicrous, quite frankly... outrageous ...," for counsel to submit photographs of appellant as a child, while objecting to numerous photographs proffered on victim impact evidence: "I mean it's just ludicrous." (RT 10287: 4; 26 - 180288: 1.)

My understanding of the review by the Court of Appeals [sic] that was absolutely appropriate. And the argument that I made about being self-serving and the like, and that he said it to other persons, is about as much leeway as the prosecution has. It is reality.

.....

In the penalty phase of the trial, the reality is, it is not an even playing field.

.....

The bottom line, it's fair in the general concept because of the finality of the potential punishment. That's what the case law says.

.....

Mr. Fox: The letters are clearly admissible for state of mind, even though the argument can be made they're self-serving.

The Court: Some of the letters may be admissible. I agree with all that. All the letters do not necessarily become admissible."

(RT 50: 10350-10352.)

Later the same day, the prosecutor reiterated his view, "self-serving, remorseful statements are not proper ..., [and] I disagree with the Court unless I misunderstood the Court." (RT 50: 10379: 7-10.) After the court reviewed the three letters from appellant to Pastor Kilthau (Exhibits LL1-3; RT 50: 10398), defense counsel argued the admissibility of the hearsay as "indispensable" expressions of remorse "for the limited purpose of

explaining state of mind, character, circumstances in which the defendant finds himself, the relationship he has with other people." (RT 50: 10402: 21-25.) While rejecting out of hand the prosecutor's claim the letters should be excluded because Loper purportedly had a penitent-priest privilege, the court termed Fox's arguments on "state of mind" and "characteristics" exceptions to the hearsay objection "legitimate ..., [t]hat, I don't think could be contested," but questioned "the mechanism" for introduction. (RT 50: 2-12.)[164]

The court decided to defer final decision:

> " It's far too critical an issue. I understand its significance.
>
> I understand the potential, if it is excluded, causing reversal.
>
> And it is not going to be made, as I sit here at this moment.
>
> Just not going to be done.
>
> Mr. Fox: I understand."
>
> (RT 50: 10411: 15-20.)

The next day, August 13, defense counsel presented "[the] argument ..., still the same ..., which is that this was a contact that was initiated by ... both ministers ...," and their testimony regarding remorse, including the correspondence between Louis and Pastor Kilthau, should be admitted as to defendant's character and state of mind after the crimes, as should their testimony to episodes of crying during discussions regarding victims and

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[164] Dunlap expressed "dismay" over defense counsel's "ridiculous" analysis of the "hearsay" objection, and, without citation to authority, submitted the issue for decision, "excuse my tone." (RT 50: 10405: 8-28.)

their families, as mitigating evidence under factor (k). (RT 51: 10650-10653.) Dunlap presented no legal authority in response. Instead, he engaged in a lengthy and irrational diatribe against Fox. Without foundation, Dunlap claimed appellant had "manipulated" everyone – including Judge Platt – and the proffered evidence of remorse through letters and conversation with Pastor Kilthau and in study with Pastor Skaggs, was "unreliable." (RT 51: 10652-10662.) Dunlap conjured up a conspiracy of "perversity" between defense counsel and appellant with examples as follows: 1) "Mr. Peoples manufactured contact [with Pastor Kilthau]" (RT 51: 10653: 11); 2) "a perverse angle that the defense is taking ... [with] this monster ... is outrageous" (RT 51: 10655: 3-8); 3) "to get in the issue of remorse without the defendant taking the stand is absolutely perverse, using these two pastors" (RT 51: 10655: 25-26); 4) it "troubles me greatly," and "yells out at the judge this is manipulated ... this soul-searching moment of God, this moment of forgiveness seeking out this pastor, gets back to his defense lawyer" (RT 51: 10657: 10-15); 5) "Counsel should be right now grinning, because he has a chance to get in remorse through an improper vehicle ... because the pastor approached the defendant gives it a cloak ... of reliability ..." (RT 51: 10658: 10-12; 15); 6) "I have no clue what Mr. Peoples was thinking when he's manufacturing tears in front of a pastor ..." (RT 51: 10659: 9-11); and, 7) the *coup de grace*:

> " Because I have no idea what Mr. Peoples was thinking
> when he's chuckling to that pastor thinking, 'Boy, I got me
> one on the line now. Wait until I tell my defense lawyer

about this one. Wait until I tell Mr. Fox about the minister and how I found God. Wait until you read these juicy letters about me. Hey, by the way, Michael Kale, my investigator, go out to my pastor. See if he's still got my letters.'

I'm sorry, Judge, but the plotting, the manipulation, the strategy for the defense, has started way back day one."

(RT 51: 10658: 17-25.)[165]

It did not take much to sway Judge Platt. Despite his initial opinion – and experience – in favor of admitting the letters to Pastor Kilthau, the court decided to reject the letters as "unreliable," and improper, "in effect, allocution," and "I do not find any theory for admissibility." (RT 51: 10665: 18 - 10666: 6-7; 10667: 20-25.)

In the afternoon session (August 13), however, the court revisited the issue in the form of proffered *testimony* from the pastors. This time the court agreed with defense

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[165] As discussed in *Argument V, ante,* and *Argument XV, post*, the prosecutor's blatant misstatements and bald exaggeration of "facts" appears to be setting the stage for the kind of argumentative and improper cross-examination he conducted with other witnesses, and he would have undoubtedly continued if appellant had testified. (See, *Motion to Limit Cross-Examination*, etc. CT 11: 2718-2723; see also, RT 51: 10672.) According to the prosecutor, the *only* expression of remorse admissible in a California court in a capital murder case would have to come from the defendant on the witness stand: "This is a grave area that the People have been anticipating. We have been anticipating a cross-examination of Mr. Peoples for months. Because of the potential for the remorse issue to come up." (RT 51: 10685: 8-10; CT 11: 2241: 9-12; see also, RT 51: 10458; 50: 10379; 76: 105837; 10794.)

counsel that Pastors Kilthau and Skaggs should both be allowed to testify. Defense counsel provided the legal basis and offer of proof:

> " [U]nder the state and federal constitutions, I'm able to present mitigation as to my client's personality, humanity, demeanor, attitude. His sense of remorse.
>
> .....
>
> I'm offering the Reverend Kilthau and Reverend Skaggs in an attempt to humanize my client through their contact visits with my client at the jail."
>
> (RT 51: 10670: 3-6 - 10672: 28 - 10673: 1-2.)

To the prosecutor *any* testimony from Pastors Kilthau and Skagg with respect to their conversations with Louis in which he expressed remorse, or observations of his demeanor – "he was crying" – during their meetings, was twisted into "impossible" and "irrelevant" evidence; to allow counsel to "parade these witnesses ..., [t]hat alone is a perversity." (RT 51: 10675: 20-28.) After hearing additional argument from defense counsel, the court ruled:

> " As to Pastor Kilthau and Reverend Skaggs, the Court is going to allow the two persons to testify.
>
> .....
>
> [T]heir testimony, and any statements credited to, or any expressions of remorse, valid or not, whether – what are the

circumstances as represented is quote, a circumstance that, assuming it's believed by the jury, extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (RT 51: 10682: 12-26.)[166]

One week later, on August 18, 1999, after counsel and court conferred over jury instructions and last-minute rulings prior to the prosecutor's opening statement in the first penalty phase, Judge Platt reiterated his ruling in favor of admitting proffered testimony of Pastors James Kilthau and Skaggs as follows:

> " I spent considerably more time, both in research and discussion on the issue of the pastor [Kilthau] and the reverend [Skaggs], and some of my colleagues wonder why I'm struggling over that so much; because it is absolutely clear to them that the decision was correct.

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166 Even though he had been preparing to tackle remorse for six months, Dunlap complained bitterly he was now at a disadvantage and could not proceed with the penalty phase, but his motion to continue the penalty phase was denied; he replied, "I wish the right to go back on this issue." (RT 51: 10687: 10-11.) The court responded, "Show me where I'm wrong, Mr. Dunlap, and I will reconsider it. Same as I have done on any decision the Court has made." (RT 51: 10687: 12-14.) Prosecutors did not file during the next week of hearings; as Fox had pointed out on August 12, the prosecution had not filed any legal memorandum up to that point in the history of the case. (RT 50: 10345; see, RT 1: 102: 26 ['We are not going to waste time to even waste paper ...']; see also, RT 51: 10474: 4-5 [Fox: "Not one. I have not heard him recite or cite one case, actually, since we started this case."]

Show me something that tell me I'm wrong, and I'll be happy to change it.

Mr. Dunlap: I'm working on it, Judge. And I'm concerned that the colleagues would – you're allowing defendant to testify through third party as to remorse an ultimate issue.

The Court: I understand what your concern is. It is absolutely permissible.

.....

Show me I'm wrong, and I'll be happy to change my mind and advise my colleagues they're all wrong."

(RT 52: 10746: 8-27.)

The next day, August 19, 1999, at conclusion of the prosecution's presentation of victim impact evidence in the morning session, the court excused the jury for weekend before beginning the defense case. (RT 52: 10907.)[167] The prosecutor asked "the Court's indulgence ... to file with the Court a motion regarding Pastor Kilthau and Pastor Skaggs ... that is formalized and in writing ... to have this [remorse] issue resolved [reconsidered] before the defense takes on its case." (RT 51: 10907: 21-26-10908: 3-4; CT 8: 2235-43.)

On August 20, Fox stated the memorandum provided by the prosecutor on August

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[167] As will be recalled, the morning of August 19 began with a highly charged defense motion to recuse Judge Platt because of the impact of his medical condition on appellant's fundamental trial rights. (See, *Argument II*; RT 52: 10813-10821.)

19, did not provide "any issue that we didn't discuss previously in regards to the issue of whether or not statements or instances of expressions of remorse in regard to the defendant is properly admitted with the Court." (RT 52: 10911: 24-28.) The Court's position had changed dramatically.

During the hearing to reconsider the ruling, the tenacity and suspiciousness of the prosecutor had trumped the previously stated persuasiveness of the "Fifth, Sixth, Eighth and Fourteenth Amendments ..., [and] due process" (RT 50: 10346: 4-10), the judge's own experience as a prosecutor (RT 50: 10350-52), and the "considerable" research he had previously conducted. He apparently was no longer was impressed by the "absolute" unanimity of his judicial "colleagues." (RT 52: 10746.)

Relying on dicta from *People v. Livaditis, supra*, 2 Cal.4th 759, the court found *Livaditis* on "all fours ..., the only difference is that the two individuals are not family members, but they are members of the cloth," and concluded the proffered mitigation evidence was inadmissible:

> " [W]hen you look at the date of the contact, December of 1998, three months before the scheduled trial date, over a year after the defendant had been in custody, after there had been considerable examination by the experts in terms of state of mind issues as it related to the guilt phase, after all of that had been explored, after a defense had been explored and prepared in terms of those issues, after all that and with considerable

motive for indicating a remorse and state of mind that is

absolutely self-serving under the circumstances ..."

(RT 52: 10918: 11; 18-19; 26-28 - 10919: 1-7; CT 8: 2246.)

The trial court erroneously excluded from the first jury the testimony of the two pastors who had visited appellant after his arrest in November, 1997.[168]

Moreover, the court erroneously excluded evidence of remorse through Pastors Kilthau and Skaggs from the jury in the retrial of the penalty phase, although Pastor Skaggs did testify briefly to his friendship with Louis, which continued through the guilt phase, after the mistrial of the first penalty phase, and into retrial.[169]

Prior to the retrial, however, as pointed out above, defense counsel filed a more extended brief and detailed offer of proof. (CT 11: 2926-2951; 3000-3009; RT 76: 15815-15852; 82: 17021-17045.) The court heard argument on March 7, 2000. With no evidence to support his conjecture, the prosecutor continued to allege a conspiracy existed between

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[168] Judge Platt exhibited none of the patience he showed with Dunlap; he refused to allow defense counsel to "clarify" the ruling, rudely cutting off Fox: "We do not need to clarify a thing ... the record has been made, period ... That is enough." (RT 52: 10921- 10922.)

[169] Lasting five minutes, Pastor Skaggs' tepid testimony included an outline of his vocation as a minister for nearly five decades, during which time he and his wife brought Christian consolation to jail and prison inmates. He approached Louis, and over a two-year period continued visiting him in San Joaquin and Alameda County jails, and communicated "through letter, Bible studies we send him." (RT 19296: 26.) He declared, "I think my wife and I have become a friend to Louis. She'd be with me today, but she's home with eye problems." (RT 92: 19293-19298: 7-8.) The prosecutor declined examination. (RT 92: 19298.)

appellant and his attorneys to "feign" remorse as a "strategy":

> " I do know that remorse from day one is an issue in a death penalty case.
>
> .....
>
> [I] know good defense counsel talks to their client. Good defense defense counsel begins to build an issue of 'Don't screw up in jail. Don't lose your family right now. Keep the contact going. Don't screw up.' That is not common sense. That's fact.
>
> Now, what Mr. Peoples' motivation is is to live. He is on trial for his life. And that's fine, there are clearly established rules. What counsel has repeatedly tried to do is step outside those rules.
>
> .....
>
> [I] disagree with counsel when he talks about the reliability of Pastor Kilthau. I disagree with counsel when he talks about the reliability of this Pastor Skaff or Reverend Skaff [sic].
>
> That's not the issue. The issue is reliability of the statement of remorse. The reliability is the source, feign. Does the source have ulterior motives? Is the source playing a game?
>
> .....
>
> And I'm a little suspect [sic] with when all of a sudden

these two individuals who he cries in front of appear on the defense witness list."

(RT 76: 15838: 2-28 - 15839: 1-7.)[170]

The court explained it had "reviewed the transcripts a number of times" from the hearings during the first trial, and "I am still in the same position that I was ... when I reconsidered and held that Pastor Kilthau and Reverend Skaggs would not be allowed to testify because in my opinion neither reaches, based upon the circumstances that occurred, reaches the level of sufficient reliability to testify as witnesses ..." (RT 76: 15843: 3-11.) While the court correctly noted Pastor Kilthau initiated contact with appellant, it incorrectly cited "subsequent contacts" as "things that were brought about by the defendant ...," but Fox corrected the court:

" Reverend Kilthau wrote to Mr. Peoples. Mr. Peoples I believe wrote back to Reverend Kilthau.

Reverend Kilthau, unannounced, went over to Mr. Peoples and debated outside the jail if he should go visit ... this animal that had destroyed his congregation ... when he decided to follow through and had a conversation with Mr. Peoples that lasted

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[170] The trial court found defense discovery provided before commencement of the first penalty phase was timely (RT 49: 10266), and as noted above, denied the prosecutor's motion to continue the first penalty phase when it initially indicated it would allow Pastors Kilthau and Skaggs to testify. (RT 51: 10687; see also, RT 50: 10377-10378.)

30 or 35 minutes ... [and] Mr. Peoples broke down, said he didn't know why he had done these things, and now – showed remorse ..."

(RT 76: 15844: 22-28 - 15845: 1-9; see also, RT 51: 10911.)

With that correction in mind, the court found defense counsel "hired experts," including Dr. White and Dr. Woods, who had "contact" with appellant "very early on[,] long before Pastor Kilthau came into the picture, ... [who were] talking with and examining and analyzing Mr. Peoples for purpose of whatever other issues were going to be presented later on" at trial (RT 76: 15847: 18-27); and it unreasonably found expressions of remorse to Pastor Kilthau, "not reliable [or] sufficient enough to justify being presented to the jury." (RT 76: 15849: 11-12.)[171] Rejecting the notion such a ruling put a chill on the right to effective assistance of counsel, essentially placing remorse expressed to others out of bounds at trial, and without any explication of reasons for excluding expressions of remorse to Pastor Skaggs, the court recited vagaries for defense counsel, and shifted the focus of unreliability back on the pastors:

" I don't know that I can give you a time line or a where there's a magical place in time or a magical circumstance for which the reliability test is going to be sufficiently addressed.

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[171] On the other hand, earlier in the same proceeding, the court overruled appellant's objection to the introduction of "The Biography of a Crime Spree" (Exhibit 583), finding it was evidence of state of mind and lack of remorse. (RT 76: 15721-15722; see also, *Argument XV, post.*)

I do not find that family members, nor members of the cloth, nor staff at a facility of incarceration, nor other inmates, for that matter, are patently unreliable.

.....

[A]ll I am finding is that these two individuals did not meet the test of reliability ..."

(RT 76: 15848-15552: 2-26.)

Furthermore, when defense counsel brought up the subject for reconsideration before retrial of the penalty phase in light of a recent decision by this Court on the post-arrest opinions of a priest as to the defendant's character (*People v. Ervin, supra,* 22 Cal.4th 48), the trial court chastised counsel for raising the issue again:

" If there is a case law that was overlooked or missed that was existing at the time, and the Court was not provided that information, and I'm not sure that is a good reason or an appropriate reason to reevaluate the Court's prior ruling ..., then we'll take a look and see whether or not there is justification for and upon what basis the original reason may or may not be existing ...."

(RT 79: 16346: 5-19.)[172]

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[172] As noted above, the trial court *twice* encouraged Dunlap to provide authority if he wanted a reconsideration of the decision allowing the

Nonetheless, the court relented, and considered but rejected *Ervin* as a basis for changing its rulings on remorse, and, again, focused not on the so-called *unreliable* "source" (appellant), but, apparently, upon Pastor Skaggs' alleged lack of trustworthiness:

> " [A]bout a half-dozen [sic] contacts over a two-year period now, although there was monthly or bimonthly letters that were sent back and forth ... what occurred or what was discussed or what was opined about is simply not admissible through – to Reverend Skaggs. So it just doesn't change the Court's ruling in any fashion." (RT 79: 16532: 9-18.)

B. The Trial Court's Erroneous Redactions of Remorse Expressed In Letters to Family Members

With the foregoing in mind, the trial court's exclusion of appellant's expressions of remorse to family members is not surprising.[173] While the prosecutor had no objection to

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testimony of the two pastors in penalty phase of the first trial, permitting him to file a memorandum *after* consideration of the issue on proffer of evidence *and* full complement of argument. (RT 51: 10687; 52: 10746.) Clearly, Dunlap did not discover any "new" law when the court granted the prosecutor's motion to "reconsider" and changed the in limine ruling, and the courtesy, "[s]ame as I have done on any decision the Court has made" (RT 51: 10687: 12-14), did not apply to Fox.

[173] In limine hearings on letters submitted by the defense coincided with those on Pastors Skaggs and Kilthau; rulings on the exclusion of letters to Pastor Kilthau actually followed redactions to family letters on August 13, 1999, though the initial ruling on admissibility of his testimony came after redactions and exclusions of family letters. (See, RT 51: 10455- 10457; 10665-10667.)

children's letters written to their father, admissibility of all remaining letters was controverted:

> " Mr. Dunlap: [S]elf-serving, remorseful statements are not proper ...
>
> The Court: I don't think I said that automatically anything and everything written in a letter comes in.
>
> Mr. Dunlap: I think letters of Mr. Peoples to his wife expressing love for his family, anything that represents guidance for the children, anything that talks about a family history that are unrelated to the crimes can come in to show character. And court's [sic] have been lenient in the past.
>
> But I think anything that talks about finding religion, I think anything that talks about religion and relates to the sins, I think anything that talks about methampehtamine use, clearly anything that talks about remorse, are all self-serving statements basically designed to circumvent the cross-examination.
>
> The Court: I don't disagree with that. I don't know exactly what it was I said, but I believe the language was that almost, or pretty much, everything may find its way in at least a good amount of it ..."
>
> (RT 50: 10379: 7-28 - 10380: 1.)[174]

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[174] While the prosecutor cited no case authority, the court referred to several cases to support exclusion – redaction – of remorse expressed by appellant

Three packets were submitted by the defense containing over one hundred fifty letters written after arrest from: 1) Louis to family members (Loretta, Luther and Lee); 2) his wife (Carol) to Louis; and, 3) the children (Lindsey and Matthew) to Louis. (RT 50: 10378; 51: 10529.) At the outset of the hearing on correspondence with family members, the court ruled upon an objection from the prosecutor to "the whole packet of letters from the wife when she can testify" (RT 51: 10527: 16) without considering the content of letters written by Carol to Louis, offered – as the children's letters were – to show the continuation and depth of their relationship under factor (k) (RT 51: 10527-10528): "I am not going to allow 107 letters just because they were written." (RT 51: 10529: 23-28.) At counsel's request, it agreed it would instruct the jury on the number written, but "I won't select a magical arbitrary number [to admit into evidence] ..., is not one in good taste ..., [but] if you present 30, and I think 20 gets the point across, then that's what I would rule,

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in letters to family members as a prohibited form of "allocution," and for exclusion of any reference to how a death verdict would impact the family in the future, because it "would be to cloak the defendant's right to testify with a unique immunity from examination by the People." (RT 50: 10380: 18-20; see also, 51: 10510.) This about-face occurred shortly after hearings on penalty phase issues began August 12, when the trial court cited federal constitutional guidelines in capital cases to advise the prosecutor: "[L]etters written by the defendant to other persons, it's going to be very difficult to keep those out. Self-serving as they may be, and I can draw a specific example where a person I was prosecuting for a capital offense in the penalty phase had two letters read that he wrote to his children – not to the children of the victim, but to his children – apologizing for how he ruined their life." (RT 50: 10346; 10350.)

if I think it's one or if I think it's 99." (RT 51: 10530: 3-15.)[175]

Accordingly, upon objection of the prosecutor, the court redacted nine separate expressions of remorse:

1) " I'm so sorry you had to see me on T.V. last week.

Daddy did some really bad things and he is sorry."

(Ex 404; RT 51: 10607: 18-20);

2) " I have to tell you again. All of this is my fault. Every bit of it.

And you have to know a lot of guilt goes with it."

(Ex 406; RT 51: 10608: 4-6; 26);

3) " You don't know how sorry I am about all of this. I've made

a big mistake. It doesn't mean I don't love you."

(Ex 414; RT 51: 10611: 10-12);

4) " I love you so much I never meant to hurt you or anybody."

(Ex 415; RT 51: 10613: 2-7 ['or anybody' redacted];

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[175] Defense counsel "pared down" the "volumes" of letters written to and from family members and appellant from November, 1997-August, 1999. (RT 51: 10597; 10601.) A "series" (Exhibits 200-400) was used to number the letters. The prosecutor did not object to the children's letters and cards to appellant (201-246). (RT 51: 10598.) Letters from Carol, and other family members were designated (301-319; 800-805), and from "we're offering 35 letters [401-435] over the 100 that Mr. Peoples wrote." (RT 51: 10597: 24-25.) Letters from the children, Carol and other family members, as well as the – seven redacted – letters from appellant, were admitted at both trials. (See, RT 54: 11127; 56: 11373; 11379; 58: 11943; 94: 19979; 96: 20348; *Reporter's Master Index of Trial Exhibits*, xcvii-cii; cxli-cxlv.)

5) " I feel sad because I know I've hurt you. And a lot of other people ... I'm sorry for everything that has happened. I'm sorry for the the victims and their families, and I wish I could undue what has been done."

(Ex 421; RT 51: 10614: 9-16);

6) " I made a big mistake but I'm still your dad and I'll never stop loving you."

(Ex 423; RT 51: 10615: 13-14; 10601: 13-15);

7) " I made a mistake but it doesn't mean I don't love you."

(Ex 424; RT 51: 10615: 22-23 - 10616: 15-16 - 10618: 1-3);

8) " I love you so much. And I never meant to bring all this down on you or anybody else. I was out of my mind on drugs and overtaken by my addiction and all the rage inside me that I went berserk."

(Ex. 430; RT 10621: 13-17 - 10621: 21-23);

9) " A letter like that makes this nightmare and this place easier to deal with. I told you reading it made me cry. Well, I should have told you they were happy tears. I love you so much. I've never loved anybody but you. The love I have for you is so strong, the things that happened when we were on dope didn't weaken my love. It only made me look for excuses for what was going on. And I knew the bad things were because of the dope."

(Ex 432; RT 51: 10625: 14-22; 10626: 17-20).[176]

Defense counsel objected to the redactions, and argued the trial court's exclusion of evidence of remorse violated the Eighth and Fourteenth Amendments to the United States Constitution, and California Constitution, article I, section 28, "truth in evidence" provisions, relying on *Green v. Georgia, supra*, 442 U.S. 95, and *Penry v. Lynaugh, supra*, 492 U.S. 302, creating the likelihood of a unreliable verdict. He argued, "[I]t is a distortion of the jury to receive the letters and redact the parts of the letters that show remorse for the victims .., [a]nd then of course the law allows the D.A. ... [to] argue ... that there's a lack of mitigation because the defendant has not shown an act of remorse." (RT 51: 10602-10605: 12-22.) The court responded it was "not inhibiting or prohibiting in any fashion those issues being presented to a jury" through appellant's own testimony, but to admit the excluded statements in the letters "is a pure reliability issue" and would "circumvent the issue of cross-examination." (RT 51: 10606: 2-11.)

C. Prosecutor's Exploitation of Erroneous Rulings Arguments to the Jury in Retrial of the Penalty Phase

As pointed out in *Argument V*, defense counsel moved for mistrial on the grounds the prosecutor committed misconduct during his closing argument in the retrial of the penalty phase and violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment

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[176] By stipulation, references to what defense counsel told appellant and to "fighting for my life" were redacted from Exhibit 429, references to counsel and court were redacted Exhibit 433, and Exhibit 430 (8 above) was "rejected" in its entirety. (RT 51: 10620-10624; 10627-10628; see also 51: 10540-10563.)

rights under the United States Constitution and Article 1, Sections 15, 16 and 17 of the California Constitution. (RT 96: 20227.) He argued that the prosecutor committed misconduct during closing argument to the jury in the retrial by "repeatedly claim[ing] that Louis had no remorse after successfully convincing the Court to remove all evidence of remorse from the trial." (RT 96: 20228: 1-25.) Defense counsel had sought to preempt improper argument before the prosecutor commenced with his closing argument to the jury, arguing that the prosecutor's display of redacted letters written by appellant juxtaposed to blown-up photographs of the victims on a chart distorted the truth and violated appellant's enumerated federal and state constitutional rights, but the court overruled the objection to the use of the redacted letters during argument. (RT 95: 20009-20010; see RT 95: 20084-20088 [victim impact photographs contrasted with lack of remorse]; 20145-20146 [appellant's "love" letter to wife compared to victim impact].) As discussed in *Section D* following, the prejudicial impact of the trial court's rulings were exacerbated by the prosecutor's focus in argument, and they are quoted in full here, as cited in defense counsel's motion for mistrial:

1) Referring to Dr. White's testimony:

"She never talked about these themes and patterns that affected him when he was upwards of 16 years old would make him go into innocent people's store and gun down Stephen Chacko ... [a]nd have absolutely no remorse."

(RT 95: 20162: 2-7; see also RT 60: 12184: 1 ["remorse ... bull"]);

2) " A childhood does not explain premeditated, deliberate murder on innocent people for enjoyment. Enjoyment.

.....

I told you I would prove he liked it. And I have."

(RT 95: 20183: 22-23 - 20184: 19-20);

3) Referring to Dr. Woods's testimony:

" When you look at lack of remorse, it's not methamphetamine. It's called antisocial personality disorder, and that's called criminal. It's not complicated."

(RT 95: 20185: 4-7);

4) " Dr. Woods testifies for the defense exclusively. Dr. Woods is paid a lot of money, a lot of money to talk about a pattern of clearing. Dr. Woods came in and said Mr. Peoples expresses genuine remorse. That's the only remorse you hear, from a defense expert. Because there's no remorse in these crimes. There's no remorse when he guns down James Loper ...

There's no remorse when he guns down Thomas Harrison and laughs about it to Michael Liebelt. There's no remorse whatsoever about Stephen Chacko and laughs about it to his wife.

There's no remorse when he leaves Besun Yu on the floor to die ... And he has the audacity to write in the book ha, ha.

It's not consistent."

(RT 95: 20186: 27-28 - 20187: 1-15);

5) " He knew the police were searching, so he drives out of town. Where's the remorse? He kills a man. He laughs about it to his wife. And he can go shopping."

(RT 95: 20195: 2-5);

6) " I mean, you could just go on and on and on. I mean, if you really want to make up all of these cognitive things that Mr. Peoples – and the bottom line, they all point to one thing. This man has no remorse. He likes to kill. And its that simple."

(RT 95: 20198: 18-22);

7) " I mean you don't have frontal lobe damage ... You can go around and kill people because you like it; Have no remorse cuz [sic] you like it ..."

(RT 95: 20207: 2-6);

8) " He's addicted to meth, and he's got an antisocial personality disorder. What's that? It means basically a lifetime of crime. With no remorse. That's it."

(RT 95: 20210: 10-14.)

9) Referring (reading) to Dr. Rogerson's testimony:

" 'Q. [Dunlap] Can people who have antisocial personality disorder commit heinous crimes against fellow man because they like it?

A. [Dr. Rogerson]: They sure can and have little or no empathy for what they've done.

Q. One of the criteria for antisocial personality disorder is no remorse?

A. That's correct.

Q. And then you also said that Mr. Peoples has schizoid traits, correct?

A. Correct.

Q. Is that because he has no remorse?

A. Right.'"

(RT 95: 20212: 2-16 [citing RT 94: 19886].)

10) " This is an intentional, premeditated murder by an individual who likes it with no remorse and who did it again and again and again and again and again."

(RT 95: 20218: 10-12.)

In addition to defense counsel's cited references to lack of remorse on the second

full day of his closing argument,[177] the prosecutor's relentless exploitation of the erroneous exclusion of evidence of remorse occurred prior to the citations referenced in the motion for mistrial :

11) " There's an emerging pattern there, ladies and gentlemen.

Lack of remorse? Remember we heard that term [apparent reference to Dr. Woods's testimony]? Lack of remorse. Just remember that.

Anderson Park. Auto burglary. He calls up and says You dumb shit, got your gun.

And then he does that through the series of brutal homicidal murders. But let's look at that. Cuz we talk about cognitive functioning. Let's talk about lack of remorse. Let's talk about he enjoys it. Starts right there.

.....

I'm going to come back to this, ladies and gentlemen ... Lack of remorse. Right there. Right there, ladies and gentlemen. That's where it starts.

Then he gets hire? He gets hired ... Good dad. Boy, great neighbor. Helps out on the softball team.

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[177] The prosecutor argued for two full days, Thursday and Friday, May 10-11, 2000. (RT 95: 20008-20110; 20119-20224.)

Same time period.

That's the evidence. Except there's one little problem. On the inside, he had has [sic] no remorse for his crimes. He calls and says, Hey I got your gun."

(RT 95: 20043: 3-28 - 20044: 1-9);

12) " When you consider remorse for the defendant, you remember James Loper and you remember the defendant's statement [to police on November 12, 1997] that he's smiling."

(RT 95: 20056: 12-14);

13) " Mr. Fox likes to talk about two weeks that he killed, two weeks that he killed.

This is where remorse starts. He likes it."

(RT 95: 20104: 26-28);

14) " [After detailing appellant's statement to police]: When you want to talk about remorse, mercy, compassion, for that man, you remember all the case not snippets."

(RT 95: 20110: 14-16).[178]

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[178] An additional (15) direct references to lack of remorse in argument on May 11, not cited by defense counsel in his motion for mistrial, include incorporation of Louis's conversations with Quigel, and the improper inference: "[Louis] has no remorse. He likes to hurt people. He likes to laugh at people. He likes to rub salt in the wounds, and he does it again and again and again." (RT 95: 20188: 11-14.)

Moreover, the following day, after Fox interposed another objection to the prosecutor referencing directly or by "inference" letters written by appellant to show lack of remorse for the victims when the court had redacted his expressions of remorse from letters written to his own family, and only permitted expressions of love. The court agreed with defense counsel that for the prosecutor to draw "any inference is just as improper as it is by direct statement ..., [and] it would be improper to either directly or indirectly comment on the issue." (RT 95: 20115-20116: 5-13.) The court advised Fox it was a "nonissue," after the prosecutor assured the court he had no intention of doing so in his remaining argument: "I agree." (RT 95: 20116: 7.) In addition, Dunlap reassured the court he would not argue lack of remorse as an aggravating factor under the circumstances of the crime, but as lack of mitigation. (RT 95: 20016-20017.) Nevertheless, shortly thereafter the prosecutor provided the following inflammatory argument comparing appellant's letters to his wife with victim autopsy photographs:

> " Is the fact that he now writes love letters to his wife mitigation? No ...
>
> You want to talk about mercy for that man? Can't close your eyes because that's what he did.
>
> You want to talk about his humanity? Counsel wants to talk about Mr. Peoples' humanity. When you hear these letters, you remember these pictures.
>
> ' Dear Carol, just writing to let you know I'm still

thinking of you as always. I love you so much and miss you badly. You just don't know what your love and support mean to me. When I get your letters, they make me so happy. When I read those beautiful words you write about me being your one and only and how we are one together.'

You want to look at his humanity, don't forget who he is because that's what he did to those people, to those people who had their own hopes and dreams. It's amazing.

.....

Counsel will talk about letters and mercy. I'll come back to facts and punishment."

(RT 95: 20146: 2-19; 20152: 26-28.)

As pointed out above, appellant not only moved for mistrial based upon the misleading and prejudicial arguments of the prosecutor, but he moved for a new trial based upon the exclusion of evidence of remorse and the improper arguments presented by the prosecutor; the court erroneously denied both motions. (*Motion for New Trial*; CT 13: 3387; 20623-20625.)

D. The Prejudice of Erroneous Exclusion of Evidence of Remorse

Defense counsel accurately described the impact of the trial court's sole, rigid "mechanism" left open for evidence of remorse, part of the trial court's failure and refusal to limit the scope of the prosecutor's cross-examination if appellant were to testify in the

penalty phase, compounding the error of exclusion of the proffered evidence:[179]

> " [T]o exclude [remorse] completely and say I'm only going to allow all of this in if the defendant is up on the stand subject to cross-examination. And you know this is just a forum for the prosecutor to parade for two weeks all of the circumstances of the crimes again like he did with the experts. It is just an excuse to have the prosecutor attack my client, or give him the opportunity to go through every single thing that ever happened that we spent two months on."
>
> (RT 51: 10672: 15-23.)

The trial court improperly excluded the critical evidence proffered by appellant as a basis for a sentence less than death. As pointed out above, defense counsel challenged the trial court's erroneous exclusion of evidence of remorse, moved for mistrial before and after the prosecutor's closing arguments, and sought a new trial after the verdict was rendered. The court erroneously denied the motions. (RT 51: 10602-10606; 52: 10918-

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[179] As discussed in *Argument XV, post*, defense counsel filed a *Motion to Limit Prosecutor's Cross-Examination of Defendant in the Penalty Retrial* "to those matters testified to on direct examination ..., [because denial] would place him in the untenable position of being unable to present crucial and important mitigating evidence the jury." (CT 11: 2718-2723: 1.) Prosecutors filed two-page response, claiming it was untimely. (CT 11: 2724-2725.) The court denied the motion as premature, indicating it would consider the motion only after appellant testified, the same ruling in the first trial. (RT 51: 10666-10667; 62: 12681-12684; 75: 15619-15629: 25-28.)

10919; 76: 15720-22; 15815-15852; 82: 17021-17045; 96: 20228-20230; CT 13: 3387; RT 97: 20623-20625.)

In *People. v. Robertson* (1982) 33 Cal.3d 21, part of a line of cases to address "antisympathy" arguments by prosecutors and instructions from the trial court, this Court found both unconstitutional. The *Robertson* Court quoted extensively from *Woodson v. North Carolina, infra,* 428 U.S. at p. 304, to explain the constitutional basis for "sympathy" as a critical part of the mitigation equation:

> " [*Woodson*] emphasized: 'A process that accords no significance to relevant facets of character and record of the individual offender or the circumstances of the particular offense excludes *from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of human kind* ... [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally *indispensable part of the process of inflicting the penalty of death.*' (Italics added.) Thus, as we explained in our recent opinion in *People v. Haskett, supra*, 30 Cal.3d at page 863: 'It is not only appropriate, but necessary, that the jury weigh the sympathetic

elements of defendant's background against those that may offend the conscience.'"

(See also, *People v. Brown* (1985) 40 Cal3d 512; *People v. Lanphear* (1984) 36 Cal.3d 163; *People v. Easley* (1983) 34 Cal.3d 858.)

The trial court here not only erred in excluding appellant's expressions of remorse to family members and two pastors who initiated contact with him, but it approved of the prosecutor's inflammatory and "distorting" arguments to the jury on lack of remorse is used to undermine sympathetic aspects of appellant's character. When the trial court – like the prosecutor in argument to the jury – termed the case for the death penalty "overwhelming," it was doing so without consideration of remorse, characteristics both the prosecutor and the trial court considered from experience and law to be "critical" and "at the heart" of the penalty determination. (RT 50: 10350; 10402; 51: 10668; 97: 20670.) Defense counsel's efforts to provide the jury with appellant's "characteristics," "state of mind," "personality, humanity, demeanor ... [and] sense of remorse" (RT 51: 10670-10672), were legitimate efforts to meet the aggravating "circumstances of the crime." Those "circumstances," as argued by the prosecutor, included the *Biography of a Crime Spree* referred to repeatedly in argument to counterattack mitigation theories of a drug-induced, brain-damaged, two-week period of aberrant violence with prosecution themes of "systematic serial" killings, a remorseless "lifetime history of escalating crime," and a defendant undeserving of sympathy, compassion or mercy. (See, e.g., RT 95: 20019-20020; 20021; 20023; 20026; 20085; 20103-20104; 20146-20147.) The proffered

testimony of Pastors Kilthau and Skaggs, as well as appellant's letters to his wife and children, provided reliable evidence of remorse, and the trial court erroneously deprived him of powerful evidence in mitigation.

In final analysis, any effort to balance prejudice is unpersuasive in the context of the constitutionally reliable determination of punishment. (*Chapman v. California, supra,* 386 U.S. 15; *Tennard v. Dretke, supra,* 542 US. 274; *People v. Jones, supra,* 29 Cal.4th 1229, 1264; *People v. Bennett, supra*, 45 Cal.4th at 604.) Dr. Woods's testimony regarding remorse as a symptom of "clearing" from methamphetamine was no substitute for the testimony of an essentially hostile clergyman (Pastor Kilthau), the testimony of a lifelong jail minister (Pastor Skaggs), or the heartfelt expressions to family members in letters, as the prosecutor so aptly drove home to the jury:

> " Dr. Woods testifies for the defense exclusively.
>
> Dr. Woods is paid a lot of money, a lot of money
>
> to talk about a pattern of clearing. Dr. Woods came
>
> in and said Mr. Peoples expresses genuine remorse.
>
> That's the only remorse you hear, from a defense expert."
>
> (RT 95: 20186: 27-28 - 20187: 1-4.)

The circumstances under which each pastor approached appellant were unique and reliable because the pastors were not paid, were committed ministers of faith in a position to judge the credibility of penitence, and did not seek out remorse. They were both convinced appellant's expressions of remorse were genuine. Therefore, bias, if any, was

minimal, but it was powerful evidence in mitigation of punishment. The proffer of the evidence of remorse expressed to the pastors and in appellant's letters to children and other family members, provided more than ample evidence of reliability and trustworthiness, and it was clearly erroneous to exclude it. (*Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Green v. Georgia, supra*, 442 U.S. at p. 97; *Brown v. Payton, supra,* 544 U.S. at pp. 142-143; *Crawford v. Washington, supra,* 541 U.S. 36; *People v. Bennett, supra,* 45 Cal.4th at pp. 604-605.)

As implied from the mistrial – eight to four for life imprisonment – in the first penalty phase in August,1999, and jury deliberations in the retrial of the penalty phase in May to June over 12 days and 30 hours, with indications of three jurors voting for life imprisonment after 20 hours of deliberations and six votes, this was a close case even without introduction of evidence of remorse. (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 779-780; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163, disapproved on other grounds, *Calderon v. Coleman* (1998) 525 U.S. 141, citing *People v. Murtishaw* (1998) 29 Cal.3d 733.) For the foregoing reasons, judgment must be reversed. (*Chapman v. California, supra,* 386 U.S. 15; *People v. Jones, supra,* 29 Cal.4rth 1229, 1264.)

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VII.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED BY ADMISSION AT TRIAL OF HIS INVOLUNTARY STATEMENT AND OTHER EVIDENCE OBTAINED BY POLICE.

Appellant's rights against self-incrimination, to a fair trial, to due process of law, to reliable determinations of guilt and punishment, and to be free from cruel and unusual punishment, were violated by law enforcement officers in this case who engaged in coercive practices over twelve hours of intensive interrogation conducted November 12-13, 1997. The erroneous admission at trial of his involuntary statements requires reversal of his convictions and sentence of death. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. 1, §§ 1, 7, 13, 15 &17; *Miranda v. Arizona* (1966) 384 U.S. 436; *Schneckloth v. Bustamante* (1973) 412 U.S. 218; *Beck v. Alabama* (1980) 447 U.S. 635; *Oregon v. Elstad* (1985) 470 U.S. 298; *Moran v. Burbine* (1986) 475 U.S. 412; *Arizona v. Fulminate* (1991) 499 U.S. 279; *Dickerson v. United States* (2000) 530 U.S. 428; *Missouri v. Seibert* (2004) 542 U.S. 600; *People v. Cahill* (1993) 5 Cal.4th 478; *People v. Neal* (2003) 31 Cal. 4th 63; *People v. Holloway* (2004) 33 Cal.4th 96; *People v. Richardson* (2008) 43 Cal.4th 959; *People v. Rundle* (2008) 43 Cal.4th 76.)

Following federal guidelines, before a defendant's statement may be admitted at trial in California the prosecution bears the burden of proving by a preponderance of the evidence that the statement was freely and voluntarily give to police. (*People v. Sapp* (2003) 31 Cal.4th 240, 267; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033; *People v.*

Markham (1989) 49 Cal.3d 63, 71; *Dickerson v. United States, supra*, 530 U.S. at 438-39; *Stansbury v. California* (1994) 511 U.S. 318, 325-26.) Statements that have been obtained by threats, promises of leniency, or the exertion of *any* improper influence, whether express or implied, are inadmissible in the prosecution's case-in-chief. (*People v. Clark* (1993) 5 Cal.4th 950, 988; *People v. Benson* (1990) 52 Cal.3d 754, 778; *People v. Hill* (1967) 66 Cal.2d 536, 549.) As declared in *People v. Neal, supra*, 31 Cal.4th at p. 67:

> " It long has been settled under the due process clause of the Fourteenth Amendment to the United States Constitution that an involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion is inadmissible in a criminal proceeding. (*Brown v. Mississippi* (1936) 297 U.S. 278, 285-286 [80 L.Ed. 682, 56 S.Ct. 461].)"

Under firmly established principles, courts apply a "totality of circumstances" test to determine: a) the voluntariness of a confession; and, b) whether defendant's waiver of right or "choice" to confess was in fact and law "essentially free." (*People v. Holloway, supra*, 33 Cal.4th at 114; *People v. Clark, supra,* 5 Cal.4th at 986-87; see also *Moran v. Burbine, supra,* 475 U.S. at 421; *Dickerson v. United States, supra,* 530 U.S. 434.) In reviewing the trial court's determination of voluntariness on appeal, the constitutionally based determination of whether a defendant's statements to police were freely and voluntarily given necessitates an independent standard:

> " As we stated in *People v. Boyer* (1989) 263 [256 Cal.Rptr.96,

768 P.2d 610], reviewing a similar claimed *Miranda* violation,

'The scope of our review of constitutional claims of this nature is well established. We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]'"

(*People v. Johnson* (1993) 6 Cal.4th 1, 25; see also, *People v. Holloway, supra*, 33 Cal.4th at 114; *People v. Boyette* (2002) 29 Cal.4th 381, 411; *People v. Davis* (2009) 46 Cal.4th 539, 585-586; *People v. Neal, supra,* 31 Cal.4th at p. 80.)[180]

Moreover, becauae the interrogation in this case was recorded on videotape, as this Court reiterated in *People v. McWhorter* (2009) 47 Cal.4th 318, 346, quoting from *People v. Maury* (2003) 30 Cal.4th 342, 404:

" 'When, as here, the interview was tape-recorded, and the facts surrounding the giving of the statement are undisputed, the the appellate court may independently review the trial court's determination of voluntariness.' (Citation omitted.)"

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180 "Substantial evidence" means "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case."(*People v. Samuel* (1981) 29 Cal.3d 489, 505.)

(See also *People v. Davis, supra,* 46 Cal.4th at pp. 585-587.)

The United States Supreme Court has clearly established the constitutional basis for the suppression of involuntary confessions, and this Court has followed suit. (*Arizona v. Fulminate, supra*, 499 U.S. 279; *People v. Cahill, supra*, 5 Cal.4th at pp. 482-483.) General guidelines are summarized in *People v. Cahill, supra*, 5 Cal.4th at p. 485:

> " Past cases establish that the category of involuntary or coerced confessions encompasses a wide range of circumstances and includes not only the most familiar example of confessions extracted from a suspect by means of actual or threatened physical violence or torture (see, e.g., *People v. Jones* (1944) 24 Cal.2d 601, 604-611 [150 P.2d 801]), but also confessions elicited by those psychological ploys and interrogation techniques whose use, although less egregious than the resort to physical violence or torture, nonetheless have been deemed inconsistent with a defendant's right to be free from self-incrimination. (See, e.g., *People v. Quinn* (1964) 61 Cal.2d 551, 552-554 [39 Cal.Rptr. 393, 393 P.2d 705], and cases cited.) ... [I]nterrogation technique[s] employed during the police questions of defendant ... rendered defendant's resulting confession 'involuntary'

under a long line of cases that have held confessions inadmissible when obtained as a result of express or implied promises, on the part of law enforcement officials, of 'leniency' or 'benefit' in the event the defendant confesses. (See, e.g., *People v. McClary* (1977) 20 Cal.3d 218, 227-230 [142 Cal.Rptr. 163, 571 P.2d 62]; *People v. Rogers* (1943) 22 Cal.2d 787, 805-806 [141 P.2d 722]; *People v. Barric* (1874) 49 Cal. 342, 345; *People v. Johnson* (1871) 41 Cal.452, 454-455.)"

Similarly, in *Spano v. New York* (1959) 360 U.S. 315, at 320-321, the high court held defendant's due process rights were violated when an involuntary confession was admitted at trial, even though no physical brutality had been applied during interrogation:

" The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those

> cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. The facts of no case recently in this Court have quite approached the brutal beatings in *Brown v. Mississippi* [citation omitted] or the 36 consecutive hours of questioning present in *Ashcraft v. Tennessee* [citation omitted]. But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made." [181]

In *Dickerson* v. *United States, supra,* 530 U.S. at p. 433, the court emphasized that *Miranda* established guidelines for the admissibility of statements given in a custodial interrogation, because "custodial police interrogation, by its very nature, isolates and pressures the individual," and,"'[e]ven without employing brutality, the 'third degree' or [other] specific stratagems..., custodial interrogation exacts a heavy toll on individual

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[181] As Justice Baxter echoed in his concurring opinion in *People v. Neal, supra,* 31 Cal.4th at 89, "There are few less pleasant judicial duties than to reverse a conviction because a police officer, though charged with enforcing the law, obtained important evidence by deliberately improper means."

liberty and trades on the weakness of individuals.' *Id.*, at 455, 86 S.Ct. 1602." Thus, while evidence the accused has some familiarity with the criminal justice system, and is shown to be reasonably intelligent, are general characteristics to consider, they are not dispositive in determining whether "the defendant's will was overborne." (*Lynum v. Illinois* (1963); *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Yarborough v. Alvarado* (2004) 541 U.S. 652.) Both the details of the examination and the unique characteristics of the accused must be examined in determining whether the accused's will was overborne. (*People v. McWhorter, supra*, 47 Cal.4th at p. 346; *People v. Neal, supra*, 31 Cal.4th at p. 84.)

As the United States Supreme Court reminded us in *Withrow v. Williams* (1993) 507 U.S. 680, 691, 113 S.Ct. 1745, quoting from *United States v. Verduzco-Urqudez* (1990) 494 U.S. 259, 264, 110 S. Ct. 1056, "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a 'fundamental trial right.'" (See also *Dickerson v. United States, supra,* 530 U.S. at 433.) As discussed following, the trial court erred when it admitted appellant's involuntary statement to police on November 12 and 13, 1997, and the fruits thereof, including his subsequent statement and the handgun used in the crimes. The prejudice of the admitted evidence requires reversal of convictions and death sentence. (*Arizona v. Fulminate, supra*, 499 U.S. 279; *People v. Cahill, supra*, 5 Cal.4th pp. 482-483.)

A. Factual Background to Arrest

Detective Coon received a telephone call from Stockton Police Officer Brian

Swanson at 1:00 PM, November 12, 1997. Officer Swanson was on patrol and on the lookout for a vehicle matching the description given by witnesses who had seen a vehicle leaving the parking lot of *Mayfair Liquors* on November 4 shortly after the robbery. Swanson reported a Nissan similar to the vehicle described by witnesses and read the license plate frame to Detective Coon: "'Carol and Louis Forever.'" Coon ran a vehicle record check, noted the registered owner to be Carol Peoples, and then checked appellant's criminal record. Detective Coon advised Officer Swanson he recognized the name "Peoples" from an employee list he had reviewed at *Charter Way Tow* during the investigation of the James Loper homicide. Detective Coon advised Swanson to conduct surveillance on the vehicle and detain anyone who might enter it. (RT 33: 6750-6755; 6765-6770. [RT 83: 17398-17401].)

After he called for backup, Officer Swanson parked down the street from the Nissan; he received a photograph of Louis on his patrol monitor. (RT 33: 6769-6770.) At 3:00 PM, officers who had arrived in an unmarked police car reported that "a white male matching Louis Peoples' description was walking away from the apartment complex" on Ben Holt Drive. The man, Louis, was carrying a backpack and a fanny pack, was wearing a baseball hat, and headphones, and appeared unkempt. As Officer Swanson drove his vehicle towards Louis, he observed Officers Kohler and Tribble approach on foot with guns drawn, and backed up by several other officers. They handcuffed Louis in a field near an elementary school and Anderson Park. (RT 33: 6755-59; 6771-73; 6808-09.) Louis did not resist arrest. Swanson searched the packs for weapons, and found evidence

linking Louis to all the crimes. Swanson took Louis into custody for interrogation. (RT 33: 6808-09; 6775-6805.)

Officer Swanson placed Louis into his patrol car without incident at 3:15 PM. Louis appeared passive and did not speak during the ten-minute drive to the police station. Swanson had received academy training, but he did not recognize symptoms of drug intoxication or withdrawal and did not conduct field sobriety tests. (RT 33: 6777-78; 6793; 6814-6844.) Officer Swanson remained at the police station over the next twelve hours, while homicide detectives interrogated Louis and ultimately booked him on murder charges at 4:30 AM, November 13, 1997. (RT 33: 6816-17; 6839-6841. [RT 81: 16866-16880; 82: 16916-16963.].)

Detectives Huber and Coon interrogated Louis from 4:30 PM November 12 to 4:30 AM November 13, 1997; the sessions were videotaped. (CT 9: 2471; RT 33: 6828-29; 6839-41; 34: 6961-69; Exhibits 695-A-B. [RT 83: 17347-50; 17369-88; 17405-08.].) Louis denied any knowledge of the crimes for ten hours. (RT 34: 6928-30. [83: 17398-17403].) Then police confronted Louis with his wife's statements made to them while he was being held in custody. Police threatened to "drag" Carole into the case and "lean on" his son, Matthew. Louis, sweating profusely, pulling out his hair, rubbing his skin, twitching his facial muscles, grinding his teeth, and at times appearing to nod off to sleep, admitted committing the crimes at issue during the final two hours of interrogation. (RT 34: 6946-6948; 35: 7215-7224. [83: 17405-17,408.].)

At 9:00 AM, November 13, Louis gave directions to police to assist in recovery

of the gun he had used in the crimes. When law enforcement personnel could not locate the weapon, he went into the field with them at 9:45 AM and helped recover King's *Glock* pistol near the point of his arrest. (RT 34: 7089-90; 35: 7241-7245; 7261-64; 47: 9724-25; Exhibit 622; [RT 83: 17398-401.].) At 2:30 PM on November 13, Kent Rogerson, M.D., a forensic psychiatrist retained by the San Joaquin County District Attorney's office, entered the San Joaquin County Jail and conducted a general psychiatric and competency evaluation for the prosecution. (RT 47: 9625-37; 9687-9691. [RT 94: 19762-19768; 19802-19809.].)[182] Detective Huber audiotape-recorded an interview with Louis regarding the unusual scratches on the *Glock* the next morning (November 14), as Louis waited in a courthouse holding cell for his arraignment. (RT 34: 7090-91; Exhibit 663. [RT 83: 17398-17401.].)[183]

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[182] Dr. Rogerson testified as a rebuttal witness in both trials, but is cited here solely for the timeline of case events.

[183] Upon recovery of Michael King's *Glock* .40 caliber firearm in the field near Louis's apartment, DOJ Agent Giusto matched all case-related cartridges as fired from the gun. (RT 33: 6711-6718; 6721-6737. [81: 16789-16803.].) The serial number on the metal frame of the pistol had been "covered over and obliterated" and the breech face "scratched out." (RT 33: 6721-22; 6725-26; Exhibit 622; see also, RT 28: 5579.) Jeff Reed, Alameda County Sheriff's Deputy Regional Range Coordinator, testified in the guilt phase regarding issuance of firearms to officers. County records showed Exhibit 622 (Serial BMG014) had been issued to Daniel Harrison on March 8, 1996, while another *Glock* (BMG272) had been issued to Deputy King. County records did not show Exhibit 622 had ever been issued to King. Over foundational, hearsay, and relevancy objections, the records were admitted, and Deputy Reed opined the guns must have been "inadvertently switched" at some point. (RT 37: 7603-23.)

B. Hearing on the Motion to Suppress

On October 13, 1998, while the case was still in San Joaquin County Superior Court, appellant filed a motion to suppress his coerced statements obtained by law enforcement officials on November 12 and 13, 1997, and included reference to a proffered expert, Richard Leo, Ph.D., J.D. (CT 3: 729-749.) Respondent filed an opposition memorandum on October 26, 1998. (CT 3: 751-760.) A reply was filed, and included a motion to redact "all otherwise inadmissible portions" of the statements under Evidence Code section 352 in the event the court denied the motion to suppress on constitutional grounds. (CT 5: 1153-1234.) On February 16 through 18, 1999, after Detective Huber authenticated the tapes, the prosecution presented the twelve-hour videotaped recording of the interrogation, which was played in the courtroom. (RT 5: 904-978; Exhibits 65A-B; see also, RT 7: 1467-1469.)[184]

After the prosecution rested, defense counsel presented the testimony of Richard A.

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[184] The tapes were subsequently admitted at trial as People's Exhibits 695A-B. (CT 2471.) As described in *Argument III, ante*, the trial court improperly refused defense counsel's request to for a court reporter so he could object contemporaneously, e.g., when he felt Judge Platt was not paying attention to the videotape at certain points counsel felt were critical to the motion. (RT 5: 919-920.) Judge Platt informed defense counsel he was "quite capable of doing two things at one time" (ibid.), and that it is "not a difficult task" for counsel to take notes and preserve objections: "[I]f one cannot handle that, they should not be trying this case." (RT 5: 929.) The trial court also improperly permitted witnesses to remain in the courtroom during the playing of the tape after defense counsel noted the trial court's emphatic "inflection" in denying the motion to exclude witnesses, threatening counsel that "every word that comes after *enough* [will be fined] at $100 a word is going to get the message across, I have ruled. Period." (RT 5: 937-938.)

Leo, Ph.D., J.D., on February 25 and 26, 1998. (RT 6: 1217-1318; 7: 1378-1460.) Dr. Leo, a professor in the Department of Criminology at University of California, Irvine, qualified as an expert in "identifying aspects of police interrogation and identifying aspects of coercive persuasion" in order to assist the trial court with whether appellant's statement to police was "admissible because it was or wasn't the subject of free will." In order to provide an opinion, Dr. Leo viewed the videotaped recording of appellant's statements to police of November 12 and 13, 1997, with the agreed-upon transcript of the statement. (RT 6: 1217-1219; 1251; 1253-1254; Def. Ex. 30 [Leo *Curriculum Vitae*; CT 3: 737-749].)[185]

Dr. Leo testified to the "application of social psychological principles to explain how interrogation works ..., [and] how we go from the study of rational decision making to it's [sic] application in the context of police interrogation." (RT 6: 1257.) He described the research discipline as "empirical and analytical," not a subject designed "to draw normative conclusions about what is morally appropriate or morally inappropriate." (RT 6: 1245.) With respect to confessions obtained by police as a standardized practice, "[i]nterrogators have to convince a suspect they've been caught, there's no way out, their fate is sealed, [and] they're [sic] interest lies in confessing." (RT 6: 1241.) The "application of principles of rational decision making, which are generally accepted and studied in other contexts are similarly applied in police interrogation practice ...," and are

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[185] A 434-page transcript of the videotaped interrogation was submitted for the hearing and stipulated to as accurate by both parties. (CT 3: 729; 751; 5: 1153-1154; RT 5: 904; 911; Exhibit 101.)

taught throughout the United States and police academies and police departments. (RT 6: 1243.) Interrogation "techniques [are] written for both and police training literature as well as police training courses, and in the academic social science literature." (RT 6: 1244.)

Dr. Leo explained that research shows police follow clear "stages" of interrogation, because they are "trained to overcome the denials of suspects ... [and] interrogation is predicated on the premise that a rational individual will deny unless you make it in their interest to confess." (RT 6: 1240.) The first "step" is "shifting the suspect from confidence that they bring into the interrogation room, whether innocent or guilty, that they're going to leave the interrogation to a sense of hopelessness, despair, or desperation." (RT 6: 1240-1241.) The second "step" is to "offer suspects inducement or incentive to confess ..., [which] can be arrayed along a spectrum of low-end inducement, appeals to morality, catharsis, you'll get this off your chest, you'll feel better, [i]t's the right thing to do." (RT 6: 1241-1242.) Dr. Leo terms these "low-end or benign because they do not suggest any tangible benefit for the suspect." (RT 6: 1242.) The second "category" of "low-end inducement" are "systemic incentives," and include references to "the criminal justice system" and how prosecutors, judges and jurors will view "remorse and contrition ... [and] how that will affect you down line as your case is processed." (RT 6: 1242.) In the "final category" police use a "high-end" inducement model to include "promises of leniency or threats of harm, whether delivered implicitly or explicitly," and

may include subtle references to punishment, including the death penalty. (RT 6: 1242.)[186]

The parties and court agreed there was no question but that police applied the "first step," or "absolute certainty" principle, fourteen times – repeatedly accusing the suspect of the crime, undermining alibi and denial – to shift Louis's sense of confidence into one of hopelessness. (RT 6: 1265-1267.) Certain "sub-techniques," such as, "the issue is not whether he did it but only why he did it" (RT 6: 1269), were also employed at least four times. In addition, "ploys," including references to his wife's different version of events, backpack items, "hypothetical evidence, demeanor evidence, different kinds of appeals that are meant to convince him that's he's guilty, he's caught and there's no way out," were used by the police in this case in "very creative" ways. (RT 6: 1275.)

Moreover, Dr. Leo found pervasive elements of "low-end" and "high-end" inducements used by police during the twelve-hours interrogation of November 12 and 13, 1997. Of greatest importance to whether coercive techniques were applied to undermine Louis's free will, Dr. Leo cited over fifty instances from pages 71-403 of the transcript of the statement where police "implied a threat or implicit reference to harsher punishment if you don't confess ..." (RT 6: 1312.) By the time Louis acknowledged he was either going to spend the rest of his life in prison, or "'get the gas chamber,'" at pages 403-404, the police had stopped using threats of punishment because by then Louis had "already

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[186] Physical assault or other "third degree" methods were not used in this case and "today [1998] are rare." (RT 6: 1261; 1249-1250.) Dr. Leo opined the length of the interview (12 hours) was not unusual for "high profile serious crimes" (RT 6: 1263), but the trial court found it was "very lengthy ...," but not "paramount" to determination of the issue presented. (RT 7: 1497.)

admitted what they want[ed] him to admit." (RT 6: 1314.)[187] Prior to Louis's admissions, however, Dr. Leo described the techniques of implied threat of greater punishment used by police in the first ten hours of interrogation – 380 pages of transcript – as "a lot of what happened in this interrogation ..., [as it] revolved around what was going to happen to [Louis] and was a kind of bargaining process, negotiating process about a better outcome based upon what he told them as opposed to a worse outcome ... meaning the kind of punishment he would receive." (RT 6: 1315.) As a result of the nature of the "sequential events" of interrogation, police "can't take back what was said earlier in an interrogation;" their messages "accumulate and develop, repeat, and build ...[a]nd that's part of the effectiveness of interrogation ..., the repetitive, cumulative nature of the persuasion process." (RT 6: 1291-1292.)

Stronger evidence of the effect of coercion can be seen with the "classic" and "explicit example of high-end technique[s]" of threatening to incarcerate and accuse his wife, Carol, as complicit in the crimes (RT 6: 1301-1303), and when officers threatened to "lean on" his twelve-year-old son, Matthew (RT 6: 1310-1311):

"1) You completely changed your demeanor here after hearing

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[187] According to Dr. Leo, as researcher, he does not examine the characters or challenge the duties of Detectives Huber and Coon but analyzes methodology in the context of procedures used by police across the country. (RT 7: 1446-1447; 1455-1456.) Indeed, at the point Louis had inculpated himself, Detective Huber no longer wanted to discuss punishment: "I don't want to get off into penalty." (Ex 101, p. 404.)

that, completely changed. She's not lying to us.[188]

.....

[D]on't drag your wife into this anymore. You don't need to do that.

.....

Give the people what they want — the truth, rather than what she thinks she heard you say or what we're thinking you're thinking. Give us, give us the truth. Step up and be a man about it! You're done, you're caught," pp. 246-247;

2) " Louis, are we gonna have to go lean on Matthew now to find out if he saw that gun up in the closet?

.....

Twelve, we're gonna have to go out and talk to a 12-year-old and drag him into this too, to find out if he saw that gun? Huh?" pp. 376-377.

Dr. Leo's opinion in this case is that some "low end" coercion also blends into "high end" coercive incentives. For instance, there appears to be "a kind of implicit suggestion that there is some kind of bargaining going on" for punishment, as Detectives Huber and Coon "can portray his case in a certain way depending on what he says, or presumably in a different worse way if he doesn't admit right now what they're asking him to admit to." (RT 6: 1288; 1290.) A significant example occurs when officers accuse

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[188] After ten hours of interrogation, Sheriff's Detective Antonio Cruz entered the room and played the taped interview conducted at the station house with Carol Peoples. (*Statement of the Case, ante*, p. 41; CT 3: 730; 734.)

Louis of being a "mass murderer ..., [and] the implication is clear that that carries a harsher punishment" (RT 6: 1287):

> " Think about it because you're not gonna have a chance to explain to the world why this happened, okay? Once this, once this is over, it's over .... They're gonna start saying, oh maybe he killed in Florida, maybe he killed there. They'll be looking at ya [sic] all over the place," page 327.

Similarly, as interrogators focused attention on accidental as opposed to premeditated homicide, the effort is to "minimize the outcome with the implicit message that the account that's being suggested by the interrogator, if the suspect agrees to it, will be a lessened account and presumably carry lesser sentencing ..." (RT 6: 1297; 1290), exemplified by the following (RT 6: 1290-1309):

1) " Maybe you didn't mean to [shoot anyone]," p. 71;

2) " I don't think you were trying to kill anybody ...
Maybe you're probably firing like this, you;'re probably not even looking, you don't even know nothing about guns," p. 90;

3) " I can guess that when you went out there, you had no intentions of shooting anybody when you went out to Mariposa Road, California Spray," p. 91;

4) " Nobody died [at Cal Spray]. It wasn't, it was not that serious. Nobody's in the hospital," p. 92;

5) " I don't think you meant to hurt anybody in that case," p. 95;

6) " But you know there's, there's all different aspects of homicide ... and if there's a death, a death can be anything from accidental, suicide, natural or homicide. I think that's about it," p. 304;

7) " [T]here's a big difference between shooting a gun and attempted murder, isn't there?" p. 357;

8) " You weren't trying to kill that guy, were you Louis? Are you really that bad of a shot, you tried to kill him?" p. 358.

The point, according to Dr. Leo, is that an alleged mass murderer "is someone who gets punished very severely ..., [but] somebody who made a mistake ... some kind of accident, then there is a suggestion that there are two different levels of outcome within the suspect's choice." (RT 6: 1287; 7: 1409.)[189]

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[189] Examples proffered by Dr. Leo of "low-end" incentives or "moral" benefits to get appellant to confess include the following (RT 6: 1278-1279): 1) appeal to Loper's "young kids," and "for an explanation," pp. 144-145 [Ex. 101]; 2) appeal to crimes "eating on conscience," pp. 159, 203, 302, 347; 3) appeal to obligations to his wife, p. 169; 4) appeal to the "morally right thing to do," p. 180; 6) appeal to what "other people are going to think when they read about this in the paper," p. 220; 7) appeal to "putting this behind him," p. 222; 8) appeal to "doing the right thing and telling the truth," p. 255; 9) appeal to "apologizing" as right thing to do, p. 299; 10) appeal to his "children," p. 325; 11) appeal to his "daughter," p. 332; 12) appeal to "catharsis," p. 333; 13) appeal to "families" of the victims, p. 340; 14) appeal to "showing he has a heart," p. 349; 15) appeal to "moral" help to investigators, p. 364-65; 16) appeal to "crying out for help," pp. 98-100; and, 17) appeal to "control over what's said and what's done." p. 258.

Dr. Leo "categorized" the examples of "high-end" incentives cited above as coercion because they are "threats" and "ploys" under any definition. (RT 6: 1311.) As he also pointed out, it is precisely ten hours into the interrogation that "the beginning of the so-called confession" occurred (RT 6: 1311), and it is demarcated by the officers no longer attempting to coerce Louis. Dr. Leo has concluded from research and experience that "[a]n implicit threat or implicit reference to harsher punishment if you don't confess can be just as effective, [b]ut the more explicit the message is communicated, the more powerfully it is likely to be understood." (RT 6: 1312.) Threatening a spouse or a child may be more powerful to one person – Louis Peoples – than to another who is not close to family, and in the present case it appears both threats immediately preceded appellant's decision to incriminate himself. (RT 6: 1312.) After that point in the interrogation, Dr. Leo opined "the significance for me as a researcher in trying to analyze this is that ... [Louis] understands his situation as involving different degrees of possible punishments ..., [and b]y the time they've stopped the threats ... he's already admitted what they want him to admit." (RT 6: 1314; 1398-1399.)

After hearing arguments of counsel (RT 7: 1466-1478; 1479-1493; 1493-1495),[190]

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[190] As discussed in *Argument V, ante*, the prosecutor could not refrain from injecting personal invective against Dr. Leo: " I give him no credence. None whatsoever." (RT 7: 1490: 1-2.) "There is [sic] no implied promises of leniency through these vague statements that Dr. Leo gives credence to. [Dr. Leo was paid] 6,000 dollars of wasted taxpayer money." (RT 7: 1491: 8-11; see, RT 7: 1379 .)

the court issued a decision from the bench. First, Judge Platt indicated, "I was very impressed with Dr. Leo." (RT 7: 1495.) In examining Dr. Leo's testimony the court found it compelling, but decided what is "acceptable to a social scientist ... whether or not coercive at a moral or social level ...," is "just an apple and oranges argument," because the test is "under the totality of circumstances" whether it "passes muster for a legal standard of undue coercion." (RT 7: 1504; 1496.) Dr. Leo conceded that a social scientist may define "coercion" more liberally than most judges (RT 7: 1411-1412), but the trial court agreed that by any standard twelve hours is "a very lengthy interrogation ... [b]ut length of time by itself is not paramount." (RT 7: 1497.) Based on viewing the taped interrogation, "reading both the language and the body and demeanor [of appellant], that there is a recognition that the noose is tightening ..." (RT 7: 1500), the court denied the motion to suppress on the ground the statements were not the product of "undue coercion." (RT 7: 1505; 1506.)

C. Appellant's Statements Were Not Freely and Voluntarily Given Under The Totality of the Circumstances

In the present case, there was no dispute that the interrogation at the station house lasted twelve hours. (RT 7: 1467; 1478; 1481; 1497.) Dr. Leo provided clear testimony of police officers's repeatedly suggesting over ten hours of interrogation that lesser or greater punishment depended on Louis's willingness to cooperate; the implication was a benefit would inure to him if he chose to confess, but a detriment would surely devolve to him if he did not. (RT 6: 1312.) The nature of the "bargaining process, negotiating

process about a better outcome based upon what he told them as opposed to a worse outcome..., meaning the kind of punishment he would receive," is established from repeated references to the "nature of homicide," including contrasting "accidental" vs. "mass murder," and the "worst guy in the whole wide world" vs. "[the guy] crying out for help." (Exhibit 101, pp. 98; 258; 304, 327; RT 6: 1315.) According to Dr. Leo, in the final analysis the extent of "high end" techniques employed during the first ten hours, coupled with implied threats to family members, created the foundation for coercion. (RT 6: 1305-314.) Despite the fact that Louis denied culpability for over 10 hours under repeated *implicit* threats of "harsher punishment if you don't confess," once police played Carol's taped statement to him, and directly threatened to "drag" her into the case (Ex. 101, p. 246) and to "lean" on Matthew (Ex. 101, p. 376), "the more explicit ... message [was] communicated, [and] the more powerfully it [was] understood." (RT 6:1312.)

Further, Louis was confined for the entire time in the station house, exhibited signs of drowsiness, such as, nodding off, and was allowed only water, caffeinated coffee and sodas, and use of a toilet. (RT 7: 1469; CT 3: 734.) The videotape also reveals he was grinding his teeth and shivering. (RT 7: 1470.) During the retrial of the penalty phase Deputy District Attorney Dunlap described Louis's "unkempt" appearance when the interrogation began at 4:30 p.m. on November 11, 1997, his "deteriorated" condition twelve hours later as depicted in the booking photograph (Exhibit 106-A) taken at 5:00 a.m. on November 12, and, as evidenced in the videotape of the twelve-hour interrogation:

"Q. Okay. And then just a few other things. We actually see

Mr. Peoples' appearance there in the beginning and then again twelve hours later. Talked about him pulling out his hair, saw the rubbing. Was Mr. Peoples at times sweating, and appear to be nervous?

A. [Detective Coon] Yes."

(RT 83: 17405: 17-22.)

Detective Huber had also described Louis during the guilt phase of trial as appearing to him to be "sleepy" when the interview began (RT 34: 6947), of admonishing him several times to stay awake (RT 35: 7214-7216), of observing Louis's eyes rolling back in his head (RT 34: 7218-7219), of Detective Coon asking Louis about his facial "twitch" (RT 35: 7217; 7221), of Louis repeatedly asking for water (RT 35: 7216-7217); Louis was plied with caffeine drinks (coffee and sodas) to keep him awake. (CT 3: 734.)

Indeed, coupled with the length of time – over ten hours – of the interrogation and police interrogation techniques used to overcome Louis's will before he admitted to the crimes, Louis's sleep-deprived state and other physical symptoms (grinding teeth, sweating, thirst, pulling hair, etc.) of "deterioration," created the conditions necessary to overcome Louis's will.

In *People v. Neal, supra*, 31 Cal.4th at pp. 81, 85, this Court condemned the same kind of repeated carrot waving used by police officers who threatened Kenneth Neal with "'the system is going to stick it to you ... charge you with a heavier [sic] charge,'"and "threatened defendant, in [the officer's] Greyhound Bus metaphor, to drop defendant off

closer to Timbuktu than to home if he did not cooperate." As the Court noted:

> " Promises and threats have traditionally been recognized as corrosive of voluntariness. (See, e.g., *Hutto v. Ross*, *supra,* 429 U.S. at p. 30; *Malloy v. Hogan, supra*, 378 U.S. at p. 7; *People v. Benson, supra*, 52 Cal.3d at p. 778.)" (*Id.*, at p. 84.)

Moreover, even though Kenneth Neal was 18 at the time he was initially interrogated by police for murder on April 4, 1999, and Louis was 35 at the time he was taken into custody, Neal was questioned with the same condemned interrogation techniques used here, but for less than two hours. (*People v. Neal, supra,* 31 Cal.4th at pp. 72-74.) In addition, after Neal had invoked his right to counsel, he was booked for murder, and remained in custody for seven hours without food before contact by police later that evening, which was deemed unlawful and part of the coercive effect of his revocation of Fifth Amendment rights and the basis for the inadmissibility of his subsequent admissions under *Miranda v. Arizona, supra,* 384 U.S. 436 and *Edwards v. Arizona* (1981) 451 U.S. 477. Similar kinds of techniques and deprivations occurred in both cases, and here the length of interrogation and symptoms of exhaustion were so much greater than in *Neal.*

In a recent case, *Doody v. Schiro* (9th Cir. 2010) 596 F.3d 620, the court reversed seventeen-year old Jonathan Doody's conviction upon admission at trial of his involuntarily obtained incriminating statements in the murder of six Buddhist monks in

Arizona. While age was clearly a factor, it is noteworthy that the "first break was over nine hours into the interrogation, after Doody's will was overborne." (*Doody v. Schiro, supra*, 596 F.3d at p. 641.) Indeed, in Louis's case there were no real "breaks," and there are similarities between the use of a "tag team approach" by officers in Doody's case to Officers Huber, Coon and Cruz in Louis's case, as well as the offering of drinks, food and use of the bathroom. (*Ibid.*) As in Louis's case, "Doody was virtually non-responsive despite being peppered with a barrage of questions [and] exhortations ..." over twelve hours. (*Ibid.*)

In the present case, the trial court erroneously set a unrealistic standard of *undue* coercion more akin to proof that "the blood of the accused" had been shed in order to suppress an unconstitutionally obtained confession, when no such showing is necessary. (*Blackburn v. Alabama* (1960) 361 U.S. 199.) Again, as this Court wrote in *People v. Neal, supra,* 31 Cal.4th at p. 84, and consistent with Dr. Leo's testimony, psychological coercion can be as powerful as corporal punishment:

> " Although defendant's situation might not have reflected 'physical punishment' (*Schneckloth v. Bustamante* (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 93, S.Ct. 2041]) in the strictest sense of the phrase, its harshness cannot be ignored. Put simply, defendant's situation 'could only have increased his feelings of helplessness.' (*People v. Montano* (1991) 226 Cal.App.3d 914, 939 [277 Cal.Rptr. 327].)"

(See also *People v. McWhorter, supra*, 47 Cal.4th at pp. 346-347.)

Louis's free will was worn down by prolonged interrogation in the inherently coercive environment of the station house, implicit threats of greater punishment if he did not confess, and, ultimately, with explicit threats to his family. As pointed out in *Doody v. Schiro, supra*, 596 F.3d at p. 639, quoting from *Haley v. Ohio* (1948) 332 U.S. 596, 599-600, a case that also involved a juvenile, "'What transpired would make us pause for careful inquiry if a mature man were involved ...'" Louis's age is far less significant than the other "surrounding [personal] circumstances" (*People v. McWhorter, supra*, 47 Cal.4th at p. 346), including compelling evidence of exhaustion and the length of interrogation, and for all the foregoing reasons the statement should have been suppressed. (see *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1486-1487 [statement of 'exhausted' adult questioned for 8 hours suppressed as involuntary].)

Before the prophylaxis developed by *Miranda* and its progeny, Justice Franfurter wrote more than half a century ago in *Watts v. Indiana* (1949) 338 U.S. 49, 53-54, in reversing the murder conviction of an adult male taken into custody on suspicion of assault and subjected to interrogation by several officers on and off over six days:

> " A confession by which life becomes forfeit must be the expression of free choice. A statement, to be voluntary, of course need not be volunteered. But if it is the product of sustained pressure by the police, it does not issue from a free choice. When a suspect speaks because he is overborne, it is

immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation, and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure, which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court, with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."

D. The Fruits of the Coerced Statement Must Also be Suppressed.

Moreover, the fruits of the coerced statement, including the follow up statement given at 9:00 AM on November 13, 1997, and the firearm retrieved with his assistance, were erroneously admitted and must also be suppressed. As pointed out above, the morning after his statements had been involuntarily obtained, detectives contacted Louis again, and he gave them directions to assist in recovery of the gun he had used in the crimes. When law enforcement personnel could not locate the weapon, he went into the

field with them at 9:45 AM and helped recover King's *Glock* pistol near the point of his arrest. (RT 34: 7089-90; 35: 7241-7245; 7261-64; 47: 9724-25; Exhibit 622; [RT 83: 17398-401.].)

As this Court pointed out in *People v. Davis, supra,* 46 Cal.4th at pp. 598-599, "[t]he fruit of the poisonous tree doctrine does not apply to physical evidence seized as a result of a noncoercive *Miranda* violation (*United States v. Patane* (2004) 542 U.S. 630, 637-638, 645; *People v. Davis* (2005) 36 Cal. 4th 510, 552; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 957)," but here it is a coercive *Miranda* violation at issue, and, therefore, the subsequent statement and the retrieved gun, which police were unable not locate without Louis's assistance, must also be suppressed. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 57.)

E. The Error Was Not Harmless Beyond a Reasonable Doubt

As presented in detail in *Arguments V-VI*, the prosecutor referenced Louis's statement to police as evidence of guilt, a cold and callous nature, and improperly used the statement to argue "lack of remorse" in both penalty phases. Indeed, it was the lynchpin in the prosecutor's arguments for both guilt and death. In the guilt phase, for example, Dunlap relied heavily upon the statement to undermine the mental state defense presented and to prove specific intent, premeditation and deliberation in order to convict Louis of the special circumstance murders:

> " If you think that the detectives were going to give up on talking to Mr. Peoples, no. He gave a statement and he lied, and he lied

for 10 hours. When you talk about attempt [sic] to kill, premeditation, deliberation, cognitive function, impulsivity, remember for 10 hours, 10 hours, Mr. Peoples held out and said huh-uh (negative), wasn't me, didn't have no gun, didn't hurt nobody. 260 times. Count 'em ...

.....

You heard from Detective Coon, you heard from Detective Huber from the sheriff's department. You heard about techniques, styles. You heard about minimizing a person's involvement, basically giving a guy an out, or a person an out, keep him talking, don't isolate him.

.....

[O]fficers mislead Mr. Peoples many times ... They're not going to tip their hand too early.

So, again, when you look at that confession, when you look at the first 10 hours, it's limited just for state of mind. It's limited just for his ability to withstand two experienced – I mean experienced homicide detectives, to fend them off for 10 hours. If it wasn't for the taped statement of Carl Peoples and Tony Cruz, also a homicide detective with the sheriff's department, bringing it in and saying, 'Louis, its over, we've got it,' and play it for him, play it."

(RT 48: 10005-10006; see also RT 48: 10017 [same argument]);

" When you look at that confession, look at how many times he's smiling. He's smiling throughout the entire tape. Smiling."

(RT 48: 10008);

" You have the confession. 260-plus denials. The memory recall ... I mean he's smiling through the tape ... Not delusional. He knows what he did was wrong."

(RT 48: 10059.)

Again, as aggravation, in the retrial of the penalty phase, the prosecutor emphasized the statement:

" [L]adies and gentlemen, let's talk about the defendant's own statement. The defendant's own statement to the police, you only saw about an hour and 40 minutes of it because all the rest of it is all lies.

Here's 260 denials .... approximately eight to nine hours of lies to this detective [Coon] and Detective John Huber. These are seasoned detectives. This man who is supposed to be impulsive, brain defective, lies for 260 plus times, eight hours, to these detectives."

(RT 95: 20108; see also RT 20196-20197 [same argument].)

After details of Louis's admissions regarding the crimes were read by the prosecutor in the argument (RT 95: 20108-20109), he concluded his review of the statement by urging

jurors, "When you want to talk about remorse, mercy, compassion for [Louis], you remember all the case not snippets." (RT 95: 20110: 14-15)

As restated in *People v. Neal, supra*, 31 Cal.4th at p. 86, in reversing his conviction:

> " [I]n *People v. Cahill, supra*, 5 Cal.4th 478, we expressed a 'recognition that confessions 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt [citation], ... that such confessions often operate 'as a kind of evidentiary bombshell which shatters the defense' [citation], ... [and therefore] that the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial ... .' (Id., at p. 503.)" (See also *People v. Esqueda, supra,* 17 Cal.App.4th at p. 1487 [murder conviction reversed where prosecutor 'heavily relied' upon involuntarily obtained statement].)

Further, the fruits (handgun and subsequent statement) obtained from the coerced statements from November 11-12, 1997, were prejudicial as well. For the forgoing reasons, appellant's enumerated constitutional rights were violated, and unlawful admission of the evidence at trial was overwhelmingly prejudicial. Accordingly, his conviction and judgment of death must be reversed. (*Arizona v. Fulminate, supra,* 499 U.S. 279; *People v. Cahill, supra,* 5 Cal.4th 478.)

VIII.

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT EXCLUDED LAY WITNESS TESTIMONY ON THE EFFECTS OF METHAMPHETAMINE.

Appellant proffered lay witness testimony in the guilt and penalty phases of trial on the effects of methamphetamine use. The general purpose of such evidence in the guilt phase of the trial was to provide jurors with lay testimony relevant to appellant's mental state at the time of the alleged crimes. As discussed in detail following, the proffered witnesses would have testified to their personal experiences with methamphetamine, including the effects, e.g., hyperactivity, erratic mood swings, feelings of persecution, auditory hallucinations, and paranoia. In addition, they were proffered as percipient witnesses to similar symptoms observed in appellant, and would have offered lay opinions consistent with the defense theory of the case. In brief, evidence had been presented in the guilt phase – unopposed by the prosecution – on the effects of methamphetamine on appellant's brain functioning by Dr. Wu, Dr. Amen, and Dr. Buchsbaum, and symptomology of addiction through Dr. Woods, on the issue of appellant's capacity to form the mental states necessary for the elements of the crimes charged. [191] Moreover, as

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[191] Special Defense Jury Instruction No. 4, a modification of CALJIC 4.21.1, was read to the jury during the guilt phase over the prosecutor's objection, which read in pertinent part: "You have also received evidence to the effect that Mr. Peoples' underlying mental defect or mental disorder may have been affected by chronic use of methamphetamine." (RT 48: 9918; see also, RT 47: 9843-9844; CT 8: 2126.) Defense counsel moved for mistrial in the guilt phase for exclusion of

evidence in mitigation, the lay witness testimony would have related personal experiences from methamphetamine users who not only experienced the devastating effects of the drug but had observed similar effects on appellant.

The prosecutor vigorously opposed the introduction of the proffered lay witness testimony despite interposing no objection to expert testimony during the guilt phase of trial, and the trial court rejected the presentation of lay witness testimony for the purposes offered. Indeed, the court refused to allow Michael Quigel to testify to the relative strength of the methamphetamine he sold to appellant the night before the *Village Oaks* crimes were committed. (RT 37: 7675-7678: 15-18.) As reiteration of the basis for earlier rulings in the guilt phase and first penalty phase, Judge Platt pronounced before retrial of the penalty phase, "[I]t ... boggles my mind if somebody ... who takes a mind altering substance [is] able to determine and be the judge of how it alters their thought process and their thinking process." (RT 87: 18310; see also RT 35: 7169; 7173-7174.)

Appellant had federal and state constitutional guarantees to present a defense, and he was entitled to present all relevant and material evidence favorable to his theory of defense. (U.S. Const., 6th Amend.; Cal. Const., Art. 1, §15; *Washington v. Texas* (1967) 388 U.S. 14, 19, 23; *Chambers v. Mississippi* (1973) 410 U,S. 284, 302; *People v. Jennings* (1991) 53 Cal.3d 334, 372; *People v. Schroeder* (1991) 227 Cal. App.3d 784,

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lay opinion testimony. (RT 45: 9283-9293; see also, *Argument XV* [juror injected personal experience with drugs into deliberations].) As noted above, *ante*, p. 61, Dr. Buchsbaum did not testify in the retrial of the penalty phase, but Dr. Wu, Dr. Amen and Dr. Woods provided essentially the same expert opinion testimony.

787.) In the present case, the excluded evidence was critical to the jury's assessment of appellant's legal and moral culpability for the crimes charged, and the erroneous exclusion of the evidence not only undermined his right to present a defense but it also precluded a reliable guilt verdict and an individualized capital sentencing determination. As a result of the exclusion of lay evidence relating to appellant's mental state at the time of the crimes, and its exclusion as evidence in mitigation of punishment, the trial court deprived appellant of his state and federal constitutional rights to due process, to fair a trial, to present a defense, to a reliable, individualized sentence determination, and to be free from cruel and unusual punishment. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; Penal Code § 190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Frye* (1998) 18 Cal.4th 894, 1015; *People v. Ochoa* (1998) 19 Cal.4th 353, 456; *People v. Williams* (1998) 44 Cal.3d 883, 915; *People v. Kennedy* (2005) 36 Cal.4th 595, 621; *People v. Gay* (2008) 42 Cal.4th 1195, 1223.)

A. Proffered Testimony from Lay Witnesses

The origin of the proffer of testimony from lay witnesses regarding the effects and experience with methamphetamine occurred shortly before the end of the prosecution's case-in-chief in the guilt phase. During a recess on June 29, 1999, Deputy District

Attorney Dunlap brought to the attention of the court a "private conversation" with Michael Fox in which defense counsel had indicated he planned to "call various witnesses to talk about the effects of methamphetamine on them individually and their experiences with the drug." (RT 35: 7169: 12-16.) Dunlap objected to the evidence as "irrelevant" and "misleading," and requested "that counsel be admonished not to go into that area ... [or] to parade a number of witnesses to talk about their personal experiences and how drugs affected them." (RT 35: 7169: 17-22.) Fox responded that someone like Michael Quigel, who "sold Louis drugs on several occasions," including "the night before the Village Oaks" incident (November 11, 1997), could "differentiate between a drug that's a good quality" from one that is weak, meaning in part that it "kept him up and allowed him no sleep ... made him hyperactive." (RT 35: 7170: 16-25; 7171: 8-10.) The trial court interjected immediately it would not allow testimony by "somebody under the influence of a mind-altering substance ... to talk about how their mind has been altered ... [or] to say I ingested something, and this is what it did to me ... [t]hat absolutely is not going to be gotten into." (RT 35: 7171: 1-3; 19-21.) In short, if the defense desired to present evidence on the effects of the drug, "that needs to be testified to clearly by an expert who has not undergone the experiences and the effects." (RT 35: 7171: 11-14.) Even if the defendant himself were to testify, the court would not allow any testimony beyond physical symptoms, such as sleeplessness:

> " [W]here a person takes a drug that alters their state of mind; that individual, under altered state of mind,

is not the best judge of what is being altered. It causes significant speculation.

.....

[T]he person under the influence is not the source in a reliable fashion in any means, to my mind's eye."

(RT 35: 7173: 27-28 - 7174: 1-2; 11-12.)

Before the prosecution rested on July 7, 1999, the prosecutor again sought a judicial admonition of defense counsel, exaggerating potential testimony of appellant's neighbors, Michael Quigel and Joni Fitzsimmons, as well as that of his wife, Carol, on the mental effects of methamphetamine – either on themselves or as observed on appellant – as "very explosive." (RT 37: 7598.) The trial court refused to admonish defense counsel, but warned Fox of its specific instructions to inform witnesses of limitations placed on their testimony and "then I'll determine whether or not sanctions are to had against either the witness or counsel." (RT 37: 7599: 23-25.)

Fox informed the court after recess that he had "advised [the witnesses] they cannot talk about how they felt ... how the drug makes them feel ..." (RT 37: 7599: 28 - 7600: 1.) The court then agreed defense counsel could ask witnesses about using methamphetamine with appellant, but repeated the ruling that lay witnesses could not testify to their personal experiences, appellant's mental state, or any statement made by appellant as to his experience: "I'm telling you right now, bring that witness through those doors, and I will them tell them ... I will sanction them, and I will sanction you." (RT 37: 7600: 5-8.) After

another brief recess, defense counsel reassured the court he had advised the witnesses of the court's limitations on testimony. (RT 37: 7600-7602.)

Michael Quigel was called to testify by the defense and the issue arose again, but not on direct examination. As discussed in *Argument III, ante,* during the prosecutor's cross-examination he elicited testimony from Quigel about the effects of methamphetamine, as well as the fact that appellant was "wired," but the court ultimately struck the testimony:

> " Q. [Dunlap] Would you let anybody baby-sit a child that you didn't think could take care of them?
>
> A. [Quigel] No, I wouldn't.
>
> Q. Okay. Good. So you had no problems with Mr. Peoples taking care of your girlfriend's children, one of which you took as your own?
>
> A. [Quigel] No.
>
> Q. And he was under the influence or wired as you call it?
>
> A. Yeah."
>
> (RT 37: 7668: 7-19.)[192]

Before conducting re-direct examination of Quigel, defense counsel sought a ruling

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[192] The prosecutor also asked Quigel questions with respect to whether appellant appeared to be "tweaking" or "looked crazy" when he observed him with a cash register in the front side of the car on or about November 11, 1997, and Quigel agreed with those characterizations: "He looked paranoid." (RT 37: 7671: 1-18; see also, RT 37: 7661-7662.)

from the court as a result of the prosecutor's cross-examination; Fox moved to be allowed to inquire of Quigel whether the amount of methamphetamine sold to appellant for $30 on November 10, 1997, would in his opinion have been "strong" enough for "two grown men" to get "high." (RT 37: 7670; 7674; 7647-48.)

As a former prosecutor of drug cases, Judge Platt opined that he "could give the opinion as well as [Quigel] could, and I don't know a damn thing about it." (RT 37: 7675: 5; 7677: 6-8.) The court was not precluding the defense from calling an expert witness "to talk about quality and amounts if they have the background and experience to talk about how that varies and its impact on an individual," but it would not allow Quigel – as a seller and addict – to testify about whether the methamphetamine sold to appellant on November 10 was "good" (high quality) or to "express an opinion on the impact, the physical impact on another individual ... [because that] is pure speculation." (RT 37: 7675-7678: 15-18.)

In striking Quigel's testimony, the court added:

> " It was excluded for the reasons that it has no impact, and is beyond any individual's ability or knowledge to testify to, under the circumstances ...
>
> .....
>
> So that [you] understand the basis of the Court's ruling, the Court has determined that nobody under the influence of any drug is the person to talk about how it affects you. That's why you're under the influence, because you're not able to

make those determinations."

(RT 37: 7692: 8-10; 7693: 4-8.)

Furthermore, when Joni Fitzimmons was called by the defense in the guilt phase, she testified to her frequent use of methamphetamine with Louis and Carol Peoples, and explained some of his behavior after they "snorted" it, including Louis becoming withdrawn, sullen, irritable, and pacing in the bedroom. (RT 38: 7793-7798; see also, *Statement of Facts, ante*, pp. 45-47.) When defense counsel asked if Louis became "more fixated after he would snort methamphetamine," the prosecutor objected "as to the orders of the Court," and Judge Platt responded before the jury:

" Objection sustained, speculation. You've asked her a point in time when she's ingested methamphetamine, and you're getting into areas about mental states that are beyond the knowledge of this person."

(RT 38: 7798: 8-12.)[193]

In the penalty phase of the first trial, defense counsel proffered the testimony of several lay witnesses who had used methamphetamine, and had either used the drug with Louis or observed symptoms of use. Lori Fike, also a neighbor at the *Paris Apartments*, had frequently used methamphetamine with Louis and Carol Peoples, and had made pretrial statements of her own regarding auditory hallucinations and insomnia. (RT 51:

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[193] The prosecutor subsequently inquired in the context of appellant's frequent methamphetamine use, "Did you ever see [Louis] act *delusional*?" (RT 38: 7821; emphasis supplied.) She responded she had not.

10515.) Over objection, the trial court prohibited the testimony from Fike or any other witness as mitigation evidence on the ground it presented the "same issue, same ruling," i.e., "It's just the [lay] individual is not the person that is an appropriate judge of what is or isn't going on" and is not competent "in a court of law" to testify to personal experiences when under the influence of methamphetamine, or to relate any similar experiences reported by appellant. (RT 51: 10517: 16-18.)

Similarly, Roger Byrd, proffered as a methamphetamine user who had used the drug with Louis in 1987-1988, was prohibited from testifying that when he had seen Louis on television broadcasts after arrest in November 1997, Byrd was "shocked" at Louis's deterioration and believed "there had been some long years" of methamphetamine use. (RT 51: 10517-10519.) Judge Platt refused to allow the testimony:

> " The Court: He's going to compare that then to himself and the way he looks and the effect it had on him?
>
> Mr. Fox: No, just a lay opinion that based on his experience of drug use with methamphetamine, which a lay person, I think, could say, at least changes the appearance of someone that looked to him –
>
> The Court: That's not what that says though, Mr. Fox. He's basing the change in appearance on long-standing drug use. He is not qualified. That is not ... a lay opinion ... I assume the argument is that the deterioration in the way

one looks is a direct result of drug use and nothing else.

Mr. Fox: Right.

The Court: That's not a lay opinion. That's not a subject of a lay opinion. That portion won't be allowed."

(RT 51: 10519: 10-27.)[194]

As pointed out above, Judge Platt's rulings applied to the retrial of the penalty phase. On April 19, 2000, after Deputy District Attorney Dunlap had reviewed Joni Fitzsimons' prior testimony, and misleadingly claimed "[t]here had been a lot of [irrelevant testimony] about how methamphetamine affected Carol Peoples and Joni Fitzsimmons," he objected "to any such line of questioning ..." in the retrial. (RT 87: 18309: 7-8.) Fox pointed out her testimony in guilt phase related to activities after ingesting methamphetamine, including compulsive house cleaning, Louis working obsessively on his bicycle, and so forth. (RT 87: 18309.) The court recalled its "previous ruling ..., [S]he can testify to the physical things that she saw, what occurred as to Mr. Peoples [and] Mrs. Peoples ..., [b]ut not as to impact or how it influenced them." (RT 87: 18310: 2-6.) Fox restated his understanding of the ruling with respect to Fitzsimons, "[S]he can't testify to not only Mr. and Mrs. Peoples mental state, but she can't testify to her own mental state," and the court replied:

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[194] Skye Baesler was proffered on the same basis; he had known Louis in the past, and when he saw Louis on television after arrest Louis looked "deranged." The court excluded Baesler's testimony on the "same rationale and ruling" as that of Roger Byrd. (RT 51: 10520: 11-17.)

> " The Court: I do not consider – and when I see in a written fashion a reviewing court telling me that a person who is under the influence is able to judge their own state of mind, then I will sit corrected. But it will nonetheless boggle my mind if somebody actually puts that in writing that somebody who takes a mind altering substance is able to determine and be the judge of how it alters their thought process and their thinking process.
>
> That literally will floor me."
>
> (RT 87: 18310: 11-21.)

Fox responded "[S]omeone that's intoxicated on alcohol should be able and is allowed to testify every day in a court of law that they were woozy, that they had poor balance, that they weren't thinking clearly, that they were nauseous." (RT 87: 18310: 25-28.) The court refused to "litigate" the issue again, and termed the argument "that you take a mind altering substance and then can sit there and talk about how it alters your mind ... is absolutely ludicrous." (RT 87: 18311: 7-11.)

Finally, at the end of the session on April 19, defense counsel proffered Edward Richards, the *Charter Way Tow* employee who introduced Louis to the company and trained him. (RT 87: 18346-18347; see, *Statement of Facts, ante*, p. 82.) Richards used methamphetamine to cope with long hours on the job, and he knew Louis and other tow-truck operators used as well; Fox explained, however, that he did not intend to offer Richards to make "generic" or specific statements about other tow-truck operators using

the drug to stay awake, but offered to limit Richards' testimony to his personal use of methamphetamine and his knowledge of Louis's use as "an issue with mitigation." (RT 87: 18348: 15.) The prosecutor objected to the evidence, and the trial court ruled, "[I]t makes no matter that anybody, all or none of the other tow truck drivers in this world, use or have used methamphetamine, and it will not be allowed." (RT 87: 18347: 19-22.) If Richards did not actually use drugs with Louis "[t]hen his testimony will not be allowed as to his [Richards'] personal use of drugs ... [b]ecause I just ruled that he cannot ..." (RT 87: 18348: 14-22.) Terming the defense proffer as "not talking about the slightest issue with mitigation," the court ruled that under Evidence Code §352:

> " It is irrelevant, absolutely, completely without probative value. Zero. None. Nil. Absolutely." (RT 87: 18349: 4-6.)[195]

B. Law and Literature Recognizes the Admissibility and Value of Lay Opinion

As a matter of state law, it has long been established that a lay witness may testify to the intoxication of another as evidence of state of mind based upon personal experience and observation. (*People v. Kennedy, supra*, 36 Cal.4th at 621; *People v. Hinton* (2006) 37 Cal.4th 839, 889; *People v. Navarette* (2003) 30 Cal.4th 458, 493; *People v. Williams, supra,* 44 Cal.3d at 915; *People v. Garcia* (1972) 27 Cal.App.3d 639, 643, ftn. 3; *People*

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[195] Defense counsel moved for mistrial during the guilt phase on constitutional grounds of cumulative prejudice caused by exclusion of lay witness opinion testimony and other restrictions placed upon defense evidence to show lack of actual intent. The court erroneously denied the motion. (See, RT 45: 9286-9287; 9290-9292; see *Arguments IX, X, XI* and *XV, post.*)

v. Smith (1949) 94 Cal.App.2d Supp. 975, 977; *People v. Ravey* (1954) 122 Cal.App.2d 699, 702.)[196]

Subjects, such as, sanity, demeanor, health, illness or injury, have been accepted as proper areas for lay opinion testimony. (See, Witkin, *Evidence* 3d ed. §§451-464; *People v. Deacon* (1953) 117 Cal.App.2d 206, 210.)[197] As this Court pointed out in *People v. Chatman* (2006) 38 Cal.4th 344, 397, a percipient witness is competent to testify to behavior and demeanor consistent with defendant kicking a school custodian for "enjoyment," because a lay witness "may testify about objective behavior and describe behavior as being consistent with a state of mind."

Similarly, a drug addict can testify to his own addiction, as well as provide opinion testimony on a substance appearing to be narcotics (*People v. Chrisman* (1967) 256 Cal.App.2d 425, 434), or alcohol (*Oxman v. Dept. ABC* (1957) 153 Cal.App.2d 740, 749.) As the *Chrisman* court colorfully pointed out:

> " Although the teetotaler would not be expected to distinguish between bourbon and scotch, once a person imbibes regularly, his opinion on that subject would be relevant, and, under general rules,

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196 Evidence Code section 800 states: " If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony."

197 Evidence Code section 870, states in pertinent part: " A witness may state his opinion as to the sanity of a person when: (a) the witness is an intimate acquaintance of the person whose sanity is in question ..."

be weighed in the light of his experience. The heavy penalties involved should not of themselves require an exception to the general rule in the case of narcotics."

(*Id.*, at p. 433-434.)

In *People v. Winston* (1956) 46 Cal.2d 151, 155-156, this Court recognized the admissibility of lay opinion testimony sufficient to sustain a drug conviction:

" [I]n addition to the testimony of users [of marijuana], experts testified that in their opinion, from the description given by the users and their reactions from its use, the substance was a narcotic, [but] ... such expert evidence is [not] required for a conviction if the users demonstrate a knowledge of the narcotic as such. .... The competency of the girls [users] to testify that the cigarettes were marijuana was shown by their knowledge of it from previous use. In view of such experience the trial court permitted the girls to identify the substance furnished by the defendant as marijuana. 'The weight, of course, to be given this testimony was for the jury.' (Citation omitted.)"

In *People v. Navarette, supra*, 30 Cal.4th at p. 493, this Court affirmed the principle that "[l]ay opinion regarding drug intoxication is admissible so long as the party eliciting the evidence establishes a foundation. (Citation.)" If, however, unlike the present case, the

lay witness does not have experience with drug intoxication, either by personal use or association with users, a trial court does not err in excluding the testimony. (*Ibid.*)[198]

In *People v. Hinton, supra*, 37 Cal.4th at p. 889, this Court approved of the trial court's admission of a prosecution witness's opinion testimony because "subtle or complex interactions" between a seller and a user of narcotics may be "difficult to put into words, which would render [the lay witness's] opinion proper." Indeed, "[a] lay witness may express [such] an opinion based on his or her perception, but only where helpful to a clear understanding of the witness's testimony (Evid. Code, §800, subd. (b)), i.e., 'where the concrete observations on which the opinion is based cannot otherwise be conveyed.' (*People v. Melton* (1988) 44 Cal.3d 713, 744.)" (*Id.,* at p. 889; see also *People v. Williams, supra*, 44 Cal.3d at p. 915.)

Moreover, the literature is filled with examples of "confessions" by lay experimenters with all kinds of intoxicants, including liquor, narcotics, and hallucinatory drugs. The experiences of Thomas de Quincey in *Confessions of an English Opium Eater* (1822) provided extraordinary insights into both the physical and psychological aspects of opium use. As Martin Booth explained in *Cannabis, A History* (2003, Picador), p. 81, de Quincey's narrative, which included personal observations of Samuel Taylor Coleridge under the influence of opium:

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[198] In *People v. Garcia, supra*, 27 Cal.App.3d at p. 643, the court jocularly suggested "the sporting theory of justice" left it speechless where the trial court had prohibited a wife from giving a lay opinion – in a court trial – that her husband was "drunk," though she was allowed to testify to her husband's "wabbly" walk, breath, slurred speech and incoherent speech.

" [D]rew considerable attention, going into detail about
the effects of opium on the imagination and considerable –
and terrible – consequences of addiction. For the first time,
the effects and dangers of narcotics were broadcast widely,
to become a matter of discussion at every level of society."

Aldous Huxley's experiments with mescaline in *The Doors of Perception* (1954, Harper & Row), and William S. Burroughs's experience as a heroin addict in *Junkie* (1953, Ace Books), are considered classics, written not by experts, but by lay individuals:

" The effect was uncanny. You would see him one time,
a fresh-faced kid. A week or so later he would turn up so
thin, sallow and old-looking, you would have to look twice
to recognize him. His face was lined with suffering in which
his eyes did not participate ..."

(*Junkie*, pp. 20-21.)

Jim Carroll's struggle with heroin addiction in *Basketball Diaries* (1978, Penguin) details both its physical and mental effects, and critically acclaimed autobiographical reflections on methamphetamine use abound. (See, Sheff, N., *Growing Up On Methamphetamines* (2008, Ginee Seo Books); Owen, Frank, *No Speed Limit: The Highs and Lows of Meth* (2007, St. Martin's Press); Moore, Patrick, *Tweaked: A Crystal Meth Memoir* (2006, Kensington).) Personal experience under the influence of the drug is a

subject that a user can describe and verify in others.[199]

In the present case, each of the lay witnesses proffered by the defense had used methamphetamine. Each proffered witness would have offered an opinion based upon personal observation and related matters "sufficiently within common experience" that such opinion testimony would have been both proper and helpful to the jury. (*People v. Farnam* (2002) 28 Cal.4th 106, 153.) Indeed, Michael Quigel was an admitted addict and seller of methamphetamine who used and sold the drug to Louis. Each of the lay witnesses understood the effects of intoxication, addiction, and withdrawal, and recognized similar symptoms in Louis. Witnesses such as Michael Quigel, Edward Richards, Lori Fitzsimmons and Carol Peoples, understood the subtleties of the drug and would have provided probative and relevant testimony to support appellant's mental state defense in the guilt phase, as well as provided compelling evidence in mitigation in the retrial of the penalty phase. Skye Baesler and Roger Byrd recognized the ravages of methamphetamine "deterioration." All of the witnesses would have given jurors insight into the dramatic mood swings and the complex of feelings of euphoria and depression, paranoia, hearing voices, and being "stuck."

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[199] Methamphetamine has become epidemic in the United States over the past twenty-five years, although its origins are in the early Twentieth Century, and historical and treatment efforts are documented by experts elsewhere. (Weisheit, R., White, W. *Methamphetamine: Its History, Pharmacology and Treatment* (2009, Hazelden); Braswell, S., *American Meth: A History of the Methamphetamine Epidemic in America* (2006, iUniverse Inc.)

C. Exclusion of the Evidence Was Not Harmless Beyond a Reasonable Doubt

Appellant was entitled under federal and state constitutional law to present all relevant evidence to support his theory of defense to the charges in the guilt phase, and to present all mitigation evidence in the penalty phase. (*Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Washington v. Texas, supra*, 388 U.S. at p. 23; *Woodson v. North Carolina, supra*, 428 U.S., at p. 304; *People v. Jennings, supra,* 53 Cal.3d at p. 372.)

Jurors presumably are not methamphetamine addicts and are not familiar with the enormous consequences of methamphetamine use, although as set forth in *Argument XVII, post*, one juror improperly introduced his own drug experiences and opinions into deliberations on retrial of the penalty phase, essentially advocating the prosecutor's position in order to convince other jurors to reject expert testimony on effects of methamphetamine as mitigation evidence. In erroneously denying appellant's Motion for New Trial based upon juror misconduct in retrial deliberations, Judge Platt said, "[I]t probably should not have been done" (RT 97: 26059), but found no harm in the injection of extraneous lay opinion consistent with the prosecution's case and directly at odds with the proffered defense evidence.

The testimony of the proffered lay witnesses would have given jurors insight into the often confused and frenetic world of the methamphetamine user. The unique perspective of the person who has experienced dramatic mood swings and paranoia under the influence of methamphetamine would have shed light on appellant's legal culpability for the crimes, and would have complimented expert witness testimony integral to his

mental-state defense in the guilt phase. The anguish and deterioration described by lay witnesses would have been invaluable to jurors charged with a full assessment of appellant's moral responsibility in the case for life.

The high court recognized in *Boyde v. California* (1990) 494 U.S. 370, 382, citing *Penry v. Lynaugh*, (1989) 492 U.S. 392, recognized the mitigating force of mental disabilities, as there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (See also, *California v. Brown* (1987) 479 U.S. 545, 545 (1987) [concurring opinion, Justice O'Connor, relying on *Lockett v. Ohio* (1978) 438 U.S. 586 (1978) and *Eddings v. Oklahoma* (1982) 455 U.S. 104.].) The exclusion of the critical state-of-mind evidence through lay witnesses was prejudicial not only because it was relevant and probative of appellant's legal culpability for the crimes he was charged with but because it could reasonably have led the jury to vote for a sentence less than death. (*People v. Gay, supra*, 42 Cal.4th at p. 1223; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

For the foregoing reasons, the trial court erred in excluding the proffered opinion testimony of lay witnesses, and the exclusion of the highly probative evidence was not harmless beyond a reasonable doubt. Accordingly, both guilt and penalty verdicts must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302.)

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IX.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE PENALTY PHASE RETRIAL WHEN THE TRIAL COURT RESTRICTED CROSS-EXAMINATION OF A PROSECUTION REBUTTAL EXPERT, ADMONISHED THE JURY TO DISREGARD PART OF DEFENSE COUNSEL'S EXAMINATION AS A SANCTION FOR A NON-EXISTENT DISCOVERY VIOLATION, AND FAILED TO INSTRUCT THE JURY THAT ANY MISCONDUCT OF COUNSEL COULD NOT BE ATTRIBUTED TO APPELLANT.

During the retrial of the penalty phase, the trial court violated appellant's state and federal constitutional rights when it prevented defense counsel from effectively cross-examining a key prosecution witness, Helen Mayberg, M.D., and disparaged defense counsel and appellant by its admonition to jurors. Dr. Mayberg testified in the guilt phase as a rebuttal witness to the mental state defense presented through the testimony of Dr. Wu, Dr. Amen, Dr. Buchsbaum, and Dr. Woods. Dr. Mayberg opined that PET and SPECT scan results of appellant's brain were unreliable, "abnormal" readings of the scans by defense experts were flawed, and that in her opinion appellant's actions while committing the crimes were not those of someone acting impulsively. (*Statement of Facts, ante*, pp. 60-61.) Dr. Mayberg was recalled by the prosecutor in the retrial of the penalty phase to rebut the case in mitigation of punishment.

In the retrial of the penalty phase the trial court erroneously restricted defense counsel's cross-examination of Dr. Mayberg, a neurologist who had testified in the guilt phase to her familiarity with Dr. Buchsbaum's published works and to her reliance upon his opinions in this case in forming her contrary opinion. Dr. Buchsbaum was not called by defense counsel in the retrial of the penalty phase, but when counsel attempted to impeach Dr. Mayberg with her own testimony from the guilt phase with respect to Dr. Buchsbaum's opinions, the trial court erroneously sustained the prosecutor's objection and refused to allow cross-examination.

Moreover, the court also concluded erroneously, during the retrial of the penalty phase that defense counsel had committed a discovery violation with respect to raw data provided by Dr. Amen in the guilt phase. The court then admonished the jury erroneously that counsel had acted improperly when he referred to Dr. Mayberg's stricken testimony in the guilt phase – proffered as impeachment – and by allegedly committing a discovery violation. Even assuming for the sake of argument that such admonition were proper, the court erred in failing to instruct the jury that any misconduct on the part of defense counsel could not be attributed to appellant.

As a result of each erroneous ruling and the improper admonition to the jurors, and their cumulative prejudicial effect, appellant's state and federal constitutional and statutory rights to confrontation, due process, fair trial, present a defense, to a reliable, individualized sentence determination, and against cruel and unusual punishment, were denied. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§ 1, 7, 13, 15, 16,

17, & 28; Penal Code §§ 190.3, 1054.5, subd. (b); Evid. Code §§ 701; 721-722, 780, subd. (f); *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Sully* (1991) 53 Cal.3d 1195.)

A. Guilt Phase Testimony of Dr. Mayberg

As outlined in the *Statement of Facts, ante*, pp. 60-61, Dr. Mayberg was called in the guilt phase of trial to rebut the medical findings and expert opinions of Dr. Wu, Dr. Amen, and Dr. Buchsbaum with respect to PET (September 1998) and SPECT (February 1999) brain scan studies conducted on appellant while he was awaiting trial. (RT 45: 9222-9371; 46: 9396-9509.) Dr. Mayberg was familiar with the professional work and lectures of Dr. Wu and Dr. Buchsbaum prior to being retained by the prosecution in this case, and she termed Dr. Buchsbaum "a pioneer in the use of PET study related to schizophrenia," with a "stellar research career," and she had read "many" of the 380 peer-reviewed articles authored by Dr. Buchsbaum on PET scan research. (RT 46: 9464: 13-14; 9468: 4-5.)

Essentially, defense counsel presented Dr. Wu and Dr. Amen during the guilt phase to explain PET and SPECT scan results, providing jurors with a basis to conclude that appellant could not actually form the specific intent required for murder or robbery.

According to all three defense experts, the separate tests provided similar results, suggesting multiple potential causes, including methamphetamine abuse and head trauma, observable by impaired executive brain functioning in the prefrontal cortex, cingulate gyrus and temporal lobes. (RT 40: 8337; 8353.) Dr. Buchsbaum confirmed the convergence of Dr. Wu's and Dr. Amen's findings, testifying that "relatively few people would show this kind of abnormality ...," and he opined "whether [the result of] traumatic brain injury or chronic effects of substance abuse ...," the abnormalities revealed in both scans were "consistent with that combination." (RT 41: 8551-8553; 8474-8475; see also, *Statement of Facts, ante*, pp. 50-56.)[200]

In rebuttal, Dr. Mayberg opined "the PET scan shows mild right frontal and cingulate hypometabolism ..., a PET scan abnormality," but disputed the causes and roundly condemned the methods and data provided by Dr. Wu and Dr. Amen. (RT 46: 9505: 1-4.) Concluding that Dr. Wu's "PET scan is – is pretty unambiguous," Dr. Mayberg surmised appellant must have been "depressed at the time of scan, or is, alternatively, not performing the task at the same speed and rate of accuracy as the control group." (RT 46: 9505: 7-17.) Her opinion was based in part upon research "studies by Dr.

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[200] As noted elsewhere, and with the exception of Brent Turvey (*Arguments VIII* and *X*), the prosecution did not challenge the admissibility of defense expert testimony proffered in the guilt phase on the actual ability to form the specific intent required to commit murder or robbery. (Penal Code §§22, 25, 28, 29; see, *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131; *People v. Horton* (1995) 11 Cal.4th 1068; *People v. Saille* (191) 54 Cal.3d 1103, 1120.) Both sides also argued the weight of the expert testimony in the first penalty phase.

Wu and Dr. Buchsbaum, looking at the effect of the state of anxiety in terms of evaluating whether or not blood flow patterns may be affected by anxiety" experienced by those – like Louis – undergoing the PET scan procedure. (RT 45: 9281: 3-6.) Besides, any perceived PET scan abnormality, according to Dr. Mayberg, "doesn't tell me anything specifically about violence ...," though "it has features that match up to some ... of the published studies" (by Dr. Buchsbaum and Dr. Raine) linking abnormal PET scans to violence. (RT 46: 9506: 2-16; see, RT 45: 9311; 9335-9338.) In short, in Dr. Mayberg's opinion the brain scans told her "nothing" about appellant's "behavior" from June-November, 1997. (RT 46: 9506: 19-23.) She termed the SPECT scan "basic data ... all right, but the way its been processed" by Dr. Amen suggested the results were unreliable. (RT 46: 9505: 14-16; 9507-9509.) As discussed following, in Dr. Mayberg's opinion Dr. Amen had provided data that was "garbage," and his opinions based upon the data were not reliable. (RT 46: 9430.)

Prior to Dr. Mayberg's second day of testimony in the guilt phase, the prosecutor requested "raw data" as a result of conversations with her "this morning [July 23, 1999] and late last night..." (RT 46: 9387.) Dunlap and Fox conferred on the date and receipt of discovery materials previously provided by Dr. Amen and Dr. Wu, and the prosecutor merely requested "clarification" of discovery as a result of discussions with his expert. (RT 46: 9387-9388.) Dunlap pointed out that "if you look at Dr. Buchsbaum's exhibits, you will see what a raw data image from a SPECT imaging looks like," but he was "not making a complaint" about discovery because he "did not know what [he] was looking at"

in exhibits referred to by Dr. Buchsbaum, Dr. Wu and Dr. Amen, until Dr. Mayberg brought it to his attention. (RT 46: 9389: 11-15.)[201] In a rare concession, Dunlap acknowledged the exhibits presented by defense experts were computer-generated images and not raw data from the tests themselves. Dunlap acknowledged he "didn't understand ... [until] last night, [and] it's been cleared up to me ... [s]o again, it's my inexperience with imaging that is the problem," and not a "complaint" against defense counsel or assertion of a discovery violation. (RT 46: 9392: 14-18.) As is readily apparent from the colloquy on July 23, 1999, both counsel expressed concerns about their knowledge of "brain science" and neither was familiar with what was meant by "raw data." (RT 46: 9387-9382.) Dunlap advised the court that Fox had provided him the "raw data" Dr. Mayberg requested, and he was satisfied with the material and announced, "We're ready to proceed [with Dr. Mayberg's testimony]." (RT 46: 9389: 16.) A ten-minute recess was requested to allow Dr. Mayberg to review materials, and the court recessed for twenty minutes. (RT 46: 9390; 9395.)

When Dr. Mayberg continued with her testimony, she attacked the foundation for the opinions of all three defense experts by first reviewing the PET scans provided:

> " Based upon looking at the raw images [Exhibit 701], doing it like Dr. Wu and Dr. Buchsbaum did, that is a

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201 As discussed following, during retrial of the penalty phase the trial court misconstrued what occurred on July 23, 1999, as a "discovery violation" and improperly berated Michael Fox and admonished the jury to disregard portions of his examination of Dr. Mayberg.

normal-appearing [PET] scan ...

.....

[M]y modification in terms of my differential diagnosis is that ... this scan pattern would be consistent with the research pattern of depression ... I'm less inclined to think this has anything to do with trauma ... less inclined to think it has to do with methamphetamine because ..., [I] would expect ... to see areas of abnormality throughout the brain, which I don't see in the statistics or the raw picture."

(RT 46: 9423: 11-12 - 9424: 5-24.)

She explained, "Dr. Wu and Dr. Buchsbaum said over and over and over, they only rely on statistics ..., [b]ut there are no statistics" to support their opinions, and "I'm basically looking at pictures here, reading [their] testimony, try[ing] to hook things together, and I'm not having an easy time." (RT 46: 9427: 9-18.)

At this point in her guilt phase rebuttal testimony, Dr. Mayberg turned to the raw data of SPECT (Exhibit 702) scans conducted by Dr. Amen, and opined:

" [I] apologize to the jury. I mean this is very difficult to me. I'm trying to read a scan, I've been provided with garbage. This is garbage.

Mr. Fox: Judge, I'll object. I'll ask that that be stricken. That's argumentative on the part of the witness.

The Court: Sustained. Last portion of the answer is stricken.

The Witness: I apologize to Your Honor.

Mr. Dunlap: That's okay. "

(RT 46: 9430: 27-28 - 9431: 1-8.)

A few moments later, however, she reiterated the SPECT scan is "never as good as a PET scan because you can never get as precise" an image, but if the data is not subjected to a "technique called attenuation correction," then, as in the case of Dr. Amen's study:

"[Y]our data is uninterpretable [sic]. And I won't use that term [garbage] I used before. But the term remains. It is uninterpretable [sic]."

(RT 46: 9334: 1-3.)

In the final analysis, Dr. Mayberg expressed opinions that Dr. Amen had presented "a false representation" of the "overactivity of the cingulate," because "these [SPECT] scans have not been processed properly ..., really can't be read ..., [a]nd that's my explanation for why I had the outburst that I had about the quality of these pictures." (RT 46: 9439: 6-12) Moreover, *all three* defense experts had testified to "predictive value" of violence from brain scans, and she categorically rejected their testimony:

" By looking at the PET scan or SPECT scan alone and saying that you can predict either what someone is like behaviorally, or what kind of neurologic, psychological or behavioral deficit they have, the

answer is no."

(RT 46: 9440: 16-19.)

Indeed, Dr. Mayberg expressed the opinion that for defense experts "to relate anything else in the past [from PET scan results], with the exception to say that it's consistent with a pattern ... that's either better or worse, is impossible." (RT 46: 9451: 11-13.)

B. Dr. Mayberg's Penalty Phase Retrial Testimony - Direct Examination

During the retrial of the penalty phase in April 2000, Dr. Wu and Dr. Amen – and Dr. Woods – testified, and presented the same essential testimony and expert opinions as had been presented in the guilt phase of the trial in July 1999, but as mitigation evidence. (RT 84: 17493-17702; 85: 17716- 17862; 86: 17893-17934.)[202] The defense did not call Dr. Buchsbaum as a witness in the penalty phase retrial.

When Dr. Mayberg was presented as a rebuttal witness on May 4, 2000 (RT 93: 19509-19662), on direct examination she once again expressed her adamant disagreement with defense expert conclusions of "abnormal" features of PET and SPECT scans and the

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202 For example, Dr. Amen concluded in the retrial that SPECT scan testing reveals appellant "has a frontal lobe disorder ..., a temporal lobe disorder ... [and] a hyperactive cingulate gyrus ..., disorder[s] of his brain's functioning"of long-standing origin. (RT 84: 17574: 2-27.) Dr. Wu's opinion remained the same as well; PET scan results show appellant's brain functioning abnormally "like someone who is driving with bad brakes ..., [so] there's a greater likelihood the brakes might fail at some point ..., [and] the more stressors that an individual who is vulnerable and at risk is exposed to, the more likely that this individual is going to have some kind of catastrophic failure ..., analogous to a brain with thin ice on a pond." (RT 85: 17781: 27-28 - 17782: 8-17.)

predictive nature of violence:

> " [T]heir reports [Wu and Amen] don't report the same areas as being abnormal ....
>
> .....
>
> We don't really have an exam. We have some comments about Dr. Wu, who doesn't give an examination. We have some notes about Dr. Amen, who says there were drugs. [Appellant] was depressed.
>
> .....
>
> What's the big thing we have here about how the brain is working and that everybody is trying to link everything up to?
>
> We have a crime ... The best evidence that this brain is working is the crime, itself. And so to see a year later, and then a year and five months later, on a PET scan, or a SPECT scan, that a little part of the frontal lobe, the exact area that would be involved in these behaviors is a little off in terms of its metabolism ..., [but it] doesn't have much meaning." (RT 93: 19585: 1-3; 19594: 8-27.)

Dr. Mayberg responded to the prosecutor's questions regarding the foundation for her opinion, as follows:

" Q. [Mr. Dunlap] We've had a chance to review testimony. You've reviewed Dr. Woods' testimony. You've reviewed Dr. Wu's testimony. Correct?

A. [Dr. Mayberg] Yes.

Q. From this proceeding, *as well as you've testified before*?

A. Yes. I've reviewed all three of those physician's testimony from the previous trial and from their recent testimony in the last

Q. You *actually read* – I mean, you had crime reports, and *everything that has been provided to you*, correct?

A. I had two banker's boxes full of records, *past transcripts*, crime reports, interviews with witnesses, interviews and confessions with – interviews with the defendant. Yes. I've read all of that."

(RT 93: 19950: 11-25; emphasis added.)

C. The Trial Court's Improper Rulings

1. The Erroneous Ruling that Appellant Could Not Cross-Examine Dr. Mayberg About Dr. Buchsbaum's Opinions

In the retrial of the penalty phase the trial court refused to allow defense counsel to cross-examine Dr. Mayberg about Dr. Buchsbaum's opinions and testimony, despite the fact that at the guilt phase she both had relied on his opinions in coming to her own opinion and had read many of his published articles. At the conclusion of Dr. Mayberg's

testimony on direct examination, defense counsel began his cross-examination as he had in the guilt phase of trial, i.e., by reviewing the foundation for the formation of her opinions. (RT 93: 19618-19620; 46: 9458-9468.) Fox asked Dr. Mayberg whether "all of the things you alluded to in your direct examination [in the retrial], you got from the defense [including the] control slides from Dr. Wu, all of the information has been disseminated by the defense through the prosecutor, correct?" (RT 93: 19618: 27-28 - 19619: 1.) Dr. Mayberg responded that was probably true:

> " [But] I also had old transcripts of other cases of Dr. Wu and Dr. Buchsbaum's to review. I don't believe that came from you."
>
> (RT 93: 19619: 3-4.)

Indeed, as to Dr. Buchsbaum, Dr. Mayberg admitted in the retrial that she had also read the guilt phase transcripts before testifying as a rebuttal witness in July 1999:

> " Q. [Michael Fox] You mentioned Dr. Buchsbaum. You read the transcript of Dr. Buchsbaum, correct?
>
> A. Correct.
>
> Q. Dr. Buchsbaum had testified at an earlier hearing in this case, correct?
>
> A. Well, no. I, actually, the day before I testified, had been sent a big pile of the current transcripts from the guilt phase of trial. And read all of the information of

all the testimony within two days of when I actually testified.

.....

The testimony and what they were thinking as a rebuttal witness was all gleaned from reading their testimony...."

(RT 93: 19619: 19-28 - 19620: 4-6.)

The prosecutor concluded direct examination in the penalty phase retrial by emphasizing Dr. Mayberg's "extensive" and "intimate" knowledge of the "facts of this case" in forming her expert opinion. Dr. Mayberg detailed what she had reviewed and included the following comment:

" [T]he *transcripts that describe examination*. There was [sic] some examinations or interviews *by other doctors who didn't have transcripts this time*.[203] So I looked at testimony from Mr. Peoples' mother. I have looked at testimony from various other witnesses describing behavior."

(RT 93: 19612: 6-19; emphasis added.)

When defense counsel examined Dr. Mayberg in the guilt phase of trial, she had described the process of forming an opinion as one of "try[ing] to review all the available information that's sent to me, and to try to articulate and have in my mind the facts of the

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[203] Dr. Buchsbaum was the only "other doctor" who did not "have transcripts this time [retrial]."

case ..., particularly all information that may be pertinent to evaluating the PET and SPECT or whatever scan there is, and to make sure that I have all of that." (RT 46: 9458: 27-28 - 9459: 1-2.) She testified that she had relied upon some 2,000 pages of police reports, brain scans, school, medical, documentation of past injuries, and such. (RT 46: 9460.) As late as two weeks before testifying (July 23, 1999) in the guilt phase of trial Dr. Mayberg explained she had not formed a conclusive opinion:

> " [N]o I hadn't, because my – my role as a rebuttal witness that much of my opinion would be based on, A, I can obviously read the scans, so I did have an opinion about what were the findings on the scans, and an impression of what the interpretation of the scans were as given by Dr. Wu ...
>
> .....
>
> So I had reviewed all the scans, including Dr. Amen's scans and his report before I had any testimony. So I had a – a preliminary impression as to whether or not the scans could support that.
>
> And then I went through the records to try to find when someone says brain injury and brain damage and methamphetamine .... And everything else was – was predicated on – on what the testimony was of the

doctors and whatever information they might have
gotten subsequently and what their opinions was [sic].
And then I was going to have to do that with a little
less preparation time."
(RT 46: 9461: 22-26 - 9462: 7-19.)

When, however, defense counsel broached the subject of Dr. Mayberg's consideration of Dr. Buchsbaum's opinions in the retrial of the penalty phase, however, the prosecutor interposed an "irrelevant" objection, and the court excused the jury for an "appropriate foundation" from defense counsel. (RT 93: 19620-21.) Outside the presence of the jury, the court allowed defense counsel to question Dr. Mayberg in order to lay the foundation for his cross-examination of her. (RT 93: 19621-19622.)

First, Dr. Mayberg testified that she had not been provided a transcript from the retrial with respect to Dr. Buchsbaum because "he hadn't testified this time round ..." (RT 93: 19622: 3-4.) It was clear not only from her testimony in the guilt phase, but from the hearing outside the presence of the jury in the penalty retrial, that Dr. Mayberg had relied upon Dr. Buchsbaum's testimony in forming her opinions:

" Q. [Mr. Fox] Up until this point [retrial of the penalty phase],
you have reviewed Dr. Buchsbaum's testimony in the first [guilt
phase] trial, correct?
A. [Dr. Mayberg] Yes. Back before I testified in the last trial
I reviewed it.

Q. And when you testified as to your opinions in the last trial, you had reviewed Dr. Buchsbaum's testimony prior to you testifying, correct?

A. Yes, I did.

Q. And you had reviewed that, and you compared his opinions with Dr. Amen's and Dr. Wu, correct?

A. Yes.

Q. And you had stated an opinion in the last trial that was not congruent with Dr. Buchsbaum, Dr. Amen and Dr. Wu, correct?

A. Yeah. My opinion was different from the three of them. Yes.

Q. And today your opinion is similar and congruent to your opinion that you gave the first trial, correct?

A. Correct."

(RT 96: 19622: 1-24.)

Defense counsel argued that not only had she specifically relied upon Dr. Buchsbaum to form her opinions related to this case, but, like any other expert, she was subject to examination on the opinions of experts who contradict her "about the interpretation of both the PET and the SPECT [scans], [and] I think I'm entitled to impeach her credibility ... [with Dr. Buchsbaum's opinions because] this is something she read and considered." (RT 93: 19623: 12-17.) The trial court ruled:

" There's been an inappropriate [sic] foundation laid,

insufficient to justify questioning this witness or this expert about Dr. Buchsbaum's opinion.

There is nothing I've heard that said that her opinion here is based upon Dr. Buchsbaum's testimony. That was what was missing. The request to examine in that area is denied.

.....

The doctor has expressed an opinion, and it must be something that she relied upon in forming her opinion. That is classic black letter law.

You cannot simply argue that anything that she has ever read can be questioned and examined. If it was not relied upon to express her opinion, it is not admissible within the expert opinion."

(RT 93: 19623: 18-23 - 19624: 2-8.)

The court allowed defense counsel to re-open his examination outside the presence of the jury, and Dr. Mayberg claimed that with respect to her opinion in the retrial:

" I did not rely on Dr. Buchsbaum at all. I have new scans from Dr. Amen. I have pictures from the testimony of Dr. Wu. I have Dr. Amen's old scans ... That's what I based my point on that they don't agree. Dr. Buchsbaum is irrelevant. Dr. Buchsbaum isn't in this trial, and I didn't rely on his opinion in the last trial for

any of my opinions that I expressed today or in forming my opinions. His opinion was not relevant to me. He didn't do a scan."

(RT 93: 19624: 24-28 - 19625: 1-5.)

When pressed by defense counsel regarding her opinion offered in the guilt phase, in which she testified she read and considered Dr. Buchsbaum's testimony to form her opinions, Dr. Mayberg equivocated about whether Dr. Buchsbaum was "irrelevant":

" My main opinion was based upon what Dr. Wu write [sic] in his report for the scan that he performs? What did Dr. Amen put in his report?

Dr. Buchsbaum made some pictures that were a composite of the other two experts' scans. So he used what they had, which I saw, and which were shown to me in trial, and which I used as the basis of showing that I saw or disagreed with.

Did I rely on Dr. Buchsbaum's testimony in forming my opinion? My opinion was to rebut, based upon the questions I was asked, what they said?"

(RT 93: 19626: 5-16.)

After defense counsel read her prior testimony to Judge Platt, he remarked, "[M]y recollection frankly, is that there was testimony that Dr. Mayberg read and considered Dr. Buchsbaum's testimony during the first trial ...," but asked "why is that relevant to this trial?" (RT 93: 19627: 15-21.) According to Judge Platt, who agreed with defense

counsel that her opinions might be "exactly the same" as in the guilt phase, it "makes no difference" for the retrial of the penalty phase. (RT 93: 19627: 22-23.) Indeed, only if her opinion had been different this time would the court have considered impeachment as a possible ground, but under no circumstances would the court have allowed counsel to examine Dr. Mayberg on any other expert's opinion with which she may have been familiar but which did not agree with her opinion. (RT 93: 19628-19629.) The trial court refused to allow defense counsel to state any further grounds for objection "for the record," but incorporated "equal protection argument, applies to all the constitutional basis, applies to the confrontation clause, and ... covers the constellation of what you have previously established ... for any objection raised ...[w]hether that constellation is in this universe or the next." (RT 93: 19628: 13-28.)

The next morning (May 5, 2000), after re-direct examination, defense counsel reiterated his argument, referring again to Dr. Mayberg's prior testimony in forming her opinions, and citing authorities to support his renewed motion to examine Dr. Mayberg regarding Dr. Buchsbaum's opinions. (RT 93: 19670-19672.)[204] Judge Platt responded "[O]ne cannot expect the Court to review the cases that were cited ...," and denied the request and said the ruling was "exactly the same as it was yesterday ... You are not allowed to use prior testimony of an individual for cross-examination purposes without

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[204] These included citations to Evidence Code 802, *People v. Bandhauer* (1970) 1 Cal.3d 609, *Rosener v. Larson* (1967) 255 Cal.App.2d 871, and *Jefferson's California Evidence Benchbook 3rd* § 29.72.

presenting that witness first and/or having it considered." (RT 93: 19676: 21-22; 19677: 8-11.)

2. The Erroneous Rulings on Dr. Mayberg's Willingness to Testify for the Prosecution Despite the "Garbage" Provided and in Admonishing the Jury That a Discovery Violation Had Occurred.

During re-cross examination of Dr. Mayberg on May 5, 2000, defense counsel sought to impeach the credibility of the prosecution's expert witness, as follows:

> " Q. [Mr. Fox] Dr. Mayberg, isn't it true that in the last hearing that you testified in in this case, you called the materials that were provided to you with Dr. Amen – the scans, the reports, the slices, the information that came from Dr. Amen – you called garbage?
>
> A. [Dr. Mayberg] Yes, I did.
>
> .....
>
> And it was objected to. And I'm even trying to remember if it was stricken.
>
> Q. But that's how you feel?
>
> A. No. You're mischaracterizing how I feel. How I feel is irrelevant. My comment about it being garbage – which I apologized for, I believe ... after I had had an entire

day of testimony, provided with the kinds of images that would have been expected.

All we had seen, up to that point, had been these 3-D oddly colored, nonstandard renderings. And at the last minute, suddenly, I had the raw images that to my eye were not properly processed ..., [I] became very concerned with the fact that he had introduced an error in the way he had analyzed the data that would create this overactivity that actually was an artifact of the processing.

Q. [Mr. Fox] So last time you were retained by the prosecution, and you came to court, you didn't even have all the materials necessary to render an opinion; but you came to court nonetheless; is that correct?

Mr. Dunlap: Your Honor, I object. Ask for a hearing ...."

(RT 93: 19699-19700.)

The court excused the jury, and a hearing was held outside the presence of the jury. Dunlap immediately pressed for "sanctions against counsel" for "outrageous" inquiry into an area of Dr. Mayberg's testimony that had been stricken in the guilt phase, and for examining her about "the discovery requests for raw data numerous times ..., and I felt like an idiot ... [because] counsel had never provided the raw data before she testified ..., [so]

its an insinuation I find offensive." (RT 93: 19701-19702.)

Fox pointed out he had "corrected" the reference to prior *testimony* by asking if that is how Dr. Mayberg "feels today." (RT 93: 19701-19703.) The court tended to agree but remarked, "That's not the most serious mistake or concern that I have." (RT 93: 19703: 9-10.) Fox explained the nature of her bias for impeachment:

> " Well, the concern I have is that this witness is ready to come to court and render an opinion without having all of the materials. That's the point I'm saying.
>
> The Court: When was the raw material provided?
>
> Mr. Fox: At some point before she testified. But she was in court ready to testify before she had all the materials. That's the point I'm making. I'm making the point she's a prosecution witness, and she comes down here to render an opinion without all of the materials.
>
> .....
>
> [T]he inference that I'm trying to make is that she's ready as a prosecution witness to testify in any case that the prosecution says there's a PET scan, there's a SPECT scan, come and give your opinion of this. That's the point I'm trying to make."

(RT 93: 19703: 11-28 - 19704: 1-3.)

Judge Platt called it "extremely improper to infer that [Dr. Mayberg] came here to present an opinion without information for which had been requested, and it is somehow her fault." (RT 93: 19704: 4-9.) Defense counsel responded that the purpose of the examination was not to draw an "inference that it was her fault." (RT 93: 10-19704: 11.) The trial court rebuffed defense counsel and ruled:

> " I will inform the jury, first, as to the comment being garbage, that it was stricken and it was improper to refer to that testimony. It occurred in an instance where there was an apology.
>
> .....
>
> More significantly, I will inform the jury, because it was represented and we went through this at the last trial, that there were multiple requests, both from the prosecution and from the defense about discovery. And that the raw data was specifically requested. And it was not provided to the prosecution. Until the day before Dr. Mayberg testified. So there was nothing improper about her coming to court and testifying with the information that had been provided."
>
> (RT 93: 19704: 17-27 - 19705: 4-12.)

The court rejected defense counsel's request to re-examine Dr. Mayberg on "how she felt" about Dr. Amen's allegedly incomplete product, but allowed defense counsel to examine her regarding her willingness to render an opinion even though she claimed she did not have the data necessary. (RT 93: 19705-19706.)[205] The prosecutor urged the court to impose sanctions for "intentional misconduct of this lawyer ..." (RT 93: 1907: 5-6.) The court agreed to sanction Fox "by admonishing, as I indicated I would do ... in front of the jury, [and] I consider that to be a significant sanction." (RT 93: 19707: 13-15.)

When the jury returned, the trial court admonished the jury as follows:

> " First involved the question about the prior testimony, that of the doctor referenced Dr. Amen's materials as garbage was stricken from the record. That means it is Non testimony [sic]. That means it should not have been referenced in any fashion for any reason. And it was extremely improper for Mr. Fox to do so before you.
>
> It is stricken. Period. It was improper questioning. Should not have been done.
>
> More importantly, the issue of the information provided the day Dr. Mayberg testified. What occurs in any criminal matter ... is called discovery compliance. Where information

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[205] Under questioning by defense counsel when the jury returned, Dr. Mayberg explained at length what she believed was a "mischaracterization of what I was willing to testify about." (RT 93: 19708: 22-23.)

in one side's possession is ordered to be turned over to the opposition or the other side. Either the defense or the prosecution to the defense.

Mr. Dunlap had made numerous discovery requests as to this specific information, which was not provided. It was untimely when it was finally provided after Dr. Mayberg had arrived and was to testify. So it was information that should have been provided earlier and was not."

(RT 93: 19707: 24-28 - 19708: 1-17.)

At the end of the day, defense counsel moved for mistrial on constitutional grounds cited in his brief and previous arguments (CT 11: 2914-2918; 75: 15600-15601; 15609), reasoning it was "improper" for the court to single out "defense counsel" as violating discovery provisions, particularly after articulating a "much more neutral" admonition outside the presence of the jury. (RT 93: 19736-19737; RT 93: 19628.) The trial court denied the motion; the admonition to the jury "as it related to those specific items ..., was [considered] not complied with by the defense ..., [and] not provided in a timely fashion, and not provided prior to Dr. Mayberg being here to testify." (RT 93: 19737: 18-21.)

D. The Trial Court Improperly Restricted Cross-Examination of Dr. Mayberg, Erroneously Admonished the Jury that Appellant's Trial Counsel Had Acted Improperly, and Failed to Instruct the Jury that It Could Not Attribute Any Misconduct To Appellant.

First, the trial court improperly restricted appellant's right to cross-examine the prosecution's key expert, Dr. Mayberg. As discussed below, this error alone is ground for reversal of the death verdict. In *Delaware v. Van Arsdall, supra,* 475 U.S. 673, 678-679, the United States Supreme Court held that trial court restrictions on the defendant's ability to cross-examine a key prosecution witness's motive or bias for testifying violated the *Confrontation Clause* of Sixth Amendment right "to be confronted with the witnesses against him," citing *Davis v. Alaska* (1974) 415 U.S. 308, 315-316, for critical principles:

> " Indeed, '[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination' (citations omitted). Of particular relevance here,
>
> 'We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'"

In *Lee v. Illinois* (1986) 476 U.S. 530, 540, citing *California v. Green* (1970) 399

U.S. 149, 158, the high court declared, "The right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception, as well as the reality, of fairness prevails ..., promote[s] to the greatest possible degree society's interest in having the accused and the accuser engage in an open and even contest in a public trial ..., [serves as] a functional right that promotes reliability in criminal trials ..., [and] advances the pursuit of truth in criminal trials."

There is little room for doubt that a challenge to a witness' credibility forms part of the constitutional and statutory framework for the reliability of criminal trials. (See, *Ibid.*; Cal. Const., art. I, §28, subd. (d); Evid. Code §§ 721-722, 780, subd. (f); *Jefferson's California Evidence Benchbook* 3d Ed. [Univ. Cal. Press, 2008], §§28.50, 29.67.) Evidence Code section 780, explicitly permits examination on "any matter that has any tendency in reason to prove or disprove the truthfulness" of a witness's testimony, "including but not limited to," a demonstration of the "existence or nonexistence of bias, interest, or other motive," under subdivision (f), and under subdivision (h), with "statement[s] made by him that [are] inconsistent with any part of his testimony ..." Evidence Code section 721, codifies underlying assumptions regarding the extended nature of cross-examination to test the credibility of expert witnesses:

> " (a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness, and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2)

the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication, unless any of the following occurs:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion;

(2) The publication has been admitted in evidence.

(3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits."

(See also, *Jefferson's Evidence Benchbook, supra*, §§29.72; RT 93: 19670-19672.)

This Court has repeatedly recognized the broad right in California to impeach a witness's credibility by demonstrating bias or prejudice with prior statements, including

prior testimony, and the reliability of every criminal proceeding depends upon the right to confront and fully cross-examine witnesses. (*People v. Sanchez* (1995) 12 Cal.4th 1, 54 [cross-examination deemed a functional right that promotes reliability]; *People v. Freeman* (1994) 8 Cal.4th 450, 494 [bias, interest, or motive proper impeachment]; *People v. Mickle* (1991) 54 Cal.3d 140, 168-169 [broad right to impeachment]; *People v. Sully* (1991) 53 Cal.3d 1195, 1219-1220 [denial of right to cross-examine subject to harmless error analysis]; *People v. Hughes* (2002) 27 Cal.4th 287, 386 [impeachment permissible when based on good faith questions].) In the context of heightened reliability in death penalty cases, any error in restricting the right to confront and fully cross-examine witnesses in the penalty phase violates Eighth and Fourteenth Amendment rights as well. (*Beck v. Alabama, supra*, 447 U.S. 625; *Ford v. Wainwright* (1986) 477 U.S. 399, 414.)

Furthermore, it is well established that expert witnesses are subject to more extensive cross-examination than lay witnesses, and greater latitude is afforded the opposing party with presentation of other opinions an expert may have relied upon in forming an opinion. (*People v. Lancaster* (2007) 41 Cal.4th 50, 105 [scope of cross-examination of experts 'especially broad']; *People v. Clark* (1993) 5 Cal.4th 950, 1013 [expert subject to cross-examination on training, scholarly articles, and other material]; *Evidence Benchbook, supra,* §29.70.) In his motion to re-open cross-examination of Dr. Mayberg in the retrial of the penalty phase, defense counsel cited *Rosener v. Larson, supra*, 255 Cal.App.2d 871, which concisely explained:

" The questioning of [the physician/expert] was

> legitimate cross-examination; probing into the reasons of an expert witness is usually the only recourse of the cross-examiner. It may be as important to learn what facts the witness disregarded as unimportant in the formation of his opinion, as to ascertain what facts he believed and relied upon as the foundation for his opinion." (*Id.*, at p. 878.)[206]

Similarly, in *People v. Clark supra*, 5 Cal.4th at pp. 1013-1014, relying upon Evidence Code section 721, subdivision (b), this Court approved the prosecutor's cross-examination of a defense expert, Dr. Raffle, on another (Dr. Diamond) expert's "works," because of Dr. Raffle's "familiarity" with Dr. Diamond's scholarly articles, and because "he considered or relied upon all of his training in arriving at this conclusion."

As described in detail in *Section A* above, the record demonstrates Dr. Mayberg initially testified in the *guilt phase* of this capital murder trial that she relied upon Dr. Buchsbaum's testimony to form her opinions prior to her testimony. This Court has rejected efforts to delineate capital murder trials as anything other than a "unitary" trial system with two "phases." (*People v. Bemore* (2000) 22 Cal.4th 809, 858; *People v. Pride*

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[206] As pointed out above, however, the trial court refused to "review the cases that were cited" by defense counsel in denying the motion. (RT 93: 19676-19677.) The other case cited, *People v. Bandhauer, supra*, 1 Cal.3d at pp. 612-613, did not discuss the applicable law but recited the extensive cross-examination of experts on their differing opinions of brain abnormalities.

(1992) 3 Cal. 4th 195, 252-253; see also, *Lockhart v. McCree* (1986) 476 U.S. 162, 181-182.) As the cases demonstrate, the "circumstances of the crime" present much of what is factor (a) aggravating evidence, and the jury determining the appropriate punishment is statutorily "entitled to hear" the evidence adduced from the guilt phase. (*People v. Pride, supra*, 22 Cal.4th at p. 252.) The *retrial* of the penalty phase was a continuation of the guilt phase of a unitary trial, and included all of the same evidence presented in the guilt phase, but as part of a penalty determination. During hearings before the retrial of the penalty phase, after discussion with counsel, the court decided to advise prospective jurors about a "previous jury having found Mr. Peoples guilty of the allegations and their role is only to decide punishment." (RT 62: 12642: 21-23.) In advising prospective jurors of their duties, the court instructed:

> " A previous jury has found the defendant Louis Peoples guilty of each of the allegations that I'm going to read to you. The jury, however, was unable to reach a decision in the penalty or punishment phase of the trial. Your role as jurors will be only to decide, if you can, what punishment shall be imposed on Louis Peoples."
>
> (RT 62: 12761: 26-28 - 12762: 1-3.)

Accordingly, references by the trial court, counsel and Dr. Mayberg to a "prior hearing," "last hearing," or "first trial" – as well as during the examination of *all* the experts and many of lay witnesses who had testified in the guilt phase – were little more

than convenient semantic devices with no legal significance, but in fact appear to have created a distinction with a misleading difference. Indeed, the prosecution presented a virtually identical case in the retrial of the penalty phase as it had in the guilt phase, relying extensively on testimony and exhibits admitted during the guilt phase in order to aggravate punishment; Dr. Mayberg did not testify at the first penalty phase but had been presented as a witness in the guilt phase only, as had Dr. Wu, Dr. Amen and Dr. Buchsbaum. Dr. Mayberg's attempt to minimize her reliance on Dr. Buchsbaum's testimony in the hearing outside the presence of the jury on May 5, 2000, during the retrial of the penalty phase, was transparently disingenuous, and reference to her prior testimony could have been used to further impeach her credibility before the jury. (Evid. Code, §780, subd. (h).) Although she claimed raw data supplied by Dr. Wu and Dr. Amen were the "main" or primary basis for her retrial testimony that hardly exempted her from examination on *secondary* – or foundational – sources for her opinions expressed in the guilt phase, including her reliance upon and disagreement with Dr. Buchsbaum's opinions. (See, RT 93: 19626: 5.)

People v. Clark supra, 5 Cal.4th at pp. 1013-1014, not only reaffirms the statutory right of an opposing party to cross-examine an expert on "materials" relied upon to form an opinion, including scholarly works, but it was not considered error for the prosecutor to examine a defense expert on materials he was familiar with as part of his "training" and experience. Similarly, in *Rosener v. Larson, supra*, 255 Cal.App.2d at pp. 878-879, cross-examination of a physician on a medical report that he read but "ignored, as unimportant," was deemed a proper subject for impeachment, and the jury was properly instructed that

the report was not offered for the truth of the matter.

In the present case, Dr. Mayberg's reliance on Dr. Buchsbaum's opinions to form her rebuttal opinion in the guilt phase of trial was clearly expressed on July 23, 1999, as it was "[b]ased upon looking at the raw images [Exhibit 701], doing it like Dr. Wu and Dr. Buchsbaum did, that is a normal-appearing [PET] scan ..." (RT 46: 9423.) Her "differential diagnosis" of the PET "scan pattern would be consistent with the research pattern of depression," at complete odds with all three defense experts. (RT 46: 9424.) Contrary to her misleading testimony outside the presence of the jury on May 5, 2000, she attempted to distinguish Dr. Wu and Dr. Amen as the basis for her "main" opinions, even though she had testified in the guilt phase on July 23, 1999, "Dr. Wu *and Dr. Buchsbaum* said over and over and over, they only rely on statistics ..., [b]ut there are no statistics" to support their opinions, and "I'm basically looking at pictures here, reading [their] testimony, try[ing] to hook things together, and I'm not having an easy time." (RT 46: 9427: 9-18; emphasis added.)[207]

Indeed, as pointed out above, Dr. Mayberg's disagreement with Dr. Buchsbaum's findings during the guilt phase of the unitary trial revealed she was at odds with a scientist

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[207] A comparison of her testimony in the guilt phase with her testimony on May 5, 2000, outside the presence of the jury reveals her to be a misleading and inconsistent witness; her depiction of Dr. Buchsbaum as "irrelevant" would have been ripe material for impeachment on cross-examination had counsel properly been allowed to challenge her credibility. (See, RT 93: 19625; Evidence Code §§ 721-722; 780.)

she considered a "pioneer" in brain scan technology, someone she respected for his "stellar career," and who, she admitted, had produced an "impressive" scholarly literature with which she was familiar. (See RT 46: 9464: 13-14; 9468: 4-5.) Dr. Mayberg's opinions should have been subjected to greater scrutiny under cross-examination to expose her bias and the weakness of her contrarian opinions. (*Delaware v. Van Arsdall, supra,* 475 U.S. at pp. 678-679; *People v. Clark supra*, 5 Cal.4th at pp. 1013-1014; *People v. Bandhauer, supra*, 1 Cal.3d at pp. 612-613.) In light of Dr. Mayberg's reliance upon Dr. Buchsbaum's testimony in the guilt phase of trial, and her familiarity with his scholarly and professional achievements, the trial court improperly restricted appellant's right to confront and fully cross-examine the *key* expert witness proffered to rebut the primary mitigation evidence presented on abnormal brain functioning caused by trauma and methamphetamine abuse.

The jury on retrial of the penalty determination should have been allowed to weigh Dr. Mayberg's testimony as it had been provided in the guilt phase, just as the jury had been allowed to consider all of the other evidence presented in the guilt phase. It was a denial of appellant's previously enumerated constitutional and statutory rights to restrict cross-examination on this record. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 679; *Davis v. Alaska, supra,* 415 U.S. at p. 315; *People v. Freeman, supra,* 8 Cal.4th at p. 494; *People v. Sanchez, supra,* 12 Cal.4th at p. 54.) The improper restriction on the right to cross-examine Dr. Mayberg rendered the death verdict unreliable, and on this ground alone judgment should be reversed. (*Ibid.*; *Stringer v. Black, supra,* 503 U.S. at p. 235;

People v. Boyd, supra, 38 Cal.3d at pp. 772-775.)[208]

Moreover, the prosecutor described Dr. Mayberg to the jury in the penalty retrial as "one of the world's most respected doctors" (RT 95: 20200), arguing that Dr. Mayberg would not be "misled" by Dr. Wu and Dr. Amen. (RT 95: 20201; 20203-20204.) Without Dr. Buchsbaum's preeminent reputation or the convergence of his opinions with those of Dr. Wu and Dr. Amen to impeach Dr. Mayberg, Dunlap was free to argue Dr. Mayberg's "problems with Dr. Wu and Dr. Amen ...., [c]oming in here and saying [their] tests corroborate each other." (RT 95: 20202.) Relying only on Dr. Mayberg's testimony in the retrial, Dunlap misleadingly argued, "Dr. Amen's work is not corroborated," and "[t]here's problems in the medical community" with his work. (RT 95: 20204.)

As noted above, Dr. Buchsbaum had corroborated the work of Dr. Wu and Dr. Amen in his testimony in the guilt phase by confirming the separate findings of each; he opined that "relatively few people would show this kind of abnormality ...," and concluded that "whether [the result of] traumatic brain injury or chronic effects of substance abuse ...," the abnormalities revealed in Louis's scans were "consistent with that combination." (RT 41: 8551-8553; 8474-8475.)

In light of the prosecutor's arguments, the fact that Dr. Mayberg's testimony was

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208 Whatever reasons defense counsel may have had for not calling Dr. Buchsbaum in the retrial of the penalty phase are not at issue and do not effect appellant's right to cross-examine Dr. Mayberg as to her review and reliance upon all three experts presented in the guilt phase of trial. As pointed out above, Dr. Buchsbaum's opinions were far from equivocal and Dr. Mayberg's opinions were in direct conflict.

not cumulative to or corroborated by any other witness's testimony, and the rejection of the prosecution's case for the death penalty by eight jurors six months before, the error was not harmless beyond a reasonable doubt and the death sentence should be reversed. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684; *People v. Sully, supra,* 53 Cal.3d at pp. 1219-1220.)

Furthermore, the prejudice of restricting cross-examination was compounded by another prejudicial error made by the trial court – its admonition to the jurors that defense counsel had violated discovery laws and had also engaged in "improper questioning" of Dr. Mayberg on the "garbage" she had claimed had been presented to her before testifying in rebuttal in the guilt phase of trial. (RT 93: 19707-08.) While her testimony at the guilt phase as to the "garbage" had been stricken at defense counsel's request, when he questioned Dr. Mayberg during the retrial about her willingness to testify without complete data in order to show her bias, over objection and outside the presence of the jury, the court agreed it was a valid line of examination, but stated, "[T]hat's not the most serious mistake or concern I have." (RT 93: 19701-19703.) As pointed out above, the court disregarded defense counsel's argument that he was not trying to infer it was Dr. Mayberg's "fault" that she did not have the raw data, but rather "that she's ready as a prosecution witness to testify in any case ..." (RT 93: 19704.)

Aside from the court "missing the point" that Fox was trying to make in his cross-examination of Dr. Mayberg (RT 93: 19702), both defense counsel and the prosecutor had expressed concerns about their knowledge of "brain science" and neither was familiar with

what was meant by "raw data." This is readily apparent from the colloquy on July 23, 1999. (RT 46: 9387-9392.) Fox had explained his own ignorance about the difference between Dr. Amen's computer-generated images and raw data, and, as will be recalled, Dunlap was "not making a complaint" about discovery; he was "not capable of making this request earlier, because [he] did not know what [he] was looking at [computer-generated images]." (RT 46: 9389.) In short, Dunlap conceded, "[I]ts my inexperience with imaging that is the problem." (RT 46: 9389; 9392.)

Nonetheless, once again Dunlap played fast and loose with the facts, misleading the trial court during the retrial proceedings into believing "sanctions against [defense] counsel" for "outrageous" conduct should be imposed because the prosecution had made "the discovery requests for raw data numerous times ..." in the guilt phase. (RT 93: 19701-19702; see also, *Argument V, ante.*)

First, it is clear there had been no discovery proceeding to establish that defense counsel had violated Penal Code section 1054.5, subdivision (b), in the guilt phase of trial:

> " Before a party may seek court enforcement of any of the disclosures required ... [and] upon a showing the moving party complied with the informal discovery procedure provided ..., a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation

of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."

Second, not only had the statute not been fulfilled in order to justify sanctions, but there was no factual basis established to support a violation, and, thus, sanctions were improperly imposed. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135; *In re Littlefield* (1993) 5 Cal.4th 122; *People v. Edwards* (1993) 17 Cal. App.4th 1248.)

Accordingly, the admonition the court read to the jury during the retrial of the penalty phase as a sanction for a non-existent discovery violation was without legal or factual support, it focused attention on counsel's "extremely improper" conduct, and it misled jurors into believing the prosecutor had made "numerous discovery requests as to this specific information" that was provided by defense counsel in an "untimely" manner:

" First involved the question about the prior testimony, that of the doctor [Mayberg] referenced Dr. Amen's materials as garbage was stricken from the record. That means it is Non testimony [sic]. That means it should not have been referenced in any fashion for any reason. And it was *extremely improper* for Mr. Fox to do so before you.

It is stricken. Period. It was *improper* questioning. Should not have been done.

More importantly, the issue of the information provided

the day Dr. Mayberg testified. What occurs in any criminal matter ... is called discovery compliance. Where information in one side's possession is ordered to be turned over to the opposition or the other side. Either the defense or the prosecution to the defense.

Mr. Dunlap had made numerous discovery requests as to this specific information, which was not provided. It was untimely when it was finally provided after Dr. Mayberg had arrived and was to testify. So it was information that should have been provided earlier and was not."

(RT 93: 19707: 24-28 - 19708: 1-17; emphasis added.)

The trial court's admonition to the jury was improper and violated appellant's previously enumerated constitutional and statutory rights. (*Stringer v. Black, supra,* 503 U.S. at 235; *People v. Boyd, supra*, 38 Cal.3d at pp. 772-775.)

Finally, the admonition was not only improper, but it failed to differentiate between defense counsel's alleged misconduct and appellant's lack of responsibility for his attorney's faults. Although appellant had done nothing to deserve an admonition for "extremely improper" examination of the prosecutor's rebuttal expert and was not responsible for the "more important" and "untimely" discovery violations, by inference blame was attributed to him. The court's admonition did nothing to the jury that counsel's misconduct should not be used against appellant in deciding the appropriate punishment.

In January, 2006, CALCRIM 306, revised the former jury instruction (CALJIC 2.28) provided for violations of Penal Code section 1054.5, subdivision (b), because of what the authors of the *Bench Notes* refer to as judicial "criticism" of the instruction, advising trial courts to "consider whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant." Unlike CALJIC 2.28, CALCRIM 306 now includes the distinguishing option not read to the jury in this case:

> " [T]he fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime.
>
> You must not consider the fact that an attorney for [the] defendant failed to disclose evidence when you decide the charges against [the] defendant."

Prior to the revisions, several courts of review recognized the flaws in CALJIC 2.28. (*People v. Lawson* (2005) 131 Cal.App.4th 1242; *People v. Bell* (2004) 118 Cal.App. 4th 249; *People v. Cabral* (2004) 121 Cal.App.4th 748, 751 [criticized giving instruction when no evidence suggests defendant personally responsible for concealing evidence]; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942 [criticized instruction for 'encourag[ing] speculation and offer[ing] insufficient direction.') In *People v. Lawson, supra*, 131 Cal.App.4th 1242, the court reversed a drug sales conviction where defense counsel had failed to provide timely discovery of a percipient witness to a disputed undercover

operation, and as a sanction – later rescinded – the trial court excluded the defense witness, which may have forced defendant to testify; the trial court then improperly admonished the jury under CALJIC 2.28. In approving and summarizing the *Bell*, *Cabral* and *Saucedo* cases (*ibid.*) that had "roundly criticized No. CALJIC 2.28," the *Lawson* court recognized "the flow of events against CALJIC No. 2.28" in light of the "new" instruction (CALCRIM 3.06) "slated for publication" and authored by the justice who had written the unanimous *Bell* decision.

As pointed out in *People v. Lawson, supra*, 131 Cal.App.4th at pp. 1248-1249, then Associate Justice Corrigan of the First District Court of Appeal, and Chair of the *Judicial Council Task Force on Jury Instructions*, also authored *People v. Bell, supra*, 118 Cal.App.4th 249. In *Bell*, the defendant was convicted of murder and robbery based upon the testimony of eyewitnesses. His defense was based upon discrediting the eyewitness identifications, and in providing an alibi for the date and time the crimes were committed. The trial court found defense counsel had failed to provide timely notice of the alibi witnesses to the prosecution and instructed the jury under CALJIC 2.28. In reversing the conviction for instructional error, the court recognized that other instructions given to jurors, such as the series on fabrication of evidence as possible consciousness of guilt (CALJIC 2.03, 2.04, 2.06; 2.52), guided them on how they *may* consider such evidence if the defendant is *personally* responsible: "A jury may be told that an attempt at fabrication *by the defendant* may show a consciousness of guilt. (Citation omitted; italics original.)" (*Id.*, at p. 256.) When such instructions are given, however, jurors are also cautioned that

evidence of consciousness of guilt is not of itself sufficient to prove the defendant's guilt. If a third party is involved in an attempt to fabricate or suppress evidence, without proof of defendant's approval, it is also improper to instruct on consciousness of guilt. (*Ibid.*)

Although jurors were instructed – as they were during the retrial of the penalty phase in this case (CT 11: 3221) – that they were not to "consider or discuss facts as to which there is no evidence (CALJIC No. 1.03)," the court in *Bell* pointed out the improper admonition to jurors under CALJIC 2.28 that the defendant's "lawyer did not play by the rules" led to an inference "that the jurors should 'do something' but they were given no idea what that something should be." (*People v. Bell, supra*, 118 Cal.App.4th at p. 255.) Indeed, CALJIC 2.28, gave jurors the vague option to "'consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence.'" (*Id.*, at p. 254.) As a result of the admonition, "[J]urors may have concluded they were free to find Bell guilty merely because he failed to comply with the discovery statute." (*Id.*, at p. 256.)

In the present case, Judge Platt did not give jurors any guidance as to how to consider defense counsel's purported malfeasance and violation of discovery laws in determining the appropriate punishment for appellant. In no uncertain terms, however, Judge Platt advised jurors that not only was it "extremely improper" for Fox to examine Dr. Mayberg about her comment on Dr. Amen's work product being "garbage," but "more importantly," Fox had violated the law, and, despite Dunlap's "numerous discovery requests," Fox had deprived the prosecutor of critical evidence on brain imaging results.

In addition, as Fox pointed out, the court unfairly fashioned its own instruction and improperly admonished jurors by derogating defense counsel. (RT 93: 19736-19737 [motion for mistrial].) As in *Bell*, Judge Platt failed to "warn [jurors] that [Fox's] violation, standing alone, was insufficient to support a [death] verdict" against Louis Peoples. (*People v. Bell, supra*, 118 Cal.App.4th at p. 257.)

Here, the trial court's sanction of defense counsel for a "discovery" violation that occurred during the guilt phase by admonishing jurors in the penalty phase trial constituted a violation of appellant's previously enumerated constitutional rights. Furthermore, the trial court erroneously denied the motion for mistrial based on this violation. (RT 93: 19736-19737.) The admonition to the jury was not only without factual support, but it was misleading and damaging to appellant in that it did not explain to the jury that any failure on counsel's part could not be used against him as aggravation evidence, or to diminish his mitigation evidence. It introduced an unauthorized element of randomness and bias in favor of the death penalty, and detracted from an individualized determination of appellant's moral culpability. On this ground alone, judgment must be reversed. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Stringer v. Black, supra,* 503 U.S. at p. 235; *People v. Boyd, supra*, 38 Cal.3d at pp. 772-775 *People v. Bell, supra*, 118 Cal.App. 4th at p. 257.) Moreover, the cumulative prejudice of the trial court's erroneous rulings and improper admonition to jurors violated appellant's previously enumerated constitutional and statutory rights and requires reversal of the death judgment. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 341; *People v. Hill* (1998) 17 Cal.4th 844-845.)

X.

THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WHEN IT ERRONEOUSLY RESTRICTED THE TESTIMONY OF HIS FORENSIC EXPERT PROFFERED FOR CRIME SCENE ANALYSIS AND TO REBUT THE PROSECUTION'S THEORY OF THE CASE.

Appellant's federal and state constitutional rights to present a defense, to confront and cross-examine witnesses, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment, were denied when the trial court unduly restricted expert witness testimony proffered as part of his defense to the legal and moral culpability for the crimes charged, and to rebut the prosecutor's theory of the case. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Sully* (1991) 53 Cal.3d 1195.)

A. Offer of Proof - Brent Turvey

Near the conclusion of the prosecution's case-in-chief in the guilt phase of trial,

defense counsel proffered the testimony of Brent Turvey, a forensic expert on crime scene reconstruction, in part as a response to the testimony of Department of Justice Criminalist Kathleen Ciula on June 9, 1999. (RT 34: 7140-7143; CT 6: 1684-1685.) Over Fox's foundational objection to Cuila's expertise to offer an opinion on the "sequence of events" based upon a reconstruction of bullet trajectories and blood spatter, Ciula was allowed to render an opinion as to the sequence of bullets fired inside *Mayfair Liquors*, based upon review and reconstruction of the crime scene. The defense motion for mistrial was denied. (RT 31: 6232-6237; 6237-6242; 6269-6272.) Ciula testified that she was "able to give [her] best reconstruction, which included an order of shots." (RT 31: 6235.) She conceded on cross-examination that other reconstructions were possible, and that she could not reconstruct the time between shots, where the shooter was positioned at any time, or when the victim was struck by a bullet. (RT 31: 6272-6277.)[209]

On June 29, 1999, Fox filed a written proffer that on November 11, 1997, during the period when law enforcement officials in San Joaquin County were investigating several violent crimes in which a .40 caliber firearm had been used, Stockton Police Sergeant Rick Ragsdale consulted Turvey. Turvey suggested the *Cal Spray* incident appeared to be the work of a disgruntled employee, and he reviewed the files of former

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[209] Defense counsel objected to DOJ Criminalist Michael Giusto's testimony, "whoever did this ... was a person that knew something about firearms," and the objection was sustained on the ground of "lack of foundation" (RT 33: 6731: 17-22); however, no objection was lodged to Giusto's bullet trajectories and shell casings at the *Village Oaks* crime scene. (RT 33 : 6687-6704.)

employees. (CT 6: 1684-1685.) Prior to this case, Turvey had acted as consultant to various law enforcement agencies, including Stockton Police Department, and Sgt. Ragsdale had been a student of Turvey's in a forensic course (RT 36: 7455); Ragsdale was involved in the investigation of the unsolved violent crimes in Stockton from September through early November, 1997. Defense counsel described the purpose of testimony as a challenge to the state's theory of the crimes as carefully planned and premeditated:

> " Offered as an expert in crime scene analysis, Mr. Turvey will instruct the jury on crime scene investigation, reconstruction, and profiling. He will state that the opinion of [DOJ] Ms. Ciula regarding the scenario at MFL [Mayfair Liquors] is one of many possible scenarios that may have occurred. He will state that convergences of established offense behavior within each case relate to planning."
>
> (CT 6: 1684-1685: 15-20.)

After receiving notice of the proffer, Deputy District Attorney Dunlap demanded a hearing outside the presence of the jury. In Dunlap's view Turvey's opinions on "profiling" as an aspect of crime scene reconstruction to rebut inferences drawn during the testimony of Criminalist Ciula (RT 31: 6219-6283) and Michael Giusto (RT 33: 6678-6743) that the crimes were premeditated was "just preposterous" (RT 34: 7156: 23), and "[he found] that outrageous" (RT 34: 7153: 1).

In defense counsel's extended offer of proof, he included Turvey's testimony as "a foundation as to what appears in the crime scene, how it's interpreted [a]nd then an expert who has the credentials in psychiatry can talk about how this relates to issues of mental impairment." (RT 36: 7533: 27-28 - 7534: 1.)[210] Turvey holds undergraduate degrees in History and Psychology, and a Master's Degree in Forensic Science. (RT 36: 7371-75; 7470-7472; Exhibit 103.) Prior to 1999, Turvey had attended seminars and participated as a lecturer, presented peer-reviewed articles, and had qualified as an expert and testified in court to "criminal profiling." (RT 36: 7465-7467.) In May, 1999, he had co-authored a peer-reviewed textbook entitled *Criminal Profiling, An Introduction to Behavioral Evidence Analysis* . (RT 36: 7374-7375; Exhibit 103.) Turvey described "criminal profiling" as an accepted forensic science term, "[A] process of inferring offender characteristics," including "characteristics that describes [sic] an offender ..., [and] criminal profiling is the process that you go through to get to that result." (RT 36: 7376: 12-22.) According to Turvey, criminal profiling "always" involves analysis of forensic evidence at a crime scene. (RT 36: 7470-7471.)

However, Turvey was not offered for a general description of comparing characteristics of an "aggregate group of offenders." (RT 36: 7376.) Rather, defense

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[210] As noted in *Arguments V* and *VIII, ante*, the prosecutor stated his "strong disagreement" with the expert opinions of brain imaging experts and forensic psychiatrist (Dr. Woods) proffered for mental state defenses to the crimes charged, but advised the court, "We are not going to make a request for any [Evidence Code section] 402 hearings [for Drs. Buchsbaum, Wu, Amen, and Woods] based on the proffers offered [sic] by Mr. Fox. We're ready to proceed on cross-examination." (RT 34: 7140: 19-21.)

counsel argued that after examining police reports and crime scene information, Turvey would be offering opinions on the characteristics of each scene to lend jurors his insight into appellant's "bizarre behavior" during the period he committed the crimes. Fox proffered Turvey to testify that "reasonable inferences can be made [from the crime scenes] that need to be established so a forensic psychiatrist [Dr. Woods] can opine what the mental state appears to be and consistent with what shows on his brain [scan] images." (RT 36: 7544: 1-4; 7546: 8; 20.) Dunlap responded by an ad hominem assault "for sanctions against [defense] counsel ..., [as] the only bizarre behavior here is counsel's." (RT 36: 7548: 13-15.) According the Dunlap, the defense proffer "offers nothing [and] is ludicrous." (RT 36: 7550: 19.)[211]

After rejecting the prosecutor's demand for sanctions (RT 36: 7577), and finding much of defense counsel's argument not "ludicrous ..., [but] considerable fodder for cross-examination" (RT 36: 7564: 10-11), the court received Turvey's opinions expressed in a 26-page report dated July 3, 1999, and entitled "Crime Scene Analysis" (RT 36: 7497; 7528; Exhibit 105). Turvey's report analyzed each crime scene in detail, and then discussed each scene in terms of "precautionary acts," which include behaviors committed by an offender before, during, and after a crime to prevent detection or hamper

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[211] As discussed in detail in *Arguments III, V* and *VI, ante*, the prosecutor exploited the highly charged term "serial killer" in arguments designed to inflame jurors' passions, and the court accepted the term without a reasoned analysis. It was not "ludicrous" for the defense to attack the prosecutor's theory. Turvey had informed counsel "there are serial killings in serial fashion ...[but] no such thing as a serial killer, per se" (RT 42: 8858: 8-11), and the crimes were consistent with the impulsivity theory of the defense.

investigation, and "contradictory acts," which include behaviors that increase the likelihood of drawing the attention of authorities to the offender. Turvey concluded in his report that there were elements of planning and precautionary behavior revealed at each crime scene, but that a general decrease in the interval between crimes, coupled with an increase in violence and contradictory acts at the crime scenes, suggested the offender's ability to plan had deteriorated over time. (RT 36: 7367-7379; 7452-7495; Ex. 105, p. 25.)

As arguments concluded, defense counsel expressed a willingness to restrict Turvey's testimony to the individual characteristics in the crimes as detailed in the July 3 report. (RT 36: 7498.) The primary purpose of Turvey's testimony "as a crime scene analyst [was] to lay the foundation for Dr. George Woods ... forensic psychiatrist, to offer mental state issues based in part upon this crime scene analysis ...," and "Turvey would not be offering mental state issues for any truth of the matter asserted but as foundation so a forensic psychiatrist could then refer to this report ..." (RT 36: 7498; 7499-7500.) After hearing arguments of counsel, the court ruled that Turvey would be limited to the *physical* aspects of crime scene reconstruction in his report, but he would not be allowed "to testify to any [offender] profile." (RT 36: 7574: 25-26; 7528.) Based upon the proffers of Turvey's opinion testimony, Judge Platt stated:

> " I have considerable problem with ... understanding and ... finding that the subject of expert opinion deals with each of the scenarios where he indicates the offender engaged in contradictory acts. And then at the conclusion

> of the report indicating that the offender may have engaged in planning behaviors prior to his crimes as well as some very superficial precautionary acts during the offenses, but over time his ability to effect planning in the crimes scenes appears to have deteriorated.
>
> That absolutely is not going to be testified to by Mr. Turvey. It is well beyond the expertise of anybody that is allowed to testify as a crime scene reconstructionist [sic] or analyst. One's ability over time to effect planning appearing to have deteriorated calls for considerable speculation. Nor do I think [it] is the subject of expert opinion." (RT 36: 7529: 15-28 - 7530: 1)

Accordingly, the court termed Turvey's opinions "absolute and pure speculation" and refused to allow Turvey to express his opinion to the trier of fact as to "the general decrease in planning and precautionary acts ...," which appeared to coincide with "a decrease between the interval of offenses," and the increase in violence and "contradictory acts," beginning with the burglary of the automobile at Anderson Park (June 21, 1997) to the *Cal Spray* (September 16) crimes, and concluding with the four crimes that occurred in rapid succession: 1) *Bank of the West* (October 24); 2) *Charter Way Tow* (October 29); 3) *Mayfair Liquors* (November 4); and *Village Oaks* (November 11). (RT 36: 7564: 15-17; 7565: 14-18; see also, RT 36: 7537; 7548-7549; 7574-7575; Exhibit 105, p. 25.)

Moreover, if Turvey were called as a defense witness, the court refused to allow counsel to use the term "profiler" in describing Turvey's consultations with law enforcement agencies, because "it's not an area of expertise," and under Evidence Code §352, Turvey would not be allowed to testify that "he was asked [by Detective Ragsdale] to come in and create a profile ..., because there is no probative value to being a profiler." (RT 36: 7573: 17-18; 7574: 24-28 - 7575: 1-2.)[212]

Turvey was not called as a defense witness. As discussed in *Argument XI*, *post*, however, over objection the prosecutor was allowed to examine defense experts – and lay witnesses – on the details of each crime in order to prove the mental state elements necessary for each charged crime and to undermine appellant's defenses. Indeed, during the prosecution's case in rebuttal, defense counsel moved for a mistrial based upon the court's erroneous rulings on crime scene evidence, including the trial court's specific restrictions on Turvey's testimony, and the cumulative prejudice of the rulings. (RT 45: 9283-9289.) In this context, defense counsel argued the court had "so restricted the defense presentation of evidence" that it had violated appellant's state and federal rights to due process and reliable verdicts:

> " [By] denial of the Turvey report with the Turvey analysis and my objection to the witnesses – the forensic nuclear brain imaging scientists [Wu, Amen

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[212] If defense counsel referred to Turvey as a "profiler" in the presence of the jury, Judge Platt threatened "monetary sanctions ... custody time [a]nd ... refer[ral] to the state bar." (RT 36: 7576: 19-21.)

and Buchsbaum –] being cross-examined [by the prosecutor] as to what the forensics at the crime scenes meant instead of Turvey [being allowed to] at least [lay] a foundation as a forensic scientist."

(RT 45: 9289: 11-17.)

The court denied the motion, reiterating its "previous rulings as to Mr. Turvey and his qualifications and/or lack of it related to areas proffered but ruled upon by the Court that restricted whatever Mr. Turvey's testimony would or could have been." (RT45: 9290-93.)

B. The Testimony Offered on Crime Scene Analysis was Admissible Because Turvey was Qualified as an Expert to Testify as to "Profile" Characteristics at Each Crime Scene. Turvey's Testimony Would Have Provided a Foundation for Psychiatric Testimony, and Its Undue Restriction Prejudiced Appellant in Both Phases of Trial.

Evidence Code section 801, reads:

" If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including special knowledge, skill, experience, training, and education) perceived by or

personally known to the witness or made known to him
at or before the hearing, whether or not admissible, that is
of a type that reasonably may be relied upon by an expert
in forming an opinion upon the subject to which his
testimony relates, unless an expert is precluded by law
from using such matter as a basis for his opinion."

This Court has consistently upheld expert testimony similar in nature to profiling criminal behavior as admissible because it is a "subject 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Brown* (2004) 33 Cal.4th 892, 905 [not error to admit expert testimony regarding battered women's syndrome.] As pointed out recently in *People v. Davis* (2009) 46 Cal.4th 539, 605, citing *People v. Brown, supra*, a "general description" of a psychiatric condition, "and the behavior typical of persons" who fit the profile, is admissible through expert testimony to assist the trier of fact. Similarly, in *People v. Stoll* (1989) 49 Cal.3d 1136, 1149, 1161 fn. 22 the Court held "properly presented [expert] references to ... 'profiles' and 'syndromes'" are admissible because juries are capable of evaluating the opinions of experts on subjects not within common experience.

Moreover, the fact that the opinion may relate to the ultimate issue to be decided by the trier of fact does not make expert testimony inadmissible:

" Testimony in the form of an opinion that is otherwise
admissible is not objectionable because it embraces the

ultimate issue decided by the trier of fact."

(Evidence Code §805; *People v. Brown, supra*,

33 Cal.4th at p. 905.)

In *People v. McDonald* (1984) 37 Cal.3d 351, 371, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, and cited below in support of defense counsel's foundational objections to the testimony of DOJ Criminalist Ciula's opinion on the "sequence of events" at *Mayfair Liquors* (RT 31: 6237-38), the Court wrote:

" [C]alifornia has abandoned the 'ultimate issue' rule ... 'follow[ing] the modern tendency and [has] refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact. (*People v. Cole*, (1956) *supra*, 47 Cal.2d 99, 105, and cases cited.) Evidence Code section 805 codifies this case law ...." [213]

Apparently, Judge Platt's opinion on crime scene reconstruction had changed between Agent Ciula's testimony on June 9, 1999, and the defense proffer of Turvey on July 1, 1999. (RT 31: 6241.) On July 9, 1999, Judge Platt stated that the expression of expert opinion by "reconstruction of physical crime scenes by a comparison and analysis

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[213] As noted in *McDonald*, Penal Code §1127b requires the court to instruct the jury it "remains free to reject [expert testimony] entirely after considering the expert's opinion, reasons, qualifications and credibility." (*Ibid.*) The jury in this case was so instructed pursuant to CALJIC 2.80, 2.83. (CT 8: 2113; 2115; RT 48: 9912-9913.)

of physical evidence ... is an area that I find to be ... of accepted expertise ..." (RT 31: 6241: 22-26.) In overruling defense counsel's objection to Ciula's opinion testimony, suggesting he was "not even sure that it requires expertise ..., but simple common sense and logic," Judge Platt also posited "it is an area upon which the jury can be given guidance and assistance in terms of making a determination about the sequence of events." (RT 31: 6242: 1-3; 15-18.) Despite Turvey's experience with crime scene reconstruction and criminal profiling, and the defense proffer as a rebuttal to Ciula's opinion on the "sequence of events," as well as a foundation for a psychiatric opinion in rebuttal to the prosecution's theory of premeditation, planning, and "serial killing," the court unduly restricted Turvey's testimony to a physical reconstruction of crime scenes. (See *Argument XI* and *XIII, post*; see also *Argument V, ante*; RT 57: 11693; 91: 19140 [objection to prosecutor's improper examination of Dr. Lisak on "definition of 'serial killer.'"].)

In *People v. Hamilton* (2009) 45 Cal.4th 863, 912-913, the defendant sought to introduce a witness who had attended a four-hour presentation "on the elements of criminal profiling" offered by FBI agents, and who acknowledged "the information he received in the FBI course was anecdotal, lacked any statistical foundation, was not included in any published data and was intended for use only as an investigative tool, and that he could not remember the names or details of the cases in which he was involved." The witness was deemed unqualified to testify. In contrast, Turvey had previously qualified and testified as an expert on criminal profiling, published peer-reviewed articles and a newly published text book on the subject, and had been involved as a consultant to

the Stockton Police Department; unlike the unqualified witness in *Hamilton*, Turvey was a highly qualified expert in crime scene characteristics and profiling, and the court erroneously restricted the proffered testimony.

The trial court's restrictive ruling essentially gutted Turvey's ability to confront and offer alternative reconstructive theories, which was offered as part of the defense to the crimes charged. The testimony would have countered the prosecutor's theory of premeditation and planning, and would have laid the foundation for Dr. Woods's psychiatric testimony with respect to mental state evidence for both phases of trial; it would have undermined the prosecutor's argument at retrial that appellant was a "serial killer" who acted in a "systematic, routine, premeditated" manner during the commission of the crimes at issue. (RT 95: 20019: 28.)

For the foregoing reasons, Turvey's proffered expert testimony cannot be deemed "insufficiently probative on the issue of defendant's guilt" or on his moral culpability, and the trial court's restrictive ruling on his testimony, and the effective exclusion of his opinions from both phases of trial, constituted prejudicial error. (*People v. Hamilton, supra,* 45 Cal.4th at pp. 912-913; *People v. Lancaster* (2007) 41 Cal.4th 50, 94.) Further, as discussed in *Arguments V*, *VIII* and *XIII*, the prosecutor repeatedly used details from the scenes of the crimes to aggravate the circumstances of the crimes in seeking the death penalty, and improperly argued the "serial killer" theory to the jury, thereby compounding the violation of appellant's previously enumerated constitutional and statutory rights and further prejudicing him.

XI.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDED PROFFERED EVIDENCE OF MOLEST AND IMPROPERLY RESTRICTED HIS EXPERT'S TESTIMONY REGARDING THE PROFFERED EVIDENCE; THE PREJUDICE WAS AGGRAVATED BY THE PROSECUTOR'S IMPROPER ARGUMENTS IN THE RETRIAL OF THE PENALTY PHASE.

In 1977, when appellant was fifteen years old, he was made a ward of the juvenile court in Florida. A youth intake counselor, John Fry, was charged by the juvenile authorities with supervising appellant; on two occasions over several months of supervision, Fry molested him. At the penalty phase of his trial, appellant sought to introduce the testimony of two other youths who had been molested by Fry in similar fashion when they were juvenile wards in Fry's care, and investigators who had been involved in a subsequent prosecution, as well as Fry's felony conviction for sexual procurement in 1981. The trial court refused to allow the testimony of any of the proffered witnesses, and the only evidence allowed came from Gretchen White, Ph.D., who testified that appellant told her he was molested by Fry on two occasions, and documentary evidence introduced to establish Fry's procurement conviction for the purpose of supporting Dr. White's testimony. However, the court refused to allow Dr. White to testify to the details of her interviews with the two other molest victims. As

discussed following, each of these rulings was erroneous and prejudicial. Furthermore, as presented in *Argument V, ante*, the prosecutor exploited the erroneous rulings and improperly argued to the jury in the retrial of the penalty phase that there was no corroboration for appellant's statements to Dr. White that he had been molested, thus exacerbating the prejudicial effect of the court's errors.

Accordingly, appellant's state and federal constitutional rights to present a defense, to confrontation, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment, were denied when the trial court excluded evidence proffered to corroborate expert testimony that appellant had been molested by a youth counselor, and when the prosecutor misled jurors by improperly arguing there was "no proof of molest." (U. S. Constitution, 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§1, 7, 13, 15, 16 & 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Green v. Georgia* (1979) 442 U.S. 95; *Beck v Alabama* (1980) 447 U.S. 625; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Edwards* (1991) 54 Cal.3d 787, 837-838; *People v. Frye* (1998) 18 Cal.4th 894.)

A. In Limine Hearings and the First Penalty Phase

As with several other claims of error raised with respect to the retrial of the penalty phase, foundational hearings for the erroneous rulings of the trial court originated before

the first penalty phase, and were then revisited before retrial after evidence and arguments had been presented in the first penalty phase. With regard to the present issue, on July 1, 1999, as the prosecution moved towards conclusion of its case-in-chief in the guilt phase, defense counsel broached the subject of appellant's molest as a teenager growing up in Florida while under supervision of the Juvenile Court. Records from Florida had been subpoenaed and delivered to the Alameda courthouse under seal; the records related to John Fry, who had acted as appellant's counselor in 1977. (RT 36: 7499; 50: 10329.)

After the jury returned guilty verdicts, defense counsel advised the court on August 12, 1999, that he would be offering the records to support the testimony of psychologist and social historian, Dr. Gretchen White. Defense counsel argued the offer of Fry's 1981 conviction was corroborative of Louis's disclosure of the molest to Dr. White, who had been assigned by counsel to investigate and prepare a psychosocial history for the penalty phase, and to prepare an opinion in the context of how various risk factors might have impacted Louis's childhood and adolescent development. (RT 50: 10329; *Statement of Facts*, pp. 70; 74-75.) Louis had never revealed the molest until meeting with Dr. White, and after doing so counsel investigated Fry and discovered the conviction, as well as other molest victims. (RT 50: 10330-31.) As defense counsel explained:

> " I've proffered to the Court ... what I believe would be corroborating proof and circumstantial proof that Mr. Fry did in fact molest Mr. Peoples. And that is in the form of, number one, his conviction for procuring a minor for

the purposes of prostitution [in 1981] ...

.....

Mr. Swearingen is not really a part of this, only to the extent Mr. Swearingen and Mr. Fry were both [Florida juvenile counselors] molesting minors, so they were charged as codefendants together."

(RT 50: 10330: 2-15.)

Defense counsel next informed the court he had subpoenaed the two Florida investigating officers (Beseler and Doolittle) on a series of Fry-Swearingen homosexual molest cases, and two victims, Michael Portbury and David Lamson, who had been interviewed and were prepared to testify to facts similar to those related by Louis and as to the adverse impact on their lives; each boy had been molested as they were being transported by Fry in his car. (RT 50: 10331-10333; CT 8: 2216-2219.) Portbury had been involved in an undercover operation in 1980 leading to Fry's arrest – while in bed with another minor – and conviction, and Lamson described to defense investigators how "he was molested while in the custody of Mr. Fry ..., exactly the scenario in which Mr. Peoples alleged that he was molested [oral copulation] by Mr. Fry." (RT 50: 10331: 19-23; 10332; CT 8: 2218-2219.) In addition, counsel explained his proffer of the records and testimony as foundational to the testimony of David Lisak, Ph.D., a clinical psychologist and an expert on treating sexually traumatized males, on the "effects of the molest ... [that] can last with an individual throughout his whole life ..., [and] Mr. Lamson and Mr.

Portbury [can] testify to the lasting effects of their molest by John Fry." (RT 50: 10336: 1-15; see also, *Statement of Facts*, p. 76.) In answer to the court's inquiries, Fox informed the court Louis would not be testifying, and Fry was deceased. (RT 50: 10335; 10338.)

Defense counsel argued the theory of admissibility as hearsay evidence offered not for the truth but as corroboration of the testimony of experts White and Lisak, and as "circumstantial evidence" similar to what is permitted under Evidence Code section 1101, subdivision (b), to show a common plan scheme or design in that "[w]hat happened in 1981 is so similar to what happened to Louis in 1977 that I think the Court should allow it in." (RT 10335: 17-21; 10332.)[214]

The court recognized that "it is a very horrendous experience to have to deal with and struggle with internally," but described the 1981 conviction as "tenuous" and not sufficient evidence that Fry molested more than one child (Portbury and Lamson), and questioned whether other molest victims had "killed people." (RT 51: 10356: 7; 15-17; 50: 10334-10337.) Defense counsel assured the court Portbury and Lamson had not killed anyone, but he explained the broader purpose of mitigation under factor (k) is not necessarily "about causation" but is relevant to "disturbed development." (RT 50: 10357.) Investigators were prepared to testify to a series of charges filed against Fry, and each victim was willing to testify to being molested by Fry, and the psychological struggles

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[214] Counsel cited *People v. Ewoldt* (1994) 7 Cal.4th 380, upholding section 1101, subdivision (b), which in turn permits admission of evidence that "a person committed a crime, civil wrong, or other act when relevant to prove some fact ... other than his or her disposition to commit such act."

encountered after being molested as a teenage victim; as it is an "issue of life and death," citing *Green v. Georgia* (1979) 442 U.S. 95, counsel (Slote) argued "state court evidentiary rules may have to give way if there is information which is relevant and reliable for sentencing purposes." (RT 50: 10345-10346.)

The court saw "no legal basis" to admit Fry's conviction or the proffered testimony, applying Evidence Code section 352 to weigh the probative value of the evidence against the consumption of time, "[b]ut to parade other persons ... who went through an experience of being molested has no relevancy, and it is in addition to that, cumulative" to the proffered testimony of Dr. White and would unduly consume time. (RT 50: 10358.) The court suggested, "either by stipulation or by the document [of Fry's] conviction ..., I don't have a problem with the conviction [a]nd the statement to Gretchen White that Mr. Peoples indicated that he was the victim of being molested by Mr. Fry ..., [and t]hat gives all the latitude and leeway to argue whether or not it occurred, and what impact, if any it had [b]ut the consumption of time and the tenuous nature of Mr. Portbury ... Mr. Lamson ... Mr. Doolittle, is just inappropriate, and we're not going to go there." (RT 50: 10367: 10-25; 10373; see also RT 50: 10336-337; 10358.) The prosecutor agreed with the court's view, "[L]imit it right there: Dr. Gretchen White reviewed records that indicated a conviction of Mr. Fry." (RT 50: 10373: 20-21.)[215]

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[215] As discussed in *Argument V, ante*, this was an episode in which the court chastised Dunlap for engaging in "guffaws" and "throwing of hands in the air."(RT 50: 10341-42.) On August 4, 1999, when Dunlap described the proffer as "very, very aloof," his gyrations prompted one of Judge Platt's ineffectual warnings, "Enough. That's enough. [Fox] is allowed to litigate

On August 13 and 17, the court received additional argument, including the proffer of reports of a defense investigator (Wilson Stewart) regarding his interviews with law enforcement witnesses (Beseler, Doolittle and Newman) in the Fry investigation, with Portbury, Lamson, and Tom Nelson, and with Fry's roommate, who "used to see Mr. Fry all the time with boys coming in and out; and [Nelson] would complain that it was improper ... [a]nd that's what he told authorities, which also led to [Fry's] arrest." (RT 51: 10504: 5-19; CT 8: 2222-2223.) On August 17, 1999, counsel provided an extended written proffer of "molest witnesses re: molest by Fry," but the court still refused to admit any of the proffered evidence except the conviction, "There isn't anything that changes the Court's opinion about the ... inadmissibility of that testimony." (RT 51: 10590-10591; CT 8: 2209-2223; see also, RT 50: 10340; 10349; 10675.)

At the first penalty phase, defense counsel offered the conviction (Exhibit 806) during the testimony of Dr White, and when the court (Judge Delucchi) inquired in the presence of the jury whether Judge Platt had ruled on the admissibility of the abstract of judgment on the Fry conviction, Dunlap readily announced:

> " No objection. Unrelated to the defendant.
>
> .....
>
> Your Honor, a full and accurate explanation of that,
>
> it's a judgment that does not involve the defendant."

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whether or not it could be gotten in through other sources without indicating whether his client is or is not going to testify at this time." (RT 49: 10265: 13-19.)

(RT 57: 11575: 14-15; 22 - 11576: 11-13.)

The court then advised the jury, "[T]his is not being offered for the truth ... [but] as the basis for [Dr. White's] opinion." (RT 57: 11577: 14-16.) Dr. White explained to the jury that Louis had told her that while Fry was transporting him to a juvenile facility across counties, Fry suggested he could make things easier for himself if he allowed Fry to orally copulate him. Then Fry pulled "into an area behind some bushes in the daytime and orally copulated Louis ..., [a]nd then it happened again about four months later." (RT 57: 11578.) On cross-examination of Dr. White, however, the following occurred:

> " Mr. Dunlap: Let's talk about this allegation of molest that Mr. Peoples told you. That's the statement Mr. Peoples gave, correct?
>
> A. Yes, it is.
>
> Q. I mean, there's no court records that verify that?
>
> A. Well, I spoke to the victim in the case that John Fry was arrested for.
>
> Q. Um-hmm. And we have the certified copy of the conviction.
>
> A. Yes."
>
> (RT 57: 11601: 14-23.)

On re-direct examination, the court sustained the prosecutor's objection to defense counsel's questions regarding Dr. White's interviews with Lamson and Portbury to rebut the "recent charge of fabrication" suggested by cross-examination. (RT 57: 11626-11627.)

Dunlap's objection included the following statement before the jury, which was misleading because the prosecutor had not "presented" evidence of Fry's conviction:

> " Mr. Dunlap: Object. This is beyond the scope and ruling we've already had. There is no disagreement Mr. Fry was convicted and is subject to a felony conviction for child molest. People presented that evidence."
>
> (RT 57: 11627: 1-4.)

When Dr. Lisak testified in the first penalty phase, Dunlap pursued a similar line of cross-examination:

> " Mr. Dunlap: Let me stop you there. Let's talk about adolescence. Do you even know when the allegation of molest with Mr. Peoples occurred?
>
> A. Yes. I was told it was during adolescence.
>
> Q. Who told you that? Mr. Fox?
>
> A. Mr. Fox.
>
> Q. You've received no records that show any type of crime report alleging any improper conduct alleged to Mr. Peoples, have you?
>
> A. No."
>
> (RT 57: 11705: 18-27.)

When Dunlap argued his case for the death penalty in the first penalty phase, he reiterated his position on the molest, i.e., Dr. Lisak had not interviewed Louis, but it did not matter, because even though Dr. White had done so, defendant and his counsel might have fabricated the evidence when they found out a former counselor had been convicted of molest:

> " It is misleading. It is another broad-sweeping factor (k). Any sympathetic. Create controversy. Create confusion. Create.
>
> .....
>
> Not a single shred of evidence to connect anything to defendant. It was insulting. It's insulting. God forbid. Molestation .... Mitigation value zero. I mean zero.
>
> And I gotta go back to Dr. Gretchen White. To even think about Dr. Lisak, you gotta believe a hearsay statement offered by him, not offered for the truth of the matter to believe he was molested.
>
> Or is this some creation because he had a counselor later convicted, who, there's an angle. We don't even know. There is no credible evidence....
>
> It's got to be a joke ... We've been misled as to mitigation, 'cause it's a zero."
>
> (RT 60: 12184: 24-26 - 12185: 3-25.)

B. Retrial of the Penalty Phase

On March 27, 2000, before the presentation of mitigation evidence in the retrial of the penalty phase, counsel argued for reconsideration and an expansion of corroborative evidence to include details of Dr. White's interviews with Portbury and Lamson in light of the prosecutor's examination of witnesses, objections, and arguments presented in the first penalty phase. (RT 82: 16987-17020.)[216] Indeed, defense counsel explained that he had learned between trials that Lamson had been molested between 1973-1978, and Portbury in 1979-1980 – whereas Louis alleged the molest occurred in 1977. Fox filed a written supplement to earlier reports of interviews with witnesses, including information that all of the boys had no prior sexual experience, were troubled youths, and were molested by Fry. (RT 82: 17011; CT 11: 3019-3020; 3024; see also CT 8: 2209.)

Notwithstanding the closer proximity of the Lamson molest, and his situation similar to Louis's as a ward of the juvenile court, the court ruled, "I still don't see anything different from the Court's prior rulings, [but] I have no problems with Dr. White indicating that she confirmed her opinion by talking with two other persons, Portbury and

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[216] Indeed, as discussed in *Argument V, ante*, the prosecutor objected to defense counsel's references in opening statement to what he expected Dr. White to opine based upon her interviews with appellant and review of the Fry conviction, "This is exceeding the in limine ruling scopes [sic], there's no offer for the truth of the matter for this issue, or area, unless there was an offer of proof, Your Honor." The court overruled the objection, but Dunlap persisted, "For the truth of the matter, Your Honor." Again, the court overruled him, and informed the jury, "This isn't evidence at this point. [Fox] is indicating what the evidence will show." (RT 77: 16109: 2-14.)

Lamson." (RT 82: 17013: 14-19.) The court would not, however, allow any "specifics as to what Lamson ... or ... Portbury said," because otherwise, "under [Evidence Code §] 352 analysis, the probative value to the corroboration ... to be established by Mr. Fry's conviction ...," would create "the trial within a trial and the consumption of time is not in the best interest ... [and it] outweighs the issue of the probative value where it's established by other means ..., [a]nd then counsel can argue to the jury from respective sides about that credibility, about that corroboration." (RT 82:17013: 20-21-17014: 14-20.)

In an extended exchange, Dunlap conceded the fact that "Fry was a molester ...," and that Louis was in his care, but surmised fabrication of the molest must be at the root of Louis's intimate disclosure to Dr. White of the shameful experience with Fry: "[A]n illusion or some elaborate scheme on the part of Mr. Peoples ... when all of a sudden this came up, Mr. Fry's allegations of misconduct was known to Mr. Peoples ... rumors occur, [and] if Mr. Peoples sent the defense on this hunt." (RT 82: 17010: 5-14.)[217]

With such wild speculation in mind, defense counsel (Laub) sought clarification of the court's rulings because "the prosecution's being disingenuous ..., [Dunlap's] even

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[217] As discussed in *Argument VI, ante*, without *any* evidence to support his accusations, Dunlap employed the same histrionics to convince Judge Platt that Pastor Kilthau's and Pastor Skaggs's testimony of remorse should be excluded as mitigation: "[F]eign. Does the source [Louis] have ulterior motives? Is the source playing a game? I'm a little suspect [sic] when all of a sudden these two individuals who he cries in front of appear on the defense list." (RT 76: 15838-15839; see, *Brown v. Payton* (2005) 544 U.S. 133, 142-143, describing remorse as not unreasonably part of "post-crime character transformation.")

having a hard time even sitting still because of the fact he knows he wants to attack and, yet, he can't say that without opening the door for the full basis for this expert's opinion." (RT 82: 17004: 3-7.) The court specifically foreclosed the testimony of Lamson and Portbury on the ground that it would not allow an "opening of the door" to the "full basis" of their molests during the examination of Dr. White:

> " I don't see ever getting to the issue of the facts and circumstances of Mr. Lamson or Portbury's molest as they relate to Mr. Peoples' molest and whether or not its corroboration.
>
> .....
>
> So the corroboration is there through the conviction and through other means, without going through the entire trial, because that's exactly what it would open up about Mr. Lamson and Mr. Portbury, and that is not going to be allowed."
>
> (RT 82: 17004: 15-18; 17014: 5-9; see also, RT 82: 17016.)

The court's focus on the molest as mitigation "[was] the significance to Mr. Peoples of being molested ... not the manner in which he was molested, but it's the fact of the molest [a]nd whether or not it impacts the rest of his life." (RT 82: 17018: 14-16.) Thus, in the court's view the probative value of other molests was diminished because the import of the molest, not the fact of it, is the issue: "Then you argue whether or not that

[evidence] corroborates what Mr. Peoples has indicated occurred." (RT 82: 17016: 9-10.) In light of the rulings, the court characterized defense counsel's argument that the prosecutor would still attack the molest as "a straw dog argument." (RT 82: 17018: 1.)

Unlike in the first penalty phase, the prosecutor did not directly challenge the truth of Louis's molest by Fry during his cross-examination of Dr. White. (See RT 57: 11601: 14-23.) Dr. White testified on direct examination to her interviews with Louis, his disclosure of the molests by Fry, and her efforts "to try and corroborate this allegation" by talking to Michael Portbury and David Lamson. (RT 90: 18779-18780.) After defense counsel introduced Fry's procurement conviction and a juvenile court document showing Fry had been Louis's counselor, Dr. White expressed her opinion that the molest had been a significant factor in Louis's childhood and adolescent development. (RT 90: 18778-18781; 18783-18784; 18796; 18801; Exhibits 806, 824.) During cross-examination of Dr. Lisak, however, the prosecutor questioned the witness extensively on his unfamiliarity with the specific facts of the case, which Dr. Lisak had conceded during direct examination. (RT 91: 19130-19147.)[218] Dunlap did not directly challenge the evidence

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[218] As pointed elsewhere, in the first penalty phase Judge Delucchi prohibited the prosecutor from rehashing each murder with every witness called by the defense, whereas Judge Platt over objection permitted it; during the retrial the prosecutor devoted much of his cross-examination of Dr. Lisak to detailing the circumstances of the crimes at issue, even though Dr. Lisak readily admitted he was not familiar with the crimes and had not interviewed appellant. (RT 91: 19130-19131; 19142; 19146 [objection sustained to question "what's fearful ... about gunning down [Jun] ..." etc.] The purpose of Dr. Lisak's testimony was to provide the jury with a general framework within the mental health community for understanding the kinds

adduced to show Louis had been molested, but implied Dr. Lisak was unfamiliar with the case facts, including those facts surrounding the "alleged" molest:

> " Mr. Dunlap: Have you reviewed any documentation regarding the alleged molest of Mr. Peoples?
>
> A. No, I have not.
>
> Q. Are you familiar with any crime report as it relates to the alleged molest of Mr. Peoples?
>
> A. No.
>
> Q. Are you familiar with the source and basis of the allegation of molest against Mr. Peoples?
>
> A. No.
>
> .....
>
> Q. So you are just saying that a hypothetical male, an authority figure molests an adolescent, that age [15] it would be reasonable for you to look for rebellious conduct directed towards correctional police and people of authority?
>
> A. It's one area that might, if I take – or one area of conduct that might take, manifest itself, yeah.

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of psychological problems (vulnerability, helplessness, shame, anger, damaged self-concept, and such) encountered by males who have been molested by a homosexual adult during adolescence. (RT 91: 19100-19101; 19147-19148.)

Q. So it is a fair statement, Doctor, that you have no idea how this alleged molest impacted Mr. Peoples?

A. Specifically, yes, I didn't evaluate Mr. Peoples. So I have no opinion about that."

(RT 91: 19144: 20-28 - 19146: 3-12.)

During closing argument to the jury the prosecutor directly attacked the evidence adduced to prove a molest had occurred:

" Dr. Lisak. He's from Boston. He's a professor, a psychologist ... What did he do? Nothing. He did nothing.

.....

He's here to testify about generalities of the male development of the adolescent molest victim, and we'll get to that.

Number one, *we have no proof of molest*. God forbid there is a molest. Absolutely no relevance to this case.

.....

Mitigation value? Nothing .... He's telling you about possibilities, maybe's, could have's, should have's, would have's. Value, zero."

(RT 95: 20153: 3-28 - 20154: 16-21; emphasis added.)

On Monday, May 15, 2000, prior to presenting his summation in the retrial, defense counsel moved for a mistrial based upon prosecutorial misconduct during closing

argument to the jury. (RT 96: 20229; 20390.) Citing the above passage, Fox pointed to the prosecutor's argument on "the lack of proof of molest ... [in] direct contradiction and contravention of what the prosecutor said to the Court that he's not going to argue that there was not a molest; that we made repeated motions to allow the molest victims' statements in through Dr. White as a last resort ..., [but] as a first resort we asked that the molest victims by John Fry actually testify in front of the jury." (RT 96: 20230: 1-8.) It was "improper based on the prosecution arguing successfully for the Court not to allow any of the other evidence in to corroborate the molest." (RT 96: 20230: 15-17.) Dunlap claimed "we never conceded the issue of the molest," but "argued there was no reliable evidence and went on and said if it happened, it doesn't justify what happened 20 years later." (RT 96: 20230: 19-22.) The court deferred ruling on the motion until it could review transcripts.

The following day the court considered further argument, and Fox referred the court to its earlier rulings and Dunlap's representation that he was not contesting the truth of the molest, but rather, "We're just going to say so what," or "characterize the molest as unimportant because there's no causal link from a molest to what happens 25 years later." (RT 96: 20390: 10-11; 18-19.) Dunlap attempted to defend his improper argument to the jury by reciting the transcript (RT 95: 20153), and offered the following *non sequitur*:

> " That is not a violation of the court order. We have never not contested the idea of a molest. We did not attack it. We still do not attack it."

(RT 96: 20391: 6-8.)

The court recollected that its own "thought process was that the probative value [of evidence of molest] was significantly diminished when the issue of whether or not it occurred was not one that was going to be aggressively challenged" by the prosecution. (RT 96: 20391: 23-26.) The court misconstrued Dunlap's argument to the jury as a "concession – whether it be half-hearted or not, there was a concession in regards to had [the molest] occurred," and erroneously asserted the "relevance" of mitigation evidence to a penalty determination "was what was focused on," and, therefore, the prosecutor's argument, "We have no proof of molest" was not misconduct; the motion for mistrial was denied. (RT 96: 20392: 5-8.)

C. The Court Erred In Excluding Testimony from Appellant's Proffered Mitigation Witnesses, Restricting His Expert, and the Prosecutor Improperly Exploited The Ruling to Exacerbate the Prejudice.

The legal principles applicable here are similar to those presented regarding the erroneous exclusion of evidence of remorse and improper prosecutorial argument thereon to the jury. (See *Arguments V-VI, ante.*) The right to present all relevant mitigation evidence proffered for a sentence less than death is well established:

> " Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each

> defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."
>
> (*Lockett v. Ohio, supra,* 438 U.S. at 605.)

Evidence in mitigation must be afforded liberal scope under the Fifth, Sixth, Eighth and Fourteenth Amendments, and in "all but the rarest kind of capital case, [the sentencer must] not be precluded from considering, *as a mitigating factor*, any aspect of defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605; *Stringer v. Black, supra,* 503 U.S. at p. 230.) This Court upheld Section 190.3, enacted in 1978, in *People v. Boyd, supra*, 38 Cal.3d at p. 775, writing that statutory provisions comply with "the constitutional requirement of *Eddings v. Oklahoma, supra,* 445 U.S. 104, and *Lockett v. Ohio, supra,* 438 U.S. 586, incorporated in factor (k), [in] that the jury may be permitted to consider any aspect of defendant's character or record that he offers as a basis for a sentence less than death ...." Without complete consideration of mitigation evidence, any death sentence returned is considered unconstitutionally unreliable and arbitrary. (*Godfrey v. Georgia, supra*, 446 U.S. at p. 427; *Tuilaepa v. California, supra,* 512 U.S. at pp. 974-75; *People v. Frye, supra,* 18 Cal.4th at p. 1015.)

Moreover, in *Tennard v. Dretke* (2004) 542 US. 274, 285, relying on *Payne v. Tennessee* (1991) 501 U.S. 808, 822, the court reiterated that no nexus between mitigation evidence and the crime committed needs to be shown in order to admit mitigation

evidence, and any effort by trial courts to "screen" or limit such evidence is problematic:

> " '[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.' "

As discussed in *Tennard v. Dretke, supra,* 542 US. at pp. 283-284, trial courts must treat mitigation evidence in the "most expansive terms," and the argument that the evidence needs to pass a "constitutionally relevant" standard to be admissible was categorically rejected as in conflict with this "low threshold" standard. Tennard's death sentence was overturned because the Texas sentencing scheme attempted to require a link between evidence of low IQ and the murder. The *Tennard* court held there need be no nexus between mitigation evidence and the crime committed in order for the evidence to be admissible, because "'a State cannot bar 'the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death.' (Citation omitted.)" (*Id.*, at p. 285.)

Evidence of mental health problems and childhood abuse are firmly rooted as mitigation. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [defendant with disadvantaged background and mental health problems may be less culpable than other defendants]; *Boyde v. California* (1990) 494 U.S. 370, 382 [same].) Sexual abuse has been recognized as a critical mitigating factor. In *Wiggins v. Smith* (2003) 539 U.S. 510, 534, for example, the court referred to evidence not adduced at trial as the basis for reversal because of counsel's incompetence, including "the kind of troubled history we have declared

relevant" mitigation evidence, such as, "repeated rape during his ... years in foster care." Indeed, although the dissent claimed the only evidence of sexual abuse came from Wiggins himself, the majority pointed out that rules of evidence should have been "relaxed" to admit the evidence, and Maryland law – similar to California law – recognizes this principle insofar as it relates to mitigation evidence in the penalty phase of a capital murder trial:

> " While the dissent dismisses the contents of the social history report [that counsel failed to uncover], calling Wiggins a 'liar' and his claims of sexual abuse 'uncorroborated gossip' ..., Maryland appears to consider this type of evidence relevant [and admissible] at sentencing ..."
>
> (*Wiggins v. Smith, supra*, 539 U.S. at p. 537.)

As noted in *Argument VI, ante*, the "mechanistic" application of the hearsay rule in the context of mitigation evidence proffered in this case has been disapproved in *Chambers v. Mississippi, supra,* 410 U.S. at p. 302, *Green v. Georgia, supra*, 442 U.S. at p. 97, *Tennard v. Dretke, supra,* 542 US. at p. 285, and *Brown v. Payton, supra,* 544 U.S. pp. 1026-1029. Even where a conflict may exist between a state-created hearsay rule and the rights embodied by the Fifth, Sixth, Eighth and Fourteenth Amendments in the penalty phase of a capital murder trial, the United States Supreme Court has instructed:

> " Regardless of whether the proffered testimony comes

> within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio* [citation omitted] .... In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'
>
> *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973) [fn. omitted.]"
>
> (*Green v. Georgia, supra*, 442 U.S. at p. 97.)

In the present case, the trial court erred in several respects in ruling that the mitigation evidence proffered by appellant with respect to the molest by Fry was limited to Dr. White's testimony, Fry's felony conviction, and to her effort to try to corroborate the molest. First, the trial court misunderstood the nature of the mitigation evidence as "not the manner in which he was molested, but it's the fact of the molest [a]nd whether or not it impacts the rest of his life," and, therefore, erroneously restricted it. (RT 82: 17018: 14-16; RT 36: 10356-10358; *Tennard v. Dretke, supra,* 542 U.S. at p. 285.) As defense counsel pointed out in his initial offer of proof of the facts surrounding the Portbury and Lamson molests as corroborative of appellant's statement to Dr. White, as well for the opinion testimony of Dr. White and Dr. Lisak, whether the molest impacted "the rest of [Louis's] life" was only one facet of the evidence of molest; mitigation evidence is not

limited to "causation" but may provide insight into "a disturbed development." (RT 50: 10357; *Tennard v. Dretke, supra,* 542 US. at pp. 283-285.) The trial court erroneously concluded before the first penalty phase:

> " [T]here is no tie to Mr. Peoples' circumstances ... There are so many variables and so much difference and so widespread that it adds little or no corroboration.
>
> What you want to corroborate ... is, well, it adversely affected these guys [Portbury and Lamson], so it adversely affected Mr. Peoples, which is part of what caused him to go out and do these things.
>
> .....
>
> [I] think it is fair game and absolutely appropriate for an expert to come in and say Mr. Peoples told me he was molested, and molestation is something the victims deal with and struggle with for a good part of the rest of their life and affects lots of things they do ...
>
> But to parade other persons through who went through an experience of being molested has no relevancy, and it is in addition to that, cumulative.
>
> And in addition to that, there is a 352 issue in terms of undue consumption of time about what these persons did or didn't do and how adapted to it or didn't adapt to it ..."
>
> (RT 50: 10356: 20-28 - 10357: 28 - 10358: 1-12.)

Clearly, there was no cumulative evidence of the "fact of molest," as the only evidence of the molest was appellant's statement that he was molested in 1977, and Fry's sexual procurement conviction in 1981. The proffer of testimony included victims Michael Portbury and David Lamson, as well as investigators Beseler, Doolittle and Newman, familiar with the pattern and extent of molests committed by Fry, and Fry's roommate (Nelson), who was privy to the pattern as well. (CT 8: 2209-2223.) Not disagreeing with the proffer as being analogous to evidence admissible under Evidence Code section 1101, subdivision (b), the trial court relied erroneously upon Evidence Code section 352 to find the "probative value" of the evidence was outweighed by an "undue consumption of time," thereby violating appellant's state and federal constitutional rights. (See *People v. Ewoldt* (1994) 7 Cal.4th 380; RT 50: 10336-10337; 10358; 10367; 10373; 10358; RT 51: 10590-10591; RT 82: 17013 - 17014.) However, neither section of the Evidence Code authorizes exclusion of such mitigation evidence in the penalty phase of capital murder trial, and molest evidence was of the kind "'a State cannot bar [for] 'the consideration of ... if the sentencer could reasonably find that it warrants a sentence less than death.' (Citation omitted.)" (*Tennard v. Dretke, supra*, 542 U.S. at p. 285.)

As it had done with evidence of remorse, the trial court purported to "agree" with defense counsel's assertion of broader federal constitutional principles supporting admissibility of evidence of molest (RT 50: 10332; 10345), but then ignored "Fifth, Sixth, Eighth and Fourteenth Amendments ..., an issue of due process ...," and ruled under state-created law that "no windows [are] here, and [the rules of Evidence] won't be thrown out"

to exclude viable mitigation evidence. (RT 50: 10346.) The trial court deprived appellant of his federal constitutional rights by improperly restricting and excluding mitigation evidence under state-created law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Beck v. Alabama, supra*, 447 U.S. at p. 637; *Lockett v. Ohio, supra,* 438 U.S. at p. 605; *Stringer v. Black, supra,* 503 U.S. at p. 230; *Green v. Georgia, supra*, 442 U.S. at p. 97.)

Indeed, the Portbury and Lamsen molests were critical to appellant's case in mitigation because they not only corroborated Louis's statement to Dr. White, but also confirmed the abusive environment in which Louis was placed by the juvenile court. Rather than receiving counseling for his increasing drug addiction and other problems, Louis was subjected to sexual predation by an adult in a position of trust. In *Porter v. McCollum* (2009) 558 U.S. - , 130 S.Ct. 447, 455, the court reversed a death judgment where the Florida Supreme Court "unreasonably discounted the evidence of Porter's abusive childhood ..., especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [victim] Williams." (See also *Williams v. Taylor* (2000) 529 U.S. 362, 395-396 [evidence of abusive foster care and "nightmarish childhood" not uncovered by counsel violated defendant's right to present mitigation]; *Rompilla v. Beard* (2005) 545 U.S. 374 [evidence of abuse not uncovered by defense counsel violated defendant's right to present mitigation]; *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100 [trial court could not have excluded evidence of mental health problems and disadvantaged childhood, including sexual abuse, that defense counsel failed to competently investigate]; *People v. Frye, supra*, 18 Cal.4th at pp. 1015-1017

[error to exclude witness proffered to mitigate sexual assault conviction used by prosecution to show a pattern of violence]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1030 [defendant entitled to have jury consider mental disorder as factor in mitigation, whether or not the mental condition caused him to commit the crimes].)

The trial court here erroneously ruled defense counsel failed to show a nexus between the "horrendous experience" of being molested by a youth counselor and why appellant "killed people" (RT 51: 10356: 7; 15-17; 50: 10334-10337). The weight of the evidence is for the jury to decide. (*Tennard v. Dretke, supra*, 542 US. at pp. 283-285.)

In re Lucas (2004) 33 Cal.4th 682, is illustrative. This Court reversed the death verdict imposed where no mitigation was presented at trial, affirming the importance of childhood abuse as mitigation, as well as the admissibility of evidence of sexual abuse through other victims to infer defendant was abused. Larry Lucas was confined in juvenile facilities for most of his childhood after Ohio authorities uncovered abuse at the hands of family members. During his tenure at one juvenile institution, Lucas was housed in a facility described by other inmates:

> " [A] 13-year resident at Shawen Acres, Oran Fisher, who was an older resident while petitioner was residing there, testified that the place was 'mean,' that the supervisors abused the residents, including Fisher, with grotesque punishment for trivial offenses or for no offense at all, and that some residents were subject to sexual abuse. He recounted

an appalling tale of extreme cruelty and abuse on the part of the adults who resided with and supervised the children, and testified that abuse was commonplace, as was sexual abuse of children by older children. He recalled petitioner as a problem child who would not 'go along with the program' but just wanted to 'do what he wanted to do.' Petitioner's cousin, Larry Lambert, also stated in his declaration that he had been housed at Shawen Acres after his mother died, and that it was an unpleasant place where sexual abuse of children occurred."

(*Id.*, at p. 714.)

After reviewing the evidence presented at the hearing, this Court rejected the Attorney General's exception to the finding of the referee "that petitioner 'was physically, sexually, and emotionally abused by his Shawen Acres cottage parents,'" and affirmed the referee's finding based upon the declarations of others:

" Respondent is correct that, in support of this conclusion, the referee cited the deposition of Oran Fisher who, although he asserted that many of the adult supervisors at Shawen Acres were grossly abusive and that he himself had suffered abuse, did not state that he had seen petitioner being abused. In his declaration, Larry Lambert also stated

> he had heard that residents were sexually abused by Shawen Acres staff, but he also did not recount any incident specifically involving petitioner. The referee legitimately could infer, however, from Fisher's account of the severe abuse meted out to any inmate who did not obey the abusive adult supervisors at Shawen Acres, that petitioner suffered abuse for his failure to 'go along with the program.'"
>
> (*Id.*, at p. 717.)

Dr. White testified to her interviews with Louis and her efforts to corroborate his claims by talking with Lamson and Portbury. Fry's conviction and a Juvenile Court document showing Fry had been Louis's counselor were properly admitted, but the court erroneously excluded the direct testimony of Portbury, Lamson and the Fry investigators, and improperly restricted the "details" of Dr. White's conversations with Portbury and Lamson. (RT 90: 18778-18781; 18783-18784; 18796; 18801; Exhibits 806, 824.) Had the witnesses been allowed to testify, or had the Dr. White been permitted to explain the details of her conversations with Portbury and Lamson, there would have been little room to challenge the credibility of the disclosure of molest, and jurors could have inferred Louis had been molested. (*In re Lucas, supra*, 33 Cal.4th at p. 717.)

According to the trial court, however, the issue was erroneously framed as one of "the significance to Mr. Peoples of being molested ..., not the manner in which he was molested, but it's the fact of the molest [a]nd whether or not it impacts the rest of his life."

(RT 82: 17018: 14-16.) The "details" of appellant's statement of molest were corroborated by the Portbury and Lamson statements; Fry was their counselor when both were wards of the Florida Juvenile Court, and Fry molested both boys before and after appellant was molested. Not only was their testimony independently admissible to show the abusive conditions in which Florida juveniles had been supervised during Louis's term as a ward of the court, but it was admissible to support the inference he had been molested. (*In re Lucas* (2004) 33 Cal.4th at p. 717; *Wiggins v. Smith, supra*, 539 U.S. at p. 537.)

Moreover, as a social historian and qualified expert, Dr. White was entitled to explain the details of the statements of Portbury and Lamson in order to support her opinion and to corroborate appellant's statement to her. (*In re Lucas, supra,* 33 Cal.4th at p. 715 [various mental health experts relied on documentation of abuse reported by petitioner and others]; *Wiggins v. Smith, supra,* 539 U.S. at pp. 532, 537 [social historian/psychologist report relying on hearsay]; *Karis v. Calderon*, (9th Cir. 2002) 283 F.3d 1117, 1135 [substantial mitigating case may be impossible to construct without presentation of complete social history].) While the trial court did not exclude all evidence of molest, it excluded evidence that was neither irrelevant to the case in mitigation nor cumulative to any other evidence. Allowing Dr. White to testify to Louis's statements to her, and admitting documentary evidence of Fry's molest conviction, left the jury with an uncorroborated presentation.

Furthermore, in *People v. Lucero, supra*, 44 Cal.3d 1006, this Court held that the trial court committed prejudicial error when it excluded the testimony of a Viet Nam

Veteran with degrees in psychology and social work. Notwithstanding the testimony of a defense psychiatrist who diagnosed the defendant with Post Traumatic Stress Disorder, the Court stated that because there existed "considerable debate" about the syndrome, and whether a diagnosis could be made at all, in light of the prosecution's attack on the first expert, "evidence from a second expert to the effect that defendant meets the profile of one suffering from the syndrome, should not be deemed cumulative." (*Id.*, at p. 1031.)

The trial court not only erroneously ruled that none of the proffered witnesses could testify to similar molests to corroborate appellant's statement to Dr. White, but the court improperly restricted Dr. White's testimony to exclude the "specifics" of her conversations with Portbury and Lamson in the retrial of the penalty phase. It also erred by suggesting the evidence was cumulative because the prosecutor had set up a "straw dog" and would not attack the fact of molest. (RT 82: 17018: 1.) In fact, the prosecutor exploited the erroneous rulings and attacked the molest as a fabrication and worthless as mitigation. (See *Argument V, ante*; *Wiggins v. Smith, supra*, 539 U.S. at p. 537 [dissent refers to defendant as a 'liar' and his uncorroborated statement as 'gossip'].)

As a result of the errors committed below, it cannot be said the exclusion of proffered mitigation evidence of Fry's molest of Portbury and Lamsen, as well as evidence of investigators and Fry's former roommate, and restrictions on Dr. White's testimony, were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.) In light of the prosecutor's argument to the jury that "we have no proof of molest" (RT 95: 20153), it is clear from the

record below that the prosecutor not only wanted the proffered evidence excluded, but, if admitted by the court, he planned to attack the molest as "an illusion or some elaborate scheme on the part of Mr. Peoples ... when all of a sudden this came up, Mr. Fry's allegations of misconduct [became] known to Mr. Peoples ... rumors occur, [and] ... Mr. Peoples sent the defense on this hunt." (RT 82: 17010: 5-14; see *Wiggins v. Smith, supra*, 539 U.S. at p. 537 [mere 'gossip'].) Dunlap argued lack of corroboration for the molest in both trials, even though on penalty retrial defense counsel sought and obtained restrictions on the prosecutor based upon the motion for reconsideration. (RT 60: 12184-12185; RT 95: 20153.) Despite those rulings and admonitions, but consistent with his pattern of misconduct discussed in *Argument V, ante*, the prosecutor exploited the court's erroneous rulings and exacerbated the prejudice in his argument to the jury for the death penalty:

> " Number one, *we have no proof of molest*. God forbid there is a molest. Absolutely no relevance to this case.
>
> .....
>
> Mitigation value? Nothing .... Value, zero."
>
> (RT 95: 20153: 3-28 - 20154: 16-21.)

As pointed out above, Judge Platt recollected that his own "thought process was that the probative value [of evidence of molest] was significantly diminished when the issue of whether or not it occurred was not one that was going to be aggressively challenged" by the prosecution. (RT 96: 20391: 23-26.) However, in reviewing Dunlap's argument in the retrial of the penalty phase, Judge Platt erroneously characterized

Dunlap's argument to the jury as a "concession – whether it be half-hearted or not, there was a concession in regards to had [the molest] occurred," asserting that it was the "relevance" of the molest as mitigation evidence to a penalty determination that Dunlap "focused" on, and, therefore, the prosecutor's argument, "We have no proof of molest" was not misconduct. (RT 96: 20392: 5-8; 95: 20153.) The court not only erred in denying the motion for mistrial based on the prosecutor's misconduct in arguing there was no "proof of molest," but also when it unreasonably discounted the importance of the molest, characterizing it as of "zero" mitigation value. (*Porter v. McCollum, supra* 558 U.S. - , 130 S.Ct. at p. 454-455.)

As pointed out elsewhere, the mistrial – eight to four for life imprisonment – in the first penalty phase in August,1999, and the jury deliberations over 12 days and 30 hours in the retrial, with indications that three jurors voted for life imprisonment after 20 hours of deliberations, demonstrates this was a close case even without the full presentation of the proffered evidence of molest. (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 779-780; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163, disapproved on other grounds, *Calderon v. Coleman* (1998) 525 U.S. 141, citing *People v. Murtishaw* (1998) 29 Cal.3d 733.) For all of the foregoing reasons, judgment must be reversed. (*Chapman v. California, supra,* 386 U.S. 15.)

XII.

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT ADMITTED INFLAMMATORY AND CUMULATIVE PHOTOGRAPHS.

Appellant objected to gruesome photographs introduced at the guilt phase of his trial as inflammatory and cumulative to lay and expert testimony, especially since the photographs were related to undisputed or irrelevant issues. He renewed his objection to the photographs in the retrial of the penalty phase. Appellant contends the prejudice of admitting the photographs far outweighed their probative values. As a result of the erroneous admission of the photographs, and the prosecutor's improper use of them in the retrial of the penalty phase, appellant's state and federal rights to present a defense, to confrontation, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and against cruel and unusual punishment, were violated. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I, Sects. 1, 7, 13, 15, 16 & 17; Evidence Code §§ 210, 350, 352; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 443 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; *People v. Heard* (2003) 31 Cal.4th 946, 972 *People v. Carter* (2005) 36 Cal.4th 1114, 1164-1171; *People v. Davis* (2009) 46 Cal.4th 539, 614-615.)

This Court has set ground rules for a two-prong inquiry to evaluate the admissibility

of photographs. First the photographs must be relevant to a material and disputed issue. Second, the probative value of the photographs must outweigh their prejudicial impact. (*People v. Carter, supra,* 36 Cal.4th at p. 1166; *People v. Heard, supra,* 31 Cal.4th at p. 972; *People v. Hendricks* (1987) 43 Cal.3d 584, 594; *People v. Turner* (1984) 37 Cal.3d 302, 320-321.) Probative value must be determined in conjunction with other evidence, such as whether the photographs are merely cumulative to other evidence (*People v. Turner, supra*, 37 Cal.3d at 320-321; *People v. Anderson* (1987) 43 Cal.3d 1104, 1137), although autopsy photographs that are offered to illustrate testimony are not necessarily inadmissible simply because they are cumulative (*People v. Heard, supra*, 31 Cal.4th at p. 976). As noted in *People v. Hall* (1980) 28 Cal.3d 143, 152, however, even if proffered evidence appears probative it is still not necessarily admissible:

> " If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code Sections 210 and 350 respectively."

When counsel is willing to stipulate to facts not in dispute, it may be error to admit uncontroverted evidence. (*Ibid.*; *People v. Yoshimura* (1986) 91 Cal.App.3d 609, 622.)

On appeal the court reviews the trial court's findings for abuse of discretion, and in doing so it may independently view the photographs to determine whether they are unduly gory or inflammatory. (*People v. Heard, supra*, 31 Cal.4th at pp. 976-977; *People v. Carter, supra*, 36 Cal.4th at p. 1168; *People v. Davis, supra,* 46 Cal.4th at p. 615.)

In the present case, in light of appellant's admissions defense counsel expressed a

willingness to stipulate to the cause of death of each homicide victim, and moved to exclude autopsy photographs during the guilt phase as irrelevant, inflammatory, and cumulative. (RT 9: 1745-1746; 1749-1750; CT 5: 1431-1435.) Stipulations were reached as to the recovery of the bodies of each victim and to the fact that autopsies were performed by Dr. Fitterer. (RT 10: 2033 - 18-19; CT 6: 1545-1548.) Nonetheless, appellant's willingness to stipulate to the cause of death was rejected by the prosecutor because there was no "stipulation from counsel that says guilty of first degree murder with special circumstances." (RT 9: 2024.) Defense counsel filed a motion to exclude autopsy photographs, and also brought to the court's attention the fact that the prosecution had not provided any preview of photographs proffered for trial. The court erroneously denied the motion to exclude autopsy photographs as to each victim, incorrectly finding prejudice did not outweigh the probative value of the evidence. (CT 5: 1431-1435; RT 9: 1883-1889; 2017-2030.) Over objection, Dr. Fitterer was permitted to testify during the guilt phase using numerous gruesome photographs, cumulative to the manikins used to demonstrate bullet paths, the nature of the wounds, and causes of death as to each victim. (See, RT 30: 5983-6058; 31: 6317-6318; [Loper, Exhibits 101-104]; 32: 6328-6352; 6491-6493; [Chacko, Exhibits 180-182; 185; 187; 189]; 33: 6635-6676; 6780; [Yu, Exhibit 232; Gao, Exhibits 228-230].)

At the retrial of the penalty phase, appellant moved to exclude the autopsy photographs admitted during the guilt phase through the testimony of Dr. Fitterer, on the ground it would violate his rights under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution, as well as his rights under Article I of the California Constitution, Penal Code section 190.3, and Evidence Code section 352. (CT 10: 2704; RT 82: 17086-17089; 17090-17178.) He specifically objected to Dr. Fitterer's testimony in its entirety on those grounds, but his objections were overruled and Dr. Fitterer's testimony was admitted as "appropriate testimony for the penalty phase of trial, under the umbrella of the facts and circumstances of the crime." (RT 82: 17087; CT 10: 2704; 13: 3388.)

In *People v. Anderson, supra,* 43 Cal.3d at p. 1137, *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269, *People v. Marsh* (1985) 175 Cal. App.3d 987, 998, and *People v. Boyd* (1979) 95 Cal.App.3d 577, 589-90 [disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 835-836], error was found in the admission of gruesome autopsy photographs where the cause of death was not in dispute and the photographs were cumulative to testimony of expert and lay witnesses. Although this Court has "'often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony' (citations omitted)" (*People v. Heard, supra*, 31 Cal.4th p. 976), in the present case the autopsy photographs were not only inflammatory but cumulative to appellant's admissions, forensic scene reconstruction testimony, and medical testimony as to the manner and cause of death, which included – over objection – use of wooden dolls to illustrate the cause of death of each victim. It was unquestionably more prejudicial than probative, and the trial court abused its discretion by admitting the photographs in the guilt

phase and penalty retrial, especially where the purpose and effect of the evidence was nothing other than an appeal to jurors' emotions, as demonstrated by the prosecutor's misuse of the them during argument to the jury on retrial of the penalty phase.

As discussed in *Arguments V* and *VI, ante*, the prosecutor juxtaposed gruesome autopsy photographs in the retrial of the penalty phase against love letters written by appellant to his wife in order to improperly fuel juror's emotions by arguing appellant's lack of remorse. The admission of these photographs infused the trial with unfairness and deprived appellant of his rights to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and article 1, sections 7 and 15 of the California Constitution. (*Lisenba v. California* (1941) 314 U.S. 219, 228; *Riggins v. Nevada* (1992) 504 U.S. 127, 147 [Thomas, J., dissenting opn.]; *People v. Cavanaugh, supra*, 44 Cal.2d at pp. 268-269.) Thus, it is reasonably probable a more favorable verdict to appellant would have occurred had the jurors not been exposed to unnecessarily cumulative and inflammatory evidence, which was used by the prosecutor to inflame the jury's passions. (*People v. Hendricks, supra,* 43 Cal.3d at 594-595; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cavanaugh, supra,* 44 Cal.2d at pp. 268-269.) In light of the foregoing, the guilt phase and penalty retrial were fundamentally unfair as a result of admission of the photographs, and it violated appellant's previously enumerated constitutional rights; it cannot be said the admission of the photographs was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *Ford v. Wainwright, supra,* 477 U.S. at p. 411; *Hicks v. Oklahoma, supra,* 447 U.S. 343.)

XIII.

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY PERMITTING THE PROSECUTOR TO INTRODUCE IRRELEVANT, INFLAMMATORY AND CUMULATIVE DETAILS OF EACH CRIME DURING CROSS-EXAMINATION OF DEFENSE WITNESSES.

At various junctures during the guilt phase and retrial of the penalty phase appellant objected to the prosecutor's irrelevant, inflammatory, cumulative and prejudicial cross-examination of defense witnesses. (See *Arguments III, V* and *XII*, *ante*, and *XIV*, *post*.) As discussed following, the trial court erroneously permitted the prosecutor – over various objections and motions for mistrial – to retrace the details of each crime, using inflammatory devices, such as gruesome autopsy photographs and manikins, with defense witnesses in both the guilt phase and the retrial of the penalty phase.

While a trial court has broad discretion to determine the relevance of evidence, it lacks discretion to admit irrelevant evidence:

> " Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends 'logically,

naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.] (*People v. Garceau, supra,* 6 Cal.3d at p. 681.)"

(*People v. Heard* (2003) 31 Cal.4th 946, 972-973;

People v. Chatman (2006) 38 Cal.4th 344, 371.)

It is an abuse of discretion to admit relevant evidence when its probative value is outweighed by its inflammatory or cumulative nature. (*People v. Coleman* (1985) 38 Cal.3d 69 [court abused discretion by allowing cross-examination of defense experts on contents of letter of deceased victim].) In this case the admission of irrelevant, inflammatory and cumulative prosecution evidence at both the guilt and penalty phases was especially egregious, and it improperly infused the trial with unfairness, denying appellant due process under state and federal constitutions. (*People v. Cavanaugh, supra*, 44 Cal.2d at pp. 268-269; *People v. Anderson* (1987) 43 Cal.3d 1104, 1137; *Lisenba v. California* (1941) 314 U.S. 219, 228.) A death sentence must not be based upon extrinsic factors "constitutionally impermissible or totally irrelevant to the sentencing process." (*Zant v. Stephens* (1983) 462 U.S. 862, 885.)

As a result of the trial court's erroneous rulings, appellant's state and federal rights to due process, to a fair trial, to present a defense, to reliable guilt and penalty determinations, and against cruel and unusual punishment, were violated by the introduction of prejudicial evidence at both phases of his trial. (United States Const., 5th, 6th, 8th and 14th Amends.; Cal. Cal. Const., Art. I, Sects. 1, 7, 13, 15, 16, 17; Evidence

Code §§ 210, 350, 352; *Lisenba v. California, supra,* 314 U.S. at p. 228; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349; *Beck v. Alabama* (1980) 443 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18; *Johnson v. Mississippi* (1988) 486 U.S. 578; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269; *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.)

A. Background

1. The Guilt Phase

During the second day of cross-examination of Dr. Wu in the guilt phase, it became clear that the prosecutor intended to "walk through the crime scenes individually" with defense brain experts by using manikins, photographs, blood spatter, and other forensic evidence related to each crime, "looking at various elements of intent, premeditation, lack of impulsivity, specifically organization and planning ..." (RT39: 8088:17-18-8089:11-13.)

When defense counsel objected to such examination of defense experts on relevancy grounds, Judge Platt interrupted, "The objection's been noted, and it's relevant." (RT 39: 8089: 9-10.) During the direct examination of Dr. Wu, the court had overruled the prosecutor's objections to the opinion that the brain scans show "impaired frontal lobe function" and "demonstrates impaired ability to inhibit aggressive impulses..." (RT 39: 8238-8239.) However, because Dr. Wu testified to "the condition of Mr. Peoples' brain [as it] inhibits or prohibits" organized thinking, the court indicated it would allow cross-

examination on the details of each crime. (RT 39: 8089)[219] Repeated objections on relevancy and other grounds during the lengthy cross-examination of Dr. Wu on the facts of each crime were overruled. (RT 39: 8125; 8137-8139; 8148-8149; 8150; 8161-8167.)

Indeed, during the second day of cross-examination of Dr. Wu, the prosecutor recited the details of each crime, even though Dr. Wu admitted he was unfamiliar with the facts because they were not necessary to, or relied upon, to form his opinion on the PET scan results. After defense counsel's objection under Evidence Code section 352 was overruled when the prosecutor asked Dr. Wu if he was "aware whether or not [Louis] was armed with a weapon," and Dr. Wu replied that he "assumed" Louis was armed during the commission of the crimes, Dunlap referred to the *Glock* .40 caliber handgun with an irrelevant and inflammatory demonstration:

> " Q. This isn't just a weapon, this is a handgun, this is automatic, this is a police weapon, .40 caliber. Are

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[219] Enacted in 1984, Penal Code section 28 precludes evidence of mental disease except as it may reflect upon actual mental states required for certain crimes, and section 29, reads: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect, shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." As discussed following, in *People v. Coddington* (2000) 23 Cal.4th 529, 582-583, this Court distinguished use of expert testimony in the guilt phase for mental defects to show lack of ability to form "actual" mental states from prohibited opinion as to whether the defendant had a specific purpose, intent, knowledge or malice aforethought at the time of the offense.

you familiar with that type of weapon?

A. Not specifically."

(RT 39: 8139: 20-23.)

As Dunlap proceeded with the details of each crime, and Dr. Wu admitted he was "not specifically" aware of them, Dunlap asked Dr. Wu whether he was aware of the facts surrounding James Loper's homicide; Dr. Wu again responded that he was "not specifically" aware of the details. Fox objected to "this whole line of questioning," as "[t]his witness testified that he does not have knowledge of crime reports or specific instances and events." (RT 39: 8160.) In the presence of the jury, the court responded:

" Objection overruled. He voiced an opinion about the ability of an individual with a PET scan as he described it, and the likelihood or the ability to limit or address issues of impulse. These questions are directly related and relevant to that issue."

(RT 39: 8160-8161.)

The prosecutor "walked through" details of each crime with Dr. Wu. (RT 39: 8139-8168.)

During the direct examination of Dr. Amen, however, after he provided an opinion as to the abnormal SPECT scan he had observed, the court sustained objections to defense counsel's questions whether "brain functioning of Mr. Peoples is consistent with the nature and extent of the crimes," and "whether or not Mr. Peoples, actually, at the time of these crimes, had irrational behavior?" (RT 40: 8339.) The court instructed the jury that

defense counsel's questions were not proper, and then read Penal Code sections 28 and 29 to the jury. (RT 39: 8351-8352.) Fox then concluded his examination of Dr. Amen, who opined the abnormal SPECT scans reflected impaired "temporal [lobe] functioning" for memory, language and mood instability, as well as "prefrontal cortex ..., the executive part of the brain ... [for] impulse control, planning, organization and so on." (RT 40: 8353.)

The prosecutor's improper examination continued with Dr. Amen:

> " Q. Do you recall looking at any type of reconstruction or diagrams that showed the grouping of shots there at Cal Spray?
>
> Mr. Fox: Judge, I would object, under [Evidence Code] section 352. I would ask for an offer of proof.
>
> The Court: Overruled.
>
> The Witness: I don't recall.
>
> Q. Well, do you know what the grouping of shots was?
>
> A. No."
>
> (RT 40: 8416: 2-11.)

The next day, during cross-examination on the details of the *Bank of the West* robbery, the prosecutor asked Dr. Amen about his knowledge of the *Glock* .40 caliber handgun:

> " Q. What is a semiautomatic handgun to you?
>
> Mr. Fox: Judge, I'll object, that's beyond the scope.
>
> The Court: Overruled."

(RT 41: 8432.)

After repeating the facts of each crime (RT 41: 8432-8459), the prosecutor then asked Dr. Amen:

" Q. Do you know if Jun Gao, after he was struck in the head, do you know if Besun Yu cowered down behind the cash register counter?

Mr. Fox: I'll object. [Evidence Code section] 352.

The Court: Sustained.

Mr. Dunlap: Do you know the position of Besun Yu when she was struck by bullet fire?

Mr. Fox: Judge, may we take a break? I need to make a motion."

(RT 40: 8459: 11-19.)

When defense counsel reiterated his argument that the "positions of the wounds and angles" and other details of the crime scenes were "completely irrelevant," and that under Evidence Code section 352 it was so prejudicial "to remind the jury of all these horrible facts," the court overruled the objections and, as discussed in *Arguments III* and *V, ante*, admonished both counsel for "editorialization." (RT 41: 8460-8461.)

When the prosecutor continued his cross-examination of Dr. Amen, out of the presence of the jury defense counsel objected to "the line of questioning in regards to the whole crime scene scenario ... [c]learly ... done to reiterate all of the alleged facts of the

case, [and to] prejudice the jury ... and [it is] cumulative." (RT 40: 8417: 25-28 - 8418: 17-18.) The court overruled the objections on the grounds that the examination was relevant and not prejudicial "under [Evidence Code section] 352 analysis." (RT 40: 8421.) Fox moved for a mistrial on the ground the trial court's "approval of the prosecutor going into every single detail of every single crime," violated appellant's rights under the United States Constitution, "especially under the Eighth Amendment ..., and also under California Constitution, Article 1, Sections 7, 15, 16, and 17," but the court erroneously denied the motion. (RT 40: 8421.)

As the prosecutor continued the next day with a full line of examination of Dr. Amen as to each crime, defense counsel objected again to the prejudicial nature of the examination, and to the relevancy of "this whole line of questioning by the prosecutor [designed] to elicit opinions that are specifically proscribed by Penal Code sections 28 and 29," and requested at least a limiting instruction on the purpose of the questioning and the responses. (RT 41: 8461: 24-26.) The trial court erroneously overruled the objection and refused to provided a limiting instruction to the jury: "[E]ven under a [Evidence Code] section 352 analysis, all that has been previously presented to the jury in a factual scenario [of each crime] ... is consistent with the facts that have been testified to ... [and are] only a piece of the puzzle the jury is to consider." (RT 41: 8463: 16-26.)

Similarly, the court refused to curtail the prosecutor's examination Dr. Buchsbaum on the details of each crime recited before the jury. At the conclusion of Dr. Buchsbaum's direct examination, he testified that he had considered "together Dr. Wu's

[PET] scan and Dr. Amen's [SPECT] scan" and concluded appellant has a defect in his frontal lobe. (RT 41: 8574.) During one exchange in the presence of the jury, the court again declined to admonish the jury as to the limitations of the evidence:

> " Mr. Fox: I'd ask the Court for a limiting instruction that this whole line of questioning is not for the truth of the matter asserted, but just for the expert's opinion, as phrased.
>
> The Court: Objection – your request is denied. Its testimony that has been presented. [The prosecutor is] entitled to question him on the facts and the testimony, what knowledge, if any, he has of that."
>
> (RT 42: 8727: 14-21.)

The prosecutor's improper line of questioning continued for the remainder of the cross-examination of Dr. Buchsbaum, but with several defense objections sustained as "argumentative" and "improper." (RT 42: 8727-8755.) At the conclusion of Dr. Buchsbaum's testimony, defense counsel moved for a mistrial as to the "completely improper [and] misleading" line of cross-examination of all three psychiatrists, who are not "forensic scientists," and as it denied appellant's state and federal constitutional rights to a fair trial and to a reliable verdict. (RT 42: 8762: 27-28 - 8763: 1-9.) The court informed counsel, "I don't think you need to make it again, but it's been made," and

"based upon the same rulings," the motion for mistrial was denied. (RT 42: 8763: 17-21.)

Judge Platt refused to limit the prosecutor's improper examination of defense witnesses throughout the guilt phase of trial. Defense counsel's motion for mistrial at conclusion of the guilt phase, on the ground the court had erroneously encouraged Dunlap's improper examination of witnesses, was denied:

> " As it relates to .... the issue of the cross-examination of the experts by a factual scenario or questioning of how familiar they were or were not ... with the facts of the case, [the] Court's opinion is still that that is appropriate cross-examination when an expert, or a layperson for that matter, provide or opine opinions [sic] about scenarios and/or states of mind as it relates to this particular case.
>
> The specific acts of an individual as testified to by others is clearly appropriate food for thought as it relates to the issue of the ultimate opinions expressed. And the significance of that food for thought, and the weight to be given and a weight to be given the ultimate opinion are all appropriate issues for the trier of fact."
>
> (RT 45: 9290: 5-18.)

As a result of the erroneous rulings, not only did the jury hear the details of the *Cal Spray* and *Bank of the West* incidents, but the gruesome details of the Loper, Chacko and

Yu/Gao homicides that had been detailed in the testimony of law enforcement personnel, lay witnesses, and forensic specialists in the prosecutor's case-in-chief were repeated *three* additional times through defense witnesses, Dr. Wu, Dr. Amen and Dr. Buchsbaum.[220]

2. First Penalty Phase

As noted elsewhere, in the first penalty phase in 1999, after Judge Platt was replaced because of his heart attack, Judge Delucchi recognized that the prosecutor's attempt to confront certain witnesses about the details of the crimes could be more prejudicial than probative, and cumulative. The prosecutor attempted to continue the same approach he had used with experts in the guilt phase with lay witnesses during first penalty phase, but Judge Delucchi properly denied him the opportunity to inflame jurors by repeating the details of each crimes. (RT 56: 11406 - 11407.)

Guy Lazzaro was called as a defense witness. Lazzaro, who had worked with Louis in Florida in 1992, had been called in the first penalty phase and he testified Louis was a good worker, one he would rehire if given the opportunity. (RT 56: 11392-11405.)

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[220] As discussed in detail in *Argument V, ante*, pp. 252-254, Fox repeatedly objected to the use of 14-inch wooden figurines – representing each of the five victims – being placed on counsel's table in plain view of the jury. When Dunlap responded, "We're entitled to have all our evidence out," including the "figurines have been placed on a daily basis [to] ... represent the victims in this case," Judge Platt rejected Dunlap's argument as "absolutely ridiculous," and instructed the prosecutor to "take the figurines and put them over behind the witness box here and under where they are accessible." (RT 34: 6994-6995: 21-23.) Yet, a few days later the court overruled Fox's objection to the display of the figurines during the cross-examination of Dr. Wu, despite the fact that Dr. Wu was not examined with respect to his opinion on wound angles. (RT 39: 8091.)

Dunlap attempted to examine Lazzaro as to whether he was "familiar that on June 21st of 1997, Mr. Peoples approached Anderson Park and burglarized a van," and Fox objected to the "improper" question, and as "beyond the scope of direct examination." (RT 56: 11406-11407.) Under the guise that it was somehow within the scope of direct examination and also relevant to the penalty phase, to examine a lay witness on "the details of the planning, [and defendant's] intent" (RT 56: 11407: 5) during commission of the homicides, Judge Delucchi responded:

> " The Court: [W]ithout going into the detail of all these crimes – which I'm sure the jury's already familiar with – you can ask him the fact that he's been convicted of four felonies, four murders, an attempted murder and in five special circumstances, would that change his mind as to whether he would rehire him or take him back if he was a convicted murderer.
>
> Mr. Dunlap: Your Honor, I understand the Court's position. But I would like to go through the details of the planning, the intent.
>
> The Court: I know you would like to. But under [Evidence Code section] 352, I'm not going to let you do it. Because the jury's already heard it. It's cumulative. They know the what he's been convicted of. They know the details of the crimes.

> This man came from Florida. All he can tell you is in his opinion this man was a good worker, and he'd be willing to to hire him back.
>
> But you can ask him, like I said, would you be willing to hire back somebody who's been convicted of four murders and one attempted murder and four special circumstances?
>
> Mr. Dunlap: That's fine, Judge. No further questions."
>
> (RT 56: 11406: 24-28 - 11407: 1-17.)

It is obvious from this colloquy that Dunlap's *intent* in cross-examining Lazzaro had nothing to do with determining whether Louis's convictions would change Lazzaro's mind about Louis's fitness for work; Dunlap declined to ask Lazzaro that question. The purpose, as he stated for the record, was to repeat the circumstances of each crime, even though it was well beyond the scope of direct examination and any probative value to such testimony was far outweighed by its cumulative nature and the prejudice that repetition would impart. As demonstrated by his retrial strategy and his arguments to the jury, Dunlap's purpose in repeating the facts of each crime was to inflame jurors to the point they would not consider any evidence presented in mitigation.

3. Retrial of the Penalty Phase

In stark contrast to Judge Delucchi's eminently reasonable ruling, in the penalty retrial Judge Platt erroneously permitted the prosecutor to inflame jurors with irrelevant, inflammatory and cumulative evidence, over defense counsel's repeated objections.

Judge Platt denied appellant's motion to curtail the improper examination and permitted Dunlap to pick up where he left off in the guilt phase with Dr. Wu and Dr. Amen, and upon cross-examination of Dr. Woods and Dr. Lisak. (RT 84: 17599-17601 [Amen]; 85: 17837-17847 [Wu]; 90: 18970-18974; 91: 18992-19060 [Woods]; 91: 19134-19140 [Lisak].)

As noted above, and discussed in more detail following, the same kinds of questions were asked of Dr. Wu and Dr. Amen in the retrial as had been asked in the guilt phase, but the prosecutor added the line of questions to his examination of Dr. Lisak and Dr. Woods. As will be recalled, Dr. Lisak was proffered as an expert on the psychological effects of a homosexual molest on boys. (See *Arguments V* and *XI, ante*.) Even though Dr. Lisak had not rendered an opinion as to effect of the molest on Louis's state of mind, and admitted he was unfamiliar with the specific case facts, the court allowed Dunlap to improperly examine Dr. Lisak with the facts of each crime. (RT 91: 19130-19131; 19142; 19146.) Notwithstanding Dr. Lisak's admission and previous testimony, Dunlap pursued this improper line of examination:

> "A. [Lisak] I am not aware of any of the facts of this case.
>
> Q. Well, who is Thomas Harrison?
>
> A. I don't know who Thomas Harrison is.
>
> Q. Do you know who James Loper is?
>
> A. No.

Q. How about Stephen Chacko?

A. No.

Q. How about Jun Gao?

A. No.

Q. How about Besun Yu?

A. I do not know.

Q. If I showed you pictures of James Loper describing the area of Eight Mile Road and Interstate 5, would you know what that is?

A. No."

(RT 91: 19130: 7-21.)[221]

After proceeding through the other crime scenes and receiving the identical answers, Dunlap inquired about Dr. Lisak's knowledge of Louis's background, and then reverted to the same improper line of questioning:

" Q. Do you know how many shots were fired in the course of the victimization at Cal Spray?

Mr. Fox: Judge, I'm going to object. This is cumulative.

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[221] As discussed in *Argument V, ante*, pp. 245-246, it is misconduct for a prosecutor to ask improper questions. (*People v. Hughes* (2002) 27 Cal.4th 287, 388.)

The Court: It's been asked and answered a number of times, Mr. Dunlap.

Mr. Dunlap: I'm sorry, Judge.

Q. Let's talk about Interstate 5 and Eight Mile Road. How many shots were fired there?

Mr. Fox: Well, Judge, same objection. This is cumulative.

The Court: Been asked and answered, Mr. Dunlap. He indicated he has no knowledge of any facts of this case. It is absolutely clear. Move to another area." (RT 91: 19135: 13-27.)

Moreover, as discussed in *Arguments III* and *V*, *ante*, during the retrial of the penalty phase Fox repeatedly brought the improper display of the figurines to the court's attention. Although the court admonished the prosecutor, the admonitions were without effect. (RT 79: 16424; 16433; 85: 17852.) When Dr. Woods was called to testify (April 26, 2000), Fox again raised the issue of the display of the figurines, and Judge Platt reminded Dunlap of the previous "ruling of the Court ... that the dolls will not come out" unless they were being used to examine a witness, and the court expected "that to be the case" during cross-examination of Dr. Woods. (RT 90: 18944: 28 - 18945: 1.) The figurines were allowed to remain in plain view of the jury, even though it was not until the end of cross-examination of Dr. Woods on April 27, 2000, that the prosecutor used the

figurines, after extensive cross-examination of Dr. Woods on the details of each homicide over the better part of two days. (RT 90: 18946-18974; 91: 18992-19050.)[222]

During the retrial of the penalty phase, Dr. Woods was shown numerous photographs of the crime scenes, and the manikins of Stephen Chacko, Jun Gao, and Besun Yu were improperly displayed before the jury during the examination. (RT 91: 19010-19012; 19059-19060.) Towards the end of cross-examination of Dr. Woods, the following occurred:

> " Q. And then I was looking at my notes at the break.
>
> People's [Exhibit] 672. Do you know which doll that is?
>
> A. I would imagine that is Mr. Loper.
>
> Q. James Loper. You describe the shooting ability in part as reflecting planning, correct?
>
> A. No. I do not. No, I do not.
>
> Q. How do you describe it?
>
> A. I describe –
>
> Mr. Fox: Judge, I will object. This has been asked and answered.

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222 Judge Platt described the unnecessary display of the dolls at the retrial as "not there for simple disgust." (RT 85: 17853: 8-9.) However, as discussed in *Argument V, ante*, pp. 254-255, Dunlap understood their inflammatory value and improperly stirred up jurors's emotions by referring to autopsy photographs and figurines during his guilt phase opening statement and closing argument (RT 28: 5503-5504; 59: 12126), and in penalty retrial closing argument. (RT 95: 20014; 20116; 20030; 20031; 20064.)

The Court: Sustained.

Q. In looking at the shooting of this figurine of James Loper, would you describe this as good planning?

A. I think you have already asked me this, and I said that it was not good planning.

.....

Q. [Exhibit] 673 [figurine]. Stephen Chacko.

You describe this as poor shooting?

A. No. I did not describe that as poor shooting.

.....

Q. [Exhibit] 675 [figurine]. Jun Gao.

How would you describe this shooting pattern, Doctor?

A. I have no description for shooting pattern.

Q. And then finally, [Exhibit] 674 [figurine]. Besun Yu.

How do you describe this shooting pattern to the –

Mr. Fox: Objection. Asked and answered.

The Court: Sustained.

Mr. Dunlap: No further questions of this witness.

The Court: Redirect, Mr. Fox?

Mr. Fox: Yes. I would ask that the dolls be cleared, please.

The Court: Replace the dolls, Mr. Dunlap.

Mr. Dunlap: I'm sorry, Your Honor."

(RT 91: 19059-19060.)[223]

Prior to the prosecutor's cross-examination of Dr. Woods and Dr. Wu, defense counsel's repeated objections to the "cumulative and argumentative" questioning of Dr. Amen as to the details of each crime met with the same results as in the guilt phase; they were "overruled." (RT 84: 17599-17580.) When Dunlap proceeded with the uniform line of inquiry he had used with Dr. Wu in the guilt phase, defense counsel lodged no further objections, which were clearly futile:[224]

" Q. So let's talk about the facts of the case.

.....

A. I don't know a lot of the specific details, other

other than what I've read from the transcripts.

Q. So have you read the crime reports?

A. Not that I specifically recall.

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223 Dunlap displayed the "doll" of James Loper to his mother (Hazel Loper) during her 'victim impact' testimony, and, over strenuous objection, the court allowed it: "The Court: She'll be allowed to make reference to the doll ... It's before the jury in a number of different fashions. It isn't any more or less prejudicial through Mrs. Loper. I don't think it's particularly necessary. But victim impact is an area that there is some latitude." (RT 84: 17446-17449; 17449: 12-18; See *Argument XIV, post.*)

224 Of the four experts, Dr. Amen was presented first, followed by Dr. Wu, Dr. Woods, and Dr. Lisak. With the court's previous rulings from the guilt phase and at the outset of penalty retrial, during cross-examination of Dr. Amen defense counsel "ask[ed] that that be a continuing objection" to details of the crime; the court responded, "It's overruled." (RT 84: 17600.)

.....

Q. Did you look at the photographs?

A. Not that I recall.

Q. Did you go to the scenes?

A. No, sir.

Q. Did you drive to Eight Mile Road at Interstate 5 and view the area where James Loper was shot nine times?

A. No, sir.

Q. Why not?

A. My understanding was that my role was to perform the PET scan and to determine if the PET scan indicated whether there was presence or absence of abnormal brain function, and that was the extent of my role in the case as I understand it."

(RT 85: 17836-18737.)

After Dr. Wu's summary of his role, the prosecutor continued to inquire about his knowledge of the names of each of the victims and several witnesses, including whether Dr. Wu personally knew Jun Gao or Besun Yu. (RT 85: 18740-18741.) When Dr. Wu responded that he recalled the names but did not know them, Dunlap asked whether he knew Besun Yu's daughter, Karen Tan, who had testified as a "victim impact" witness. (RT 85: 17841: 7-8.) Dr. Wu obviously knew none of the witnesses, but that was obviously not the point of the prosecutor's examination.

In light of Judge Platt's ruling allowing the irrelevant and improper line of examination of defense experts in the guilt phase and in the retrial of the penalty phase, Dunlap questioned lay witnesses in a similar manner. He examined Guy Lazzaro in the improper manner he questioned Dr. Wu, and despite Judge Delucchi's ruling in the first penalty trial (RT 56: 11405-11407):

"Q. Do you know Karen Tan?

A. No, sir.

Q. Do you know Jack Yu [Besun Yu's son]?

A. No, sir, I don't.

Q. Do you know Thomas Harrison?

A. No, sir.

Q. James Loper?

A. I've heard that name.

Q. How have you heard it.

A. That he was one of the persons that was killed.

Q. Murdered?

A. Murdered.

Q. Premeditated murder.

A. Okay.

Q. Do you know Besun Yu?

A. No, I don't.

Q. Do you know Jun Gao?

A. No, sir."

(RT 86: 18070-18071.)[225]

Thus, the prosecutor was allowed to conduct improper, irrelevant, inflammatory and cumulative examination of both expert and lay witnesses in the penalty retrial.

B. The Trial Court's Endorsement of Improper Examination of Witnesses on Irrelevant, Inflammatory and Cumulative Evidence Resulted in Prejudice.

The record is replete with judicial endorsement of the improper examination of witnesses by the prosecutor in the guilt phase and retrial of the penalty phase. (See also, *Argument V, ante.*) The line of improper inquiry of witnesses in both phases of trial allowed the prosecutor to inflame jurors by cumulatively displaying the facts of each crime, and by exhibiting manikins and photographs of crime scenes. Although there was no lawful basis for permitting this irrelevant line of questioning, or the cumulative and inflammatory evidence, the trial court refused to curtail it.

The issue presented by the brain science witnesses was whether the PET and SPECT scans showed brain damage; as Dr. Wu succinctly summarized the purpose of the brain scans:

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[225] Dunlap asked slightly different forms of the improper questions to Joni Fitzsimmons, including whether she was aware of facts surrounding the *Cal Spray* incident and when Louis "was out on Interstate 5 and Eight Mile Road and gunned down James Loper," but the court sustained objections to the argumentative form of the questions. (RT 87: 18332-18333.)

> " My understanding was that my role was to perform the PET scan and to determine if the PET scan indicated whether there was presence or absence of abnormal brain function, and that was the extent of my role in the case as I understand it."
>
> (RT 85: 18737.)

As previously noted, the prosecution did not object to the offer of proof that expert witnesses testifying in the guilt phase of the trial would provide evidence of abnormal brain scans, abnormal functioning, and impulsive behavior; in fact, the prosecutor retained his own expert, Dr. Mayberg, to rebut the defense findings. The testimony of Dr. Wu, Dr. Amen, and Dr. Buchsbaum related to appellant's defense in the guilt phase that his impulsive behavior was the result of abnormal brain function and that he did not actually form the mental states that were necessary to prove the charges against him. The prosecutor did not interpose an objection that the expert testimony would be inadmissible under Penal Code sections 28 and 29, or otherwise. As this Court wrote in *People v. Coddington, supra,* 23 Cal.4th at pp. 582-583:

> " Sections 28 and 29 permit introduction of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental

capacity to form a specific mental state or whether the defendant actually harbored such a mental state. An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing. (Footnotes omitted.)"

Accordingly, the trial court properly admitted expert testimony during the guilt phase of the trial, because it related to "impulsivity" consistent with abnormal brain scans and abnormal brain functioning (RT 39: 8238-8329 [Dr. Wu]; 41: 8574 [Dr. Amen]; 42: 8762-63 [Dr. Buchsbaum]), but it improperly allowed the prosecutor to examine the experts on the details of the crimes that defense counsel correctly described as "completely irrelevant" and "improper [and] misleading" to the formation of their opinions as to scan results. (RT 41: 8460; 42: 8762.) It is clear from the ruling regarding Dr. Amen that Judge Platt barred expert opinion on the mental states proscribed under Penal Code sections 28 and 29, but he improperly allowed the prosecutor to examine the witnesses on the specific facts of each crime:

" As it relates to .... the issue of the cross-examination of the experts by a factual scenario or questioning of how familiar they were or were not ... with the facts of

> the case, [the] Court's opinion is still that that is appropriate cross-examination when an expert, or a layperson for that matter, provide or opine opinions [sic] about scenarios and/or states of mind as it relates to this particular case.
>
> (RT 45: 9290: 5-18.)

The "factual scenarios and/or states of mind as it relates to this particular case ..., [and] specific acts of [appellant] as testified to by others " (RT 45: 9290) were irrelevant to the opinions of the brain scan experts, and should not have been allowed. (*People v. Heard, supra,* 31 Cal.4th at pp. 972-973; *People v. Chatman, supra,* 38 Cal.4th at p. 371.)

Furthermore, even if crime scene details were relevant to attack the credibility of experts, it was an abuse of discretion to allow the prosecutor to engage in inflammatory and cumulative cross-examination of Dr. Wu, Dr. Amen and Dr. Buchsbaum in the guilt phase. (*People v. Coleman, supra,* 38 Cal.3d at p. 93 [trial court abused its discretion by allowing "extensive questioning of expert witnesses" on prejudicial letters].) The trial court allowed the prosecutor to improperly infuse the trial with unfairness, denying appellant due process under state and federal constitutions at both phases of trial. (*People v. Cavanaugh, supra*, 44 Cal.2d at pp. 268-269; *People v. Anderson, supra,* 43 Cal.3d at p. 1137; *Lisenba v. California, supra,* 314 U.S. at p. 228.)

Moreover, in the retrial of the penalty phase the issue of "actuality" was not before the jury for decision; appellant had been found guilty by the first jury. (*People v. Coddington, supra,* 23 Cal.4th at pp. 582-583.) Judge Delucchi correctly saw that the

prosecutor's attempt to confront witnesses in the penalty phase with the details of the crimes was more prejudicial than probative, and cumulative to other evidence. (RT 56: 11406-11407.) In the retrial of the penalty phase, jurors were allowed to consider the the evidence presented in the prosecution's case-in-chief presented to the first jury to show "circumstances of the crime" under factor (a). Evidence admitted in the penalty phase of a capital murder case must be related to the statutory factors enumerated in Section 190.3. (*People v. Pride* (1992) 3 Cal.4th 195, 252; *Tuilaepa v. California, supra,* 512 U.S. 967.) However, not only were the jurors in the retrial allowed to consider the evidence of the crimes presented through law enforcement personnel and various lay and expert witnesses in the prosecution's case, but over objection they were improperly bombarded with the inflammatory and cumulative details of each crime through expert and lay witnesses offered in mitigation of punishment; the prosecutor was allowed to ask numerous questions in bad faith of Dr. Lisak, Dr. Wu, and Guy Lazzaro as to whether they knew the victims and members of their families. (*People v. Hughes, supra,* 27 Cal.4th at p. 388 [improper for prosecutor to ask questions suggesting facts harmful to defendant in absence of good faith belief witness can answer].) In addition, the prosecutor was allowed to use inflammatory and cumulative photographs and manikins to examine Dr. Woods over defense counsel's objections. (RT 91: 19059-19060.)

The court permitted irrelevant, cumulative and inflammatory cross-examination of witnesses, in violation of appellant's previously enumerated constitutional rights in both phases of his trial. Under the circumstances, it is reasonably probable verdicts more

favorable to appellant would have resulted had jurors not been exposed to irrelevant, inflammatory and cumulative evidence used by the prosecutor to inflame the jury's passions in the guilt phase of trial. (*People v. Hendricks, supra,* 43 Cal.3d at 594-595; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cavanaugh, supra,* 44 Cal.2d at pp. 268-269.) Moreover, a death sentence must not be based upon extrinsic factors "constitutionally impermissible or totally irrelevant to the sentencing process." (*Zant v. Stephens, supra,* 462 U.S. at p. 885; *Tuilaepa v. California, supra,* 512 U.S. 967.) Appellant's penalty retrial was fundamentally unfair as a result of the admission of gruesome photographs, cumulative and inflammatory manikins, and the argumentative repetition of details of each crime with defense witnesses that was well beyond the scope of direct examination. Appellant was thereby deprived of his rights to due process, fair trial, death eligibility, and reliable determinations of guilt and penalty, and it cannot be said the admission of the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *Ford v. Wainwright, supra,* 477 U.S. 411; *Beck v. Alabama, supra,* 443 U.S. 635; *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Lisenba v. California, supra,* 314 U.S. at p. 228; *People v. Jones* (2003) 29 Cal.4th 1229, 1264.)

XIV.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY ADMITTED PREJUDICIAL AGGRAVATION EVIDENCE AND THE PROSECUTOR IMPROPERLY EXPLOITED THE EVIDENCE IN THE PENALTY PHASE RETRIAL.

In the present case, prior to the first penalty phase, and then again before and during the retrial of the penalty phase, defense counsel properly objected to the admission of "victim impact" evidence submitted by the prosecution, as irrelevant, unduly inflammatory, and cumulative under state and federal constitutional guidelines; he also moved for a new trial on this basis. (CT 13: 3388.) The admission of prejudicial "victim impact" evidence in the retrial of the penalty phase, including photographs and manikins, and the prosecutor's improper argument based thereon, violated appellant's state and federal constitutional rights to due process, a fair trial, confrontation, and to a reliable, individualized sentence determination, and against cruel and unusual punishment, and his sentence of death was obtained violation of those enumerated rights. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Article 1 §§ 1, 7, 13, 15, 16 & 17; Penal Code § 190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349; *Lockett v. Ohio* (1978) 438 U.S. 586; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v.*

Georgia (1980) 446 U.S. 420, 427; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-18; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Payne v. Tennessee* (1991) 501 U.S. 808; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Edwards* (1991) 54 Cal.3d 787; *People v. Fiero* (1991) 1 Cal.4th 113; *People v. Zapien* (1993) 4 Cal.4th 929; *People v. Mendoza* (2000) 24 Cal.4th 130; *People v. Smith* (2003) 30 Cal.4th 581; *People v. Marks* (2003) 31 Cal.4th 197; *People v. Roldan* (2005) 35 Cal.4th 646; .)

A. Background

As discussed in *Arguments V, XII-XIII, ante,* the prosecutor improperly used manikins and photographs at both phases of trial in his effort to convince jurors of the appropriateness of the death penalty in this case. Defense counsel made numerous efforts to anticipate the prosecutor's introduction of improper evidence, and objected in timely fashion to prejudicial photographs, videos, and manikins proffered as "aggravation." Early in the case, on February 23, 1999, defense counsel filed a motion to exclude evidence of "victim impact" evidence during the guilt phase and to limit such evidence at the penalty phase, seeking discovery of the evidence to properly prepare for trial. (CT 5: 1266-1271; 1266-1290.) On March 2, 1999, defense counsel again raised the specter of "victim impact" evidence in the guilt phase by using "family" photographs, blood spatter evidence, and "pain and suffering" of victims through Dr. Fitterer or anyone else; he also claimed a lack of notice of the parameters of proffered evidence and requested discovery of the nature of "victim impact" evidence, and an evidentiary hearing. (RT 8: 1510-

1528.) On March 9 the court heard arguments on the defense motion, which included Dunlap "personally find[ing] the request for a hearing outrageous" (RT 8: 1511: 2-3), and his representations to the court that while "not in possession of any such material at this point," victim family members were in the process of "assembling" photographs for the penalty phase "at their own pace" (RT 8: 1511: 5-6), and that he intended to introduce family videotapes. (RT 8: 1510; 1511-1524.) The court properly ruled that family photographs could not be used in the guilt phase, and ordered discovery of penalty phase evidence "in a timely fashion as best as can be done, [but] I'm not going to require those people to come in and say it." (RT 8: 1524.)

On June 15, 1999, during the guilt phase of trial, the prosecutor provided the court and defense counsel with numerous mounted photographs of victims and their families, including two fifteen-minute videotapes of the Loper and Chacko families. Defense counsel "formally" objected to the proffers. (RT 33: 6909-6911.) On August 10, 1999, the court considered the defense objections, which now included arguments that "pain and suffering" as to Thomas Harrison should be excluded as "victim impact" evidence because the jury was unable to reach a verdict as to the attempted murder charge. (RT 49: 10272-10273; see, *Statement of the Case,* p. 4.)

Defense counsel argued that 30 photographs of all four homicide victims (Exhibits 705-706), 18 photographs of James Loper (Exhibits 709-711), 8 photographs of Stephen Chacko (Exhibit 712-713), and 15 photographs of Besun Yu (Exhibits 714-715) would be cumulative to the testimony of family members and more prejudicial than probative, and

given the "very limited" purposes that such evidence is admissible under federal case law in the penalty phase, admitting the evidence would be "improper" and violate appellant's enumerated constitutional rights. (RT 49: 10282-10286: 3; 24; 10299-10230; 10304-10305.) The prosecutor alleged defense counsel's arguments were "outrageous" and "ludicrous." (RT 49: 10287: 4-6 - 10288: 1.)

The court analyzed the photographs proffered in terms of whether they "demonstrate the victim as an individual whose death represents a unique loss particularly to the family, without misdirecting [the jury] or misfocusing [sic] on emotional, subjective issue[s]," but "humaniz[ing] the victim ... is truly the greatest issue in victim impact evidence," though some of the life photographs in Exhibit 710 of James Loper might be of an "inflammatory nature." (RT 49: 10289: 26-28.)

Similarly, photographs depicting the child subsequently born to Anice Chacko, and funeral photographs of Stephen Chacko in an open casket in India were justified by the prosecutor as not "gruesome" (RT 49: 10298; 10301). Defense counsel "strongly" objected to the photographs, pointing out that the emotional impact of photographs showing "people that are actually caressing an open casket ... [is] so inflammatory to view ...," as it evokes "a visceral reaction" at "the risk of wholly arbitrary and capricious action by the jury" (RT 49: 10299: 28 - 10300: 3-9.) The court ruled the photographs admissible to "three dimensionalize [sic] and bring some meaning to the uniqueness of the individual and the value he has to family members, and significance of the loss." (RT 49:10302: 13.)

Apparently, there were no photographs to proffer as to June Gao, but as to the 15 of

Besun Yu, defense counsel objected to the cumulative nature of the photographs to proffered testimony of family members, and the court overruled the objection, finding "them again to address the three dimensional aspect of the victim." (RT 49: 10304-10305: 16-18; 10306.)

After viewing the videotapes proffered by the prosecutor, the court granted the defense motion and excluded them. (RT 49: 10304-10307.)[226]

Prior to the retrial of the penalty phase, defense counsel filed written motions for discovery and moved to exclude inadmissible evidence in aggravation, the prosecution filed a written opposition. (CT 10: 2674-2684; 2699-2709; 2736-2740.) On March 6, 2000, the court heard argument of defense counsel, essentially advocating against admission of the entire "victim impact" presentation from the first penalty trial as inflammatory "eulogies" that distracted the jury from its role in determining the appropriate punishment for appellant. (RT 75: 15631-15712.) Although the court granted requests to exclude two photographs of James Loper, the court again denied the motion to exclude victim impact evidence and Thomas Harrison's testimony on the same grounds as in the first penalty trial. (RT 75: 15700-15702; 15704-15710.) The court's ruling is summarized as follows:

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[226] The court also ruled that Thomas Harrison's testimony as to injuries and related physical rehabilitation was not admissible as "victim impact" evidence under factor (a), but was admissible under factor (b) as "violent" conduct. (RT 51: 10647-10650.)

" The Court finds specifically that the testimony is not inflammatory, is not a eulogy to the jury; and does in fact have a relevant basis for reasonable consideration about the depth and breadth of harm and injury caused by the defendant for them to reasonably consider in determining whether to or not to exercise sympathy and remorse – or sympathy and mercy as it relates to the exercise of that option, for their considerations." (RT 75: 15712: 2-9.)

Finally, defense counsel argued that introduction of the wooden manikins in the penalty phase amounted to improper aggravation evidence in the retrial of the penalty phase. However, the court denied the motion as to each, including Thomas Harrison's manikin, as "simply relevant, assuming the jury accepts the prosecution's argument ..., of the issue of premeditation, deliberation, state of mind [of appellant]." (RT 76: 15759-15760: 3-6.) During the testimony of Dr. Fitterer and Agent Giusto, the prosecutor used the manikins, and counsel objected to their use as irrelevant, cumulative, and violative of appellant's constitutional rights under the United States Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments and California Constitution, Article 1, sections 15, 16 and 17. The court overruled the objections. (RT 81: 16786-16787; 82: 17086-17087.)

As discussed in detail in *Arguments V* and *VI*, *ante*, the prosecutor improperly argued lack of remorse and the impact of the homicides on the lives of surviving victims,

referring repeatedly to photographs and manikins objected to by defense counsel.

B. Improper Evidence Admitted in the Retrial of the Penalty Phase

Evidence admitted in the penalty phase of a capital murder case must be related to statutory factors enumerated in Section 190.3, "circumstances of the crime," prior felony convictions, or "violent criminal activity." (*Tuilaepa v. California, supra,* 512 U.S. 967.) The trial court here erroneously admitted improper aggravation evidence for the jury's consideration, including inflammatory and cumulative manikins and photographs of victims while they were alive, which diverted the jury's attention away from a reasoned sentencing decision. As a result, appellant was prejudiced by the admission of improper aggravation evidence that rendered his penalty phase "fundamentally unfair." *(Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

Before 1991, the United States Supreme Court considered victim impact evidence to be barred by the Eighth Amendment, and prosecutorial argument on the subject was prohibited. (*Booth v. Maryland* (1987) 482 U.S. 49; *South Carolina v. Gathers* (1989) 490 U.S. 805; *People v. Clark* (1990) 50 Cal.3d 583, 628-29.) In *Payne v. Tennessee, supra,* 501 U.S. at p. 827, the court reversed its precedent and held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." In sanctioning the testimony of the victim's mother as to her surviving grandson's traumatic loss, the court observed that it would violate constitutional guarantees to due process if victim testimony or prosecutorial argument is "so unduly prejudicial that it renders the trial fundamentally unfair ...." (*Id.*, at

p. 825.)

Although this Court has approved the testimony of family members as a "circumstance of the crime" under factor (a), in some cases objections to the scope of the testimony have been lodged. (See, *People v. Edwards, supra*, 54 Cal.3d at p. 836; *People v. Fiero, supra,* 1 Cal.4th at pp. 235-36; *People v. Roldan, supra,* 35 Cal.4th 646, 732; see, RT 69: 8116-18; 72: 8455-78; 8478-8488.) As this Court reiterated in *People v. Roldan, supra,* 35 Cal.4th at p. 732, reflecting on the due process concerns of *Payne:* "We have several times noted that victim impact evidence may be deemed inadmissible if it is so inflammatory that it would tend to divert the jury's attention from the task at hand. (Citations omitted.)" Here, appellant's constitutional rights were violated by the admission of nearly fifty photographs cumulative to "victim impact" testimony and by reference to manikins, compounded by the prosecutor's improper arguments based upon them. (See, *Arguments III, V, ante*; *Payne v. Tennessee, supra*, 501 U.S. 827; *Darden v. Wainwright* (1986) 477 U.S. 168, 179-183.) The cumulative nature of photographs and life-like figurines, added to the testimony of victim family members, improperly injected inflammatory evidence,[227] and violated appellant's enumerated constitutional and statutory rights, rendering the penalty phase "fundamentally unfair." (*Payne v. Tennesse, supra,*

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[227] Photographs objected to included: 1) all those related to James Loper's childhood, high school graduation, recreational activities, and with his own children; 2) all photographs of Stephen Chacko's funeral and those with his own children; 3) Besun Yu's early life and photographs of her children's weddings; and, 4) all Thomas Harrison family photographs. (CT 10: 2700-2701; 2704; RT 76: 15759-15761 [manikins admitted over objection].)

501 U.S. at p. 825; *People v. Roldan, supra*, 35 Cal. at p. 732.)

Indeed, during the testimony of James Loper's mother, over objection the court allowed the prosecutor to show her the manikin of her son. (See, RT 84: 17449, citing *Payne v. Tennessee, supra,* 501 U.S. 808, *People v. Edwards, supra,* 54 Cal.3d 787, and U.S. Const., 5th, 6th 8th & 14th Amends.; Calif. Const., Article 1, §§ 15, 16 & 17.) The court erroneously ruled it was not "any more or less prejudicial through Mrs. Loper ..., [and though] not particularly necessary ...," the court found it was not an "abuse of [judicial] latitude" to allow her to be shown the manikin (RT 84: 17449: 15-25); she testified as follows:

> " Q. You've had to look at this doll for over two and a half years now. What does it do to you?
>
> A. Tears me totally apart thinking of the way that my son had to die. By himself out there in the middle of nowhere. My husband blames himself for not being there."
>
> (RT 84: 17458: 13-16.)

Although Judge Platt described the display of the figurines at the retrial as "not there for simple disgust" (RT 85: 17853: 8-9), Dunlap well understood their inflammatory value. He referred to autopsy photographs, juxtaposed with photographs of victims while alive, and repeatedly referred to the figurines in cross-examination of defense witnesses and during closing argument in the retrial of the penalty phase. (RT 95: 20014; 20116; 20030; 20031; 20064; see also, *Argument V* and *XIV, ante*.)

Furthermore, this Court has not explicitly held that victims of other crimes may testify as to the "impact" those crimes had upon them. The trial court committed error when it admitted the inflammatory and improper evidence of the "impact" of Thomas Harrison's injuries, even though the guilt phase jury was unable to reach a verdict on the charge of attempted murder. In *People v. Taylor* (2001) 26 Cal.4th 1155, 1170-72, the court approved a surviving victim's testimony, "including his paralysis, pain, and inability to care for himself," quoting *People v. Mitcham, supra,* 1 Cal.4th at p. 1063, for the proposition that "[e]vidence of the impact of the defendant's conduct on victims other than the murder victim is relevant *if related directly to the circumstances of the capital offense*. [Citations.]," and found "nothing in *Payne v. Tennessee, supra,* 501 U.S. 808, or other high court decisions, that is contrary to this analysis." (Emphasis added.) *Payne* said the same thing: "Victim impact is simply another form of informing the sentencing authority about the *specific harm caused by the crime in question*." (*Id.*, at p. 825; emphasis added.) While evidence of the violence inflicted upon Harrison may have been admissible under factor (b), the extent of his injuries and rehabilitation was not admissible.

The introduction of the evidence in the penalty retrial violated appellant's state and federal constitutional and statutory rights to a fair and reliable penalty determination. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384; *People v. Roldan, supra,* 35 Cal.4th at p. 732) In *Clemons v. Mississippi* (1990) 494 U.S. 738, 754, the high court applied a "harmless error" analysis to capital sentencing determinations, noting it would be "extremely speculative or impossible" to determine

beyond a reasonable doubt that a life verdict would not be returned in the absence of the error. That analysis applies here. (*People v. Brown* (1988) 46 Cal.3d 432, 446-48; *In re Lucas* (2004) 33 Cal.4th 682, 733.) This was a close case, involving the retrial of a penalty phase that had resulted in a hung jury – eight jurors voted for life imprisonment without parole in the first penalty phase. Accordingly, the trial court's erroneous rulings, combined with the prosecutor's improper arguments, created an unreliable and arbitrary determination, and the death judgment should be reversed.

XV.

APPELLANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS, INCLUDING A RELIABLE, INDIVIDUALIZED PENALTY DETERMINATION, WHEN THE COURT IMPROPERLY RESTRICTED PRESENTATION OF MITIGATION EVIDENCE, ERRONEOUSLY ADMITTED NON-STATUTORY EVIDENCE IN AGGRAVATION, AND IT DENIED COUNSEL'S MOTIONS TO CONTINUE.

As set forth in the following subsections, and in addition to claims made in *Arguments VI, VIII*, and *X-XIV*, *ante*, as a result of the exclusion of additional mitigation evidence, the admission of non-statutory aggravation, and the denial of counsel's motions to continue, appellant's state and federal constitutional rights to due process, fair trial, confrontation, present a defense, and to a reliable, individualized sentence determination, and against cruel and unusual punishment, were denied. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art.1, §§ 1, 7, 13, 15, 16, 17; Penal Code §190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Lockett v. Ohio* (1978) 438 U.S. 586; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Skipper v. South Carolina* (1986) 476 U.S. 1; *McCoy v. North Carolina* (1990) 494 U.S. 433; *Stringer v. Black* (1992) 503 U.S. 222; *Tuilaepa v. California* (1994) 512 U.S. 967; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d

512; *People v. Whitt* (1990) 51 Cal.3d 620, 647.)

A. Improper Restrictions On Mitigation Evidence

Under the Eighth and Fourteenth Amendments, evidence presented in mitigation *must* be afforded liberal scope and in "all but the rarest kind of capital case, the sentencer must not be precluded from considering, *as a mitigating factor*, any aspect of defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 605; *Stringer v. Black, supra,* 503 U.S. at p. 230.) In *People v. Boyd,* supra, 38 Cal.3d at p. 775, this Court upheld Section 190.3, enacted by the 1978 *Briggs Initiative*, writing that it complies with "the constitutional requirement of *Eddings v. Oklahoma, supra,* 445 U.S. 104, and *Lockett v. Ohio, supra,* 438 U.S. 586, incorporated in factor (k), [in] that the jury may be permitted to consider any aspect of defendant's character or record that he offers as a basis for a sentence less than death ...." Without such consideration, any death sentence returned is considered unconstitutionally unreliable and arbitrary. (*Furman v. Georgia, supra,* 408 U.S. 238; *Godfrey v. Georgia, supra,* 446 U.S. at p. 427; *Tuilaepa v. California, supra,* 512 U.S. at pp. 974-75.) The right to present all relevant mitigation evidence proffered as a basis for a sentence less than death is the direct result of the state's decision to seek the death penalty:

> " Given that the imposition of death by public authority
> is so profoundly different from all other penalties, we cannot
> avoid the conclusion that an individualized decision is essential

in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."

(*Lockett v. Ohio, supra,* 438 U.S. at p. 605.)

As pointed out in *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044, in reversing a death sentence, "'The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.' (*Deutscher v. Whitley*, 894 F.2d at 1161.) "

Appellant's ability to evoke the sympathetic aspects of his character was hamstrung by the trial court's erroneous rulings in violation of his enumerated constitutional rights as follows:

1. "Motion to Allow the Defense to Present the Testimony, at Retrial, of Jurors Who Witnessed the Defendant's Demeanor During Their Service at the First Trial."

Defense counsel made an offer of proof before the retrial of penalty phase began in which he outlined the testimony of four jurors from the guilt phase and first penalty trial who had witnessed Louis's emotional reactions over four months of trial, which would be impossible to duplicate on retrial, including "their observations of Mr. Peoples sitting at counsel table with tears in his eyes and quietly sobbing." (CT 11: 2896-2913: 5-6; RT 75: 15612-15616; 76: 15761-15814.) Counsel relied upon *Riggins v. Nevada* (1992) 504 U.S. 127 and *People v. Talbot* (1966) 64 Cal.2d 691, 712, to support the offer of proof, as these cases recognize that the trier of fact invariably observes the non-verbal conduct of the

defendant on trial, and remorseful behavior may be gleaned during those observations. Courtroom behavior from the guilt phase and first penalty trial was proffered as viable way to present evidence of appellant's character in mitigation of sentence. (See also, CT 2908-2910; *McCoy v. North Carolina, supra,* 494 U.S. 433; *Eddings v. Oklahoma, supra,* 445 U.S. 104; *Skipper v. South Carolina, supra,* 476 U.S. 1.) In denying the motion, the trial court erroneously excluded critical mitigation evidence. It erroneously extended Evidence Code section 1150 as an "absolute confidentiality" bar to jurors' "thought processes." (RT 76: 15813.)[228] In fact, the testimony of proffered witnesses would not have impermissibly explored the jurors' thought processes and was not intended to impeach their verdict; rather the jurors would have been testifying as percipient witnesses to appellant's remorseful demeanor, "open to sight, hearing, and the other senses and thus subject to corroboration." (*People v. Hutchinson, supra*, 71 Cal.2d at p. 350 [citation omitted].)

The trial court, in addressing Evidence Code section 352, abused its discretion by finding the proffered testimony would unduly consume time and present collateral issues: :

> " [T]he [Evidence Code section] 352 is absolutely insurmountable and the consumption of time and the collateral issues would absolutely consume this trial,

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[228] Evidence Code section 1150, prohibits intrusion into the "mental processes" of jurors in order to impeach a verdict, but "objective facts" observed by jurors are not inadmissible. (*People v. Hutchinson* (1969) 71 Cal. 2d 342, 351; see also *Argument XVII, post.*)

and it is not going to happen."

(RT 76: 15814: 1-4.)

The offer of proof explained the testimony would have been limited in scope and could have been succinctly presented. Rather than relating to collateral matters, the proffered testimony related to a key issue: whether appellant had experienced remorse. (*People v. Ervin* (2000) 22 Cal.4th 48, 103 [remorse universally recognized as a mitigating factor].) It would have been extremely probative. In this case, exclusion of the evidence was particularly prejudicial because the trial court had already excluded significant evidence of remorse, and it had allowed the prosecutor to argue the absence of remorse. (See *Argument VI, ante*, pp. 322-232; see also RT51: 10602-10605; 52: 10918-10919; RT 95: 20116: 7.) As counsel's offer of proof recited:

> " [The four jurors] saw that Mr. Peoples was emotional during the first trial – crying during the presentation of autopsy evidence in the guilt phase and, in the penalty phase, throughout the testimony of victim-impact witnesses presented by the prosecution, as well as during the testimony of immediate family and friends. If they were to testify, the four jurors would describe their observations of Mr. Peoples sitting at counsel table with tears in his eyes and quietly sobbing."
>
> (CT 11: 2913.)

In excluding the testimony the court violated appellant's previously enumerated constitutional rights, and it would be "extremely speculative or impossible" to determine beyond a reasonable doubt that a life verdict would not have been returned in the absence of the error. Therefore, the death judgment should be reversed on this ground alone. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 754; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

2. "Motion to limit prosecutor's cross-examination of defendant in the penalty retrial"

On December 29, 1999, defense counsel moved to limit the prosecutor's cross-examination prior to the retrial of the penalty phase. (CT 12: 2718-2723.) The prosecutor responded by claiming the motion was filed in an untimely manner pursuant to local rules of court. (RT 12: 2724-2725.) On August 17, 1999, however, defense counsel had raised the issue orally before the first penalty phase, and the court had ruled, "If Mr. Peoples testifies, the Court will make a ruling after listening to the evidence." (RT 51: 10586: 5-6.) The trial court heard the motion on the merits on March 6, 2000. (RT 75: 15619-15624.)

The purpose of the motion was concisely stated as whether appellant had a "constitutional right to present mitigating evidence through his own testimony [as] limited to certain specific background information, and to limit the prosecution's cross-examination to that area only." (CT 12: 2718: 25-28.) Relying on the constitutional rights and case law cited above (CT 12: 2719), defense counsel argued that denial of the motion would "place him in the untenable position of being unable to present crucial and

important mitigating evidence." (CT 12: 2723: 1-2.) Fox had repeatedly referenced the prosecutor's extraordinary capacity for disregarding the rules of evidence and cross-examining witnesses with an improper "prejudicial litany" throughout the guilt phase and first penalty trial as an additional basis to support the need for deciding the parameters of cross-examination before appellant testified. (RT 38: 7874-7875; 40: 8418; 41: 8461; 75: 15624; see also, *Argument V* and *Argument XIII, ante*.) Citing *People v. Caro* (1988) 48 Cal.3d 1035, 1055-1057, as an example of a case in which the defendant was essentially "forced to surrender his right to testify at penalty phase in order to preserve his constitutional privilege against self-incrimination," and for the broader principle that "any attempt to cross-examine [the defendant] on that subject [not addressed on direct examination] would not have survived a timely objection as to scope," defense counsel argued the importance of a pretrial ruling on his proffer that defendant would testify "concerning his background during a limited and specific period of his life." (CT 11: 2718; 2721; RT 75: 15627-15629.)[229] The trial court, however, erroneously refused to decide the issue:

> " I don't have a crystal ball. I will follow the law.
>
> The law says that direct – that cross-examination is
>
> limited by the scope of direct examination.

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[229] The principle that "the right of cross-examination is confined to the fact or matter testified to on the examination-in-chief" is well established. (*People v. O'Brien* (1885) 66 Cal.2d 602, 603; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1193 [error to allow cross-examination of defendant's mother in penalty phase on subjects beyond scope of direct examination].)

.....

But when you get to issues of credibility and other aspects of the case and circumstances of the crime, then I have to make additional determinations, under [Evidence Code section] 352 and a whole scenario of events. But I will not and cannot do it prior to the time that the testimony is presented."

(RT 75: 15625: 15-17 - 15626: 19-22; 15629.)

In light of Judge Platt's rulings in the guilt and first penalty phases of trial, especially as they related to exclusion of evidence of remorse, and his refusal and ineffective measures to prevent pervasive prosecutorial misconduct, defense counsel's motion was not appropriate and the court should have set limits on cross-examination prior to appellant's testimony. Appellant's offer of proof clearly identified the scope of the background evidence he sought to adduce. In refusing to rule before the retrial, the court deprived him of his previously enumerated constitutional rights. (*Lockett v. Ohio, supra,* 438 U.S. at 605; *Eddings v. Oklahoma, supra,* 445 U.S. 104; *Skipper v. South Carolina, supra,* 476 U.S. 1; *People v. Whitt, supra,* 51 Cal.3d at 647, fn. 17; *People v. Monterroso* (2004) 34 Cal.4th 743; *People v. Crew* (2003) 31 Cal.3d 822.) The resulting prejudice cannot be said to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264.)

3. "Motion to Videotape Proceedings to Preserve The Record of Court Demeanor"

As detailed in *Argument III*, incorporated here as if fully set forth, the record during the guilt phase and case in aggravation during the first penalty phase, coupled with Judge Platt's conducting of proceedings upon return to preside over the retrial, justified defense counsel's concerns about the trial court's bias against him and his client. Denial of the motion to provide a video recording of the proceedings compromised his ability to demonstrate intemperate judicial behavior and prejudicial actions. In light of what occurred during the retrial of the penalty phase, including Judge Platt's improper admonitions to the jurors regarding defense counsel's alleged "discovery" violation during cross-examination of Dr. Mayberg, and his admonitions to jurors who had declared a deadlock, the court's refusal to grant appellant's motion denied him a full record of the retrial of the penalty phase and violated his enumerated constitutional rights. (CT 12: 2672-2673; RT 61: 12864-12687; *Godfrey v. Georgia, supra,* 446 U.S. at 428; *People v. Howard* (1992) 1 Cal.4th 1132, 1165; *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 4.)

B. Denial of Motions to Continue

Defense counsel made numerous motions to continue both the guilt phase of trial and the penalty retrial. The trial court denied all of them. Penal Code Section 1050, subdivisions (b) and (f), and California Rules of Court, Rule 4.113, authorize continuances upon a showing of good cause when it serves the ends of justice. (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013.) The accused in a criminal case enjoys a constitutional right to *effective* assistance of counsel at all stages of the proceedings, which includes the right

to adequately prepare his defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 718; *United States v. Cronic* (1984) 466 U.S. 648, 653-54; *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875-876; U.S. Const., 6th & 14th Amends.; Cal. Const. Art. I, §15.) When the defendant joins his attorney's request to continue trial, the trial court should grant the continuance if there is no prejudice to the state – there was none here – and denial may result in prejudice to the defendant. (*People v. Johnson* (1980) 26 Cal.3d 557, 572; *People v. Maddox* (1967) 67 Cal.2d 647, 652; *People v. Manchetti* (1946) 29 Cal.2d 452, 458.) The denial of a motion to continue is reviewed for abuse of discretion. (*People v. Frye, supra,* 18 Cal.4th 894, 1012; *People v. Murphy* (1963) Cal.2d 818, 825 ["[W]hen a denial of a continuance impairs the fundamental rights of the accused, the trial court abuses its discretion."] .)

Beginning on July 10, 1998 when the trial court set a trial date in February 1999 it did so over defense counsel's objection. (RT 1: 1-14.) Before trial, defense counsel moved for a continuance of the trial. (See CT 4: 1110-1145.) Fox alleged that he was not prepared to proceed to trial because of his lack of experience, the relatively short period of time since he had been assigned the case, the number of charges, the complexity of the case, and the ongoing investigation. He included declarations of more experienced capital defense lawyers (James Larsen, Peter Fox, and D. Scott McDonald) in the Office of the Public Defender to support his motion, and with declarations from experienced capital defense attorneys (Lynne Coffin, John Phillipsborn, John Cotsirilos). (CT 4: 1141-1149; CT 5: 1235-1257; 1318-1328; 1339-1347.) On February 25, 1999, Fox asserted that he

was not prepared to proceed to trial and cited "grounds based upon Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, Section 7, 15, 16 and 17 of the California Constitution," and cases referred to in his moving papers. (RT 6: 1150-1168: 12-16.) The court abused its discretion and denied the motion, sanctioning defense counsel and reporting him to the State Bar for allegedly attempting to "establish a false record for appeal only." (CT 5: 1329; RT 5: 1074-1079; RT 6: 1180-1181; 1199; 1204; see also *Argument III, ante*.) On March 3, 1999, the court refused to reconsider the motion to continue trial. (CT 5: 1349; RT 8: 1510/39-45.)

On retrial, defense counsel sought a continuance of the retrial, primarily based upon his inability to prepare for retrial, including reviewing of over 6,000 pages of transcript from the first trial for corrections, his medical leave, and the complexities of the mental health and "brain science" at issue. (CT 10: 2685-2698.) On January 3, 2000, after Judge Platt's was reassigned to the case, he denied the motion to continue the trial. (CT 10: 2754; RT 62: 12605-12641.) Then, after two months in jury selection, counsel again moved to continue because he was not prepared to proceed due to the complexity of the issues presented, and requested a continuance from March 13 to April 17, 2000; the court abused its discretion and denied the motion on March 7, 2000. (CT 11: 2966; 2967-2979; RT 76: 15853-15865.)

Defense counsel's repeated pleas that he needed more time to prepare for trial and was not ready to represent appellant adequately on the scheduled trial date was unambiguous and indicated his lack of preparedness. In denying counsel's motions for

continuance, the trial court abused its discretion and violated appellant's previously enumerated state and federal constitutional rights. In light of the fact that the first jury favored life imprisonment by eight votes to four, by not allowing his counsel adequate time to prepare for the guilt phase, the first penalty trial, or the penalty retrial, where the jury was also unable to reach a verdict after twenty hours in deliberations, the trial court violated appellant's constitutional rights. Reversal is required unless it is determined that the error was harmless beyond a reasonable doubt; in this case, the State cannot meet that burden, and judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264.)

C. Improper Admission of Non-Statutory Aggravation and Rebuttal Evidence

Evidence admitted in the penalty phase of a capital murder case must be related to statutory factors enumerated in Section 190.3, "circumstances of the crime," "violent criminal activity," or prior felony convictions. (*People v. Boyd* (1985) 38 Cal.3d 762, 774 ["admission of prosecution evidence irrelevant to the enumerated factors" prohibited]; *Tuilaepa v. California, supra,* 512 U.S. 967 [aggravating factors under statutory scheme not void for vagueness].) In *Argument XIV, ante,* appellant has presented as a separate ground for reversal, the court's erroneous rulings that allowed the prosecution to introduce improper "victim impact" evidence. In addition, as set forth in *Arguments XII, XIII,* and *XIV, ante*, as separate grounds for reversal, appellant has argued that the trial court erroneously permitted the prosecution to introduce other non-statutory evidence in the form of inflammatory and cumulative details of the crimes, gruesome photographs,

manikins, and expanded "victim impact" testimony, and thereby violated his constitutional and statutory rights enumerated in those arguments.

Here appellant challenges the erroneous admission at the penalty phase retrial of physical evidence that had been admitted at the guilt phase. At the retrial of the penalty phase, defense counsel moved to "Exclude Inadmissible Evidence in Aggravation," essentially objecting to the introduction of all physical evidence admitted at the guilt phase of trial. (CT 10: 2699-2709; see also, *Argument XIV, ante* [challenge to victim impact photographs and manikins.]) On March 7, 2000, the court and counsel went through virtually every item of physical evidence introduced in the guilt phase; some items were withdrawn on stipulation or excluded. (RT 76: 15716-15758; [15741: excluded - Ex. 526 - Dr. Pepper bottle seized from appellant's apartment; 696 [15758 - Alameda County records regarding King handgun]; [15747: stipulated from backpack recovered upon arrest - Ex. 602 [handcuffs]; 603 [knives]; 626 [white envelopes].)

However, the trial court's erroneous rationale for denying the motion as to all other items of physical evidence listed in the motion ["J" CT 10: 2703-2704] introduced in the guilt phase was that they related to factor (a), "circumstances of the crime," which the prosecutor was allowed to introduce on retrial as aggravation evidence to show state of mind. The court further opined that the challenged items were not prejudicial or cumulative to any other evidence, because they were part of "everything beginning with the sequence of events and the [King] car being broken into [on June 21, 1997] up to and through the arrest [November 12, 1997]." (RT 76: 15727: 1-2; 15716-15720; 15720-22;

15730; 15732; 15742.) Of particular note was the court's erroneous denial of the motion to exclude appellant's recorded statement and "Biography of a Crime Spree" as "circumstances of the crime." (RT 76: 15716-15726; CT 10: 2702-2703 [Items G and H].)

With respect to appellant's recorded statement on November 12 through 13, 1997, defense counsel objected to the evidence because it contained references to "the burglary of the [King] van ..., the Bank of the West incident ..., [and] Cal Spray," which are "offenses other than the capital crimes." (RT 76: 15717-15719; Exhibits 695A-B.) The court erroneously found the statement, and, specifically, those parts objected to, "part of the circumstances of events and it is a continuing scenario of events in which this crime spree is clearly part and parcel from beginning to end." (RT 76: 15720.)

As to the "Biography of a Crime Spree" notebook retrieved from the backpack seized upon appellant's arrest, defense counsel argued the "two or three sentences" written "after the fact" were not "circumstances of the crime" as a statutory factor under factor (a), (RT 76: 15720; Exhibit 578.) The court overruled the objection as arguably "the state of mind of Mr. Peoples," and as rebuttal to any defense argument "there was or was not remorse, [and] whether or not he enjoyed or did not enjoy the crimes." (RT 76: 15721.) As discussed elsewhere, the prosecutor exploited this ruling, along with misleadingly redacted letters and erroneously excluded expressions of remorse to Pastors Kilthau and Skaggs, to improperly argue appellant lacked remorse.[230]

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[230] As described in detail in *Arguments V* and *VI, ante*, the prosecutor distorted the truth by repeatedly emphasizing lack of remorse, referring to appellant's handwritten "Ha! Ha!" on Exhibit 583.

Appellant submits the trial court erred by failing to exclude the evidence because it was highly prejudicial and "improper for the jury to consider that evidence of aggravation since it does not fall within any statutory rule for consideration." (CT 10: 2702.) This was not a case that any juror would necessarily conclude that death was the appropriate punishment. A reasonable juror – such as the eight who voted for life imprisonment in the first penalty phase, and three who favored life imprisonment after twenty hours of deliberations in the retrial – could have determined that the factors in mitigation and aggravation were balanced, and that the additional weight of just one improper factor in aggravation was sufficient to tip the scale in favor of death. The State cannot meet its burden of establishing beyond a "reasonable possibility" that improper factors contributed to at least one juror's decision to impose a death sentence. Accordingly, the sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 15; *People v. Jones* (2003) 29 Cal.4th 1229, 1264; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error in penalty phase must be deemed prejudicial].)

D. The Errors Require Reversal of the Death Judgment

The jury's consideration of non-statutory aggravation violated appellant's state and federal constitutional and statutory rights. (*People v. Boyd, supra*, 38 Cal.3d at p. 774; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) A death sentence must not be based upon extrinsic factors "constitutionally impermissible or totally irrelevant to the sentencing process," (*Zant v. Stephens, supra,* (1983) 462 U.S. 862, 885), and the jury's consideration of the objectionable evidence undermined the heightened need for reliability in the

determination that death is the appropriate punishment. The resulting verdict violated appellant's due process rights and violated the requirements of the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585; *Beck v. Alabama, supra*, 447 U.S. at p. 637.)

Furthermore, the trial court's instruction to the jury to consider the evidence presented by the prosecution as aggravation (RT 96: 20439-20441) further violated appellant's right to a reliable penalty determination. The mere possibility that an instruction created a mandatory presumption is error. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 519; see also, *Argument XVI, post.*) It is "extremely speculative or impossible" to determine beyond a reasonable doubt that a life verdict would not be returned in the absence of the trial court's erroneous rulings and violations of appellant's previously enumerated state and federal constitutional and statutory rights in the retrial of the penalty phase, which created a prejudicial, unreliable and arbitrary penalty determination. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 754; *People v. Brown, supra,* 46 Cal.3d at 446-48.)

XVI.

THE TRIAL COURT ERRED WHEN IT REJECTED DEFENSE PROPOSALS TO MODIFY AND SUPPLEMENT STANDARD JURY INSTRUCTIONS FOR THE PENALTY RETRIAL.

On May 3, 2000, a jury instruction conference was held at which the trial court rejected all but five of appellant's twenty-four proffered pinpoint additions to, and modifications of, standard CALJIC sentencing instructions for the retrial of the penalty phase. On May 9, 2000, the court "finalized" the instructions. (CT 12: 3312-3347; RT 92: 19388-19488; 95: 19961-19968; 96: 20276-20278.) On May 16, 2000, after counsel presented their arguments, the court instructed the jury. (CT 12: 3217-3276; RT 96: 20417-20445.) At the conclusion of the trial, appellant moved for a new trial based upon the court's rejection of appellant's proposed instructions and failures to properly instruct the jury. The court denied the motion. (CT 12: 2712; 13: 3338-3339; RT 97: 20662-20663.)

Appellant was entitled to jury instructions in the retrial of the penalty phase that focused attention on pertinent aspects of his case for life imprisonment without parole that were not adequately covered by standard jury instructions, especially because the first jury had been unable to reach a verdict after being instructed with standard CALJIC penalty instructions, splitting 8-to-4 for life imprisonment. As separately presented in *Argument XX, post,* California's standard jury instructions and capital sentencing law are

systemically unreliable and vague, and they generate arbitrary and capricious sentencing decisions. Appellant incorporates those arguments here, as if fully set forth. However, as this claim demonstrates, the trial court's refusal to appropriately modify standard instructions and to properly provide pinpoint jury instructions resulted in a denial of appellant's state and federal constitutional rights to due process, fair trial, and to a reliable, individualized sentence determination, and against cruel and unusual punishment. Therefore, the judgment of death must be reversed. (U. S. Const., 5th, 6th, 8th, and 14th Amends; Cal. Constitution, Art.1, sects 1, 7, 13, 15, 16, 17; Penal Code Section 190.3; *Furman v. Georgia* (1972) 408 U.S. 238; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586; *Beck v Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Ramos v. California* (1983) 463 U.S. 992; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Walton v. Arizona* (1990) 497 U.S. 639; *Stringer v. Black* (1992) 503 U.S. 222; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Tuilaepa v. California* (1994) 512 U.S. 967; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833; *People v. Alvarez* (1996) 14 Cal.4th 155; *People v. Osband* (1996) 13 Cal.4th 622; *People v. Boyd* (1985) 38 Cal.3d 762; *People v. Brown* (1985) 40 Cal.3d 512; *People v. Sears* (1970) 2 Cal.3d 180.)

It has long been recognized that standard jury instructions are guides only:

> " CALJIC ... is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof."

(*People v. Alvarez, supra*, 14 Cal.4th at p. 217.)

The California Center for Judicial Education and Research (CJER), in *Mandatory Criminal Jury Instructions Handbook* (12th Ed. 2003), p. 105, reminds trial courts that "[t]he defendant is generally entitled to an instruction that pinpoints the theory of the defense and charges the jury on how to relate the evidence ..." to the law. (See also, *People v. Sears, supra*, 2 Cal.3d at p. 190; *People v. Adrian* (1982) 135 Cal.App.3d 333.) Due to the limitations of language used in standard instructions to address the specific issues presented by the penalty phase of a capital murder trial, proposals to modify CALJIC instructions are commonplace, and modifications are part of the jury's fair assessment of the defendant's moral culpability. (*People v. Osband, supra,* 13 Cal.4th at 705-710.) For instance, the United States Supreme Court held in *Simmons v. South Carolina, supra,* 512 U.S. at p. 161, that the Due Process Clause of the Fourteenth Amendment is violated when a trial court refuses to instruct the jury in the penalty phase that defendant is ineligible for parole, a reasonably likely source of confusion for jurors about the meaning of "life imprisonment." (See also, *Walton v. Arizona, supra,* 497 U.S. at 652-655; C. Haney, M. Lynch, "Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions" (1994), *Law and Human Behavior*, Vol. 18, No. 4.) Each proposed instruction in this case was supported by law and evidence, and additions to and reasonable modification of standard jury instructions would have addressed appellant's theory of the case rather than have confused the issues. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) The twenty-two instructions defense counsel proposed for the

sentencing retrial were designed to clarify vague and confusing terms, to restrict aggravation evidence to statutory factors, and to pinpoint and expand on defense theories of mitigation not adequately addressed by standard instructions; the trial court erroneously rejected them and thereby violated appellant's enumerated constitutional rights. (CT 12: 3312-3339; 3344; 3346-3347.) As set forth following, each instruction was supported by appropriate citation to authority, and none was so argumentative as to be rejected for that reason, but the trial court rejected the proposed instructions on the erroneous ground that it was not part of the judicial function to modify or supplement standard instructions:

> " It is the function of the Court, in my opinion, to provide the bones and the skeleton upon which the meat and the argument of counsel is to place [on] the body of the case."
> (RT 92: 19441: 21-23.)

According to the United States Supreme Court, however, it is precisely the trial court's function in a capital murder case to supplement and modify standard instructions:

> " [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of law."
> (*Boyde v. California* (1990) 494 U.S. 370, 384.)

As discussed in the following sections, several of defense counsel's proposals for modifications to standard penalty phase instructions focused attention on the general normative function of the jury, while others focused on the limitations of factors in aggravation and pinpointed the defense theory of mitigation. Defense counsel withdrew a number of proposals (Number 3A [RT 92: 19417; 19435]; Number 4 [RT 92: 19417]; 10, 20 [RT 92: 19435], and 25 [RT 92: 19465]), and the court adopted two minor changes to CALJIC instructions. (Proposed Number 2 [CT 12: 3304; RT 92: 19412-19414]; Proposed Number 3 [CT 12: RT 92: 19416].)

Proposed Instruction 2 was incorporated into what the court had decided to modify on its own in CALJIC 1.00: "you must not be influenced by prejudice against the defendant," striking the word "pity." (CT 12: 3218; 3304; RT 92: 19413.) Proposed Instruction 3 read, "life without possibility of parole means exactly what it says: The defendant will be imprisoned for the rest of his life ... [and] the death penalty means exactly that ..." (CT 12: 3314), but defense counsel conceded the court's own modification of CALJIC 8.84 contained substantially same language. (CT 12: 3246; RT 92: 19416-19417; 96: 20431.) As presented in *Argument XVII, post,* however, at least one juror injected extraneous and prejudicial material into deliberations by arguing that appellant would never be executed, he would be better off on death row, and the death penalty would likely be abolished in future, thus ignoring the court's instructions. In short, trial court's *sua sponte* modifications to CALJIC were of minimal consequence, and denial of the remaining proposed defense instructions violated appellant's enumerated

constitutional rights.

A. PROPOSED MODIFICATIONS OF STANDARD JURY INSTRUCTION ON THE NORMATIVE FUNCTION OF JURORS IN THE PENALTY PHASE.

Proposed Jury Instruction No. 1, presented a modification of CALJIC 1.00 to include a broader explanation of the duty of jurors:

> "Your responsibility in the penalty phase is not merely to find facts, but also – and most important – to render an individualized, moral determination about the penalty appropriate for the particular defendant – that is, whether he should live or die."
>
> (CT 12: 3313; RT 92: 19400-19406.)

Defense counsel properly cited the United States Supreme Court's recognition of the jury's function of rendering a "reasoned moral response" as guided by focused legal instructions to ensure a reliable and *individualized* punishment in death-eligible murder cases. This Court has confirmed that "normative" function for penalty determinations in California capital murder cases. (*Penry v. Lynaugh* (1989) 492 U.S. 302; *People v. Brown* (1988) 46 Cal.3d 432, 448; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1038.) Yet the trial court found that CAJIC 8.88 "addresses the issue" and erroneously termed the proposed modification of CALJIC 1.00 "argumentative, and ... not an accurate reflection of the law." (RT 92: 19406: 18-20; see also, RT 92: 19408-19413.) There was nothing "inaccurate" about the proposed instruction, and, as read by the trial court, CALJIC 8.88, did not clarify the normative function, as described by the requested modification. (RT 92:

19406; 19412: 16; CT 12: 3294-3295.) Indeed, the principal function of the jury is to decide between life or death through a process of heightened reliability based upon an individualized moral determination, and the trial court denied appellant his enumerated constitutional rights by rejecting the proposed modification. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

B. PROPOSED LIMITATIONS ON FACTORS IN AGGRAVATION.

Proposed Instructions Numbers 5-6 on the limitations of aggravation evidence to factors (a)-(c), and Number 9 on exclusion of other non-violent (juvenile) criminal activity introduced during trial as part of the social history from consideration as "aggravation," were incorporated by the court. (CT 12: 3251; 3266; 3296; 3305.) However, the court rejected appellant's Proposed Instructions Numbers 7-8, as "argument" that "from an instruction and legal point of view" was deemed "covered" by CALJIC 1.00, i.e., "the issue of being arrested, charged or brought to trial are not evidence and should not be considered." (RT 92: 19431: 2-8; CT 12: 3218.) Proposed Instructions 7-8, which defense counsel described as "submitted ... together," are not generic references to arrest and charge as incompetent evidence, but properly attempted to focus jurors in the retrial of the penalty phase on the limitations of verdicts of the jury in the guilt phase

> " You may not treat the verdict and finding of first degree murder committed under [a] special circumstances, in and of themselves, as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by

either death or life imprisonment without possibility of parole.

Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in this trial to determine how the underlying facts of the crime bear on aggravation or mitigation."

(Number 7); and,

The finding of a multiple murder special circumstance makes the death penalty no more mandatory than the finding of any other special circumstance. Under our penalty scheme, the jury must weigh the factors in aggravation and mitigation to determine penalty. The circumstances of the crime is a potentially aggravating factor as to all defendants who reach the penalty phase. Thus, defendants [sic] with a multiple murder special circumstance are subject to no greater chance of receiving the death penalty than any other defendant against whom a special circumstance finding has been made."

(Number 8; CT 12: 3319-3320.)

Appellant's right to have the jury weigh and consider statutory aggravation as limited by law was not made sufficiently clear under CALJIC 8.85, 8.88, and 8.88 "A," as crafted and read by the trial court to the jury:

" Of the various factors in aggravation and/or mitigation that I

previously read to you [CALJIC 8.85 and 8.88; CT 12: 3249-3250; 3264] (referred to as factors (a) through (k)), only factors (a), (b), and (c) can be considered as potential factors in aggravation, depending upon what you find the facts and circumstances to be. Factors (a), (b), and (c) can be either potentially aggravating or mitigating, again, depending on what you find the facts and circumstances to be. Factors (d) through (k) can only potentially be considered as mitigating factors, again, depending on what you find the facts and circumstances to be."

(CT 12: 3266; RT 96: 20440- 20441.)

As discussed in *Argument XX, post*, pp. 601-602, appellant submits the standard instructions do not adequately limit aggravation evidence, and the jury in this case was not sufficiently guided through non-statutory factors in aggravation. Similarly, as presented in *Arguments IV-V, ante*, the court erroneously excluded appellant's expressions of remorse, while the prosecutor improperly argued lack of remorse. Without limiting factors in aggravation and clarifying mitigation, as proposed by defense counsel, the jury was free to consider non-statutory aggravation in an arbitrary manner. The CALJIC instructions did not adequately address the issues presented. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975, 9780979; *People v. Osband, supra*, 13 Cal.4th at pp. 705-706.)

C. PROPOSED MITIGATION INSTRUCTIONS

Far more extensive were trial counsel's proposed instructions, numbered 11-14, 16-18, 21-22, 24C, 28-29, which pinpointed mitigation evidence, including expanded

sympathy and mercy instructions. However, the court rejected each instruction on what amounts to the "same argument and rationale" as it had expressed with respect to other proposals, i.e., they were allegedly the "meat" to the judicial "bones,"and, as such, the subject of counsel's argument, not of instruction. (RT 92: 19436; 19444; CT 12: 3313-3339; 3342-3343.) Judge Platt viewed the entire series of expanded definitions of mitigation as "argument" and "appropriately covered in [CALJIC] 8.85" (RT 92: 19436). As set forth in *Argument IV, ante*, p. 114, during the instructions conference he demeaned defense counsel and the proposed instructions as "insulting to the jury system and human beings as a whole ..., so that they are so god damned stupid that they cannot understand simple terminology ... because humans have their heads so far up their ass that they cannot understand the issues at hand in this case ...." (RT 92: 19441: 5-14.) Contrary to the teaching of the High Court in *Boyde v. California, supra,* 494 U.S. at 384, the trial court misconstrued the judicial function as limited to "provid[ing] the bones and the skeleton" and refused to provide "the meat [for the jury] ... to place [on] the body of the case." (RT 92: 19441: 21-23.)

Defense counsel properly sought expanded definitions of mitigation under *People v. Lanphear* (1984) 36 Cal.3d 163, relying on *Lockett v. Ohio* (1978) 438 U.S. 586, in attempting to combat the prosecution's aggressive case for the death penalty. (CT 12: 3322; 3344.) In quoting extensively from its earlier decisions and federal precedent, this Court reiterated:

> " As these cases make clear, the jury is obliged to weigh

> mitigating evidence against aggravating evidence in exercising its sentencing discretion. Although the law seeks to ensure that this discretion is not exercised arbitrarily, i.e., without regard to the evidence, the weighing process is not mechanical. If a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence or its observation of the defendant arouses sympathy or compassion such as to persuade the jury that death is not the appropriate penalty, the jury may act in response thereto and opt instead for life without possibility for parole.
>
> .....
>
> Sympathy for the victim and compassion for the defendant are not mutually exclusive emotions."
>
> (*People v. Lanphear, supra,* at p. 167.)

Mere reference in CALJIC 8.85 to "whatever moral or sympathetic value you deem appropriate" is woefully inadequate to address the concepts of sympathy, compassion and mercy, and appellant's proposed mitigation instructions fleshed out the defense theory of the evidence under applicable law. (*Woodson v. North Carolina, supra,* 428 U.S. at 304; *People v. Robertson* (1982) 33 Cal.3d 21.)

Here, the trial rejected all proposed instructions presented by defense counsel to pinpoint "mitigation" for jurors. In each instance, the trial court rejected the following

proposed and expanded mitigation instructions as "argumentative" and only subject to counsel's argument to the jury (RT 92: 19441-19442; 19444; 19450; 19450-19451; 19451-19458; 19460-19461), even though they might accurately reflect the state of the law:

> " The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding to impose a death sentence in this case.
>
> But you should not limit your consideration of mitigating circumstances to these specific factors. You also may consider any other circumstances relating to the case or to the defendant shown by the evidence for not imposing the death penalty.
>
> Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case." (Proposed Instruction 11; CT 12: 3321, citing, *inter alia*, *Lockett v. Ohio* (1978) 438 U.S. 486, 604-606; *People v. Williams* (1988) 45 Cal.3d 1268, 1322);
>
> " A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense or about the defendant which, in fairness, sympathy, compassion, or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less

than death, although it does not justify or excuse the offense. Mitigating factors are unlimited and anything mitigating should be considered and may be taken into account in deciding to impose a sentence of life without possibility of parole. Any aspect of the offense or of the defendant's character or background that you consider mitigating can be the basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime"

(Proposed Instruction 12; CT 3322, citing, *inter alia*, *Lockett v. Ohio, supra*, 438 U.S. at pp. 603-605; *People v. Lanphear, supra*, 36 Cal.3d at p. 166);

" Mitigating factors are not necessarily limited to those adduced from specific evidence offered at the sentencing hearing such as character testimony. A juror might be disposed to grant mercy based on other factors, such as a humane perception of the defendant developed during trial"

(Proposed Instruction 13; CT 12: 3323, citing, *inter alia*, *People v. Jackson* (1990) 49 Cal.3d 1170, 1206);

" If a mitigating circumstance or an aspect of the defendant's background or his character called to the attention of the jury by the evidence or observation of the defendant arouses mercy, sympathy, empathy, or compassion such as to persuade you that

death is not the appropriate penalty, you may act in response thereto and impose a sentence of life without possibility of parole" Proposed Instruction 14; CT 12: 3324; *Lockett v. Ohio, supra*, 438 U.S. at pp. 603-605; *People v. Lanphear, supra*, 36 Cal.3d at p. 166));

" You may spare the defendant's life for any reason you deem appropriate and satisfactory."

(Proposed Instruction 16; CT 12: 3326, citing, *inter alia*, *McCleskey v. Kemp* (1987) 481 U.S. 279, 294);

" You need not find any mitigating circumstances in order to return a sentence of life imprisonment without possibility of parole. A life sentence may be returned regardless of the evidence."

(Proposed Instruction 17; CT 12: 3327, citing *Evans v. Thigpen* (5th Cir. 1987) 809 F.2d 239, 243; *Hill v. Thigpen* (ND Miss. 1987) 667 F.Supp. 314);

" With regard to factors in mitigation, offered by the defendant as reasons to impose a sentence of life imprisonment without parole less than death, each juror must make his or her individual assessment of the weight to be given such evidence.

There is no requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror makes an individual evaluation of each fact or circumstance offered in mitigation of

penalty. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established, regardless of the number of jurors who concur that the factor has been established."

(Proposed Instruction 18; CT 12: 3328, citing *Mills v. North Carolina* (1988) 486 U.S. 367, 375-376);

" If you have a doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole."

(Proposed Instruction 21; CT 12: 3329, citing *People v. Cancino* (1937) 10 Cal.2d 223, 330.)

As the court wrote in finding the absence of mitigation prejudicial in *Mayfield v. Woodford* (2001) 270 F.3d 915, 938, quoting Portia's famous speech in Shakespeare's *Merchant of Venice*:

" 'The quality of mercy is not strain'd, It droppeth as the gentle rain from heaven upon the place beneath.' ... [W]e must remind ourselves that the possibility of mercy, like the

possibility of gentle rain, is not predictable with certainty."

Similarly, the rejection of the proposed defense instructions on mitigation violated appellant's constitutional rights in this case.

D. PROPOSED MODIFICATIONS TO STANDARD INSTRUCTIONS ON WEIGHING FACTORS IN AGGRAVATION AND MITIGATION.

The following proposed modifications to standard CALJIC instructions were also proffered by defense counsel, but refused by the trial court as "inaccurate" and "addressed" by the standard instructions (RT 92: 19461-19462; 19463; 19464-19465;19465; 19465-19467; 19467-19470):

> " Before you may consider any of the factors which I have listed for you as aggravating, you must find that the factor has been established by the evidence beyond a reasonable. You may not consider any factor as a basis for imposing the punishment of death unless you are convinced beyond a reasonable doubt that it is true.
>
> All twelve jurors must agree as to the existence of any aggravating factor before it may be considered by you. If the jury does not unanimously agree that the existence of any aggravating factor has been proven, no juror may consider it in reaching their personal penalty verdict.
>
> In order to impose a death sentence, you must be unanimously convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances.

If you are not unanimously convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment without the possibility of parole.

In order to impose a death sentence, you must unanimously be convinced beyond a reasonable doubt that death is the appropriate punishment for the defendant. If you are not unanimously convinced beyond a reasonable doubt that death is the appropriate punishment, you must return a verdict of life imprisonment without the possibility of parole." (Proposed Instruction 22, Modified CALJIC 8.87, citing *People v. Boyd* (1985) 38 Cal.3d 762, 775-776; U.S. Const., 8th and 14th Amendments); " Both the People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of jurors, or any of them, favor such a decision. Do not decide any issue by chance, such as the drawing of lots or by any other chance determination."

(Proposed Instruction 23, Modified 17.40; CT 12: 3331 [no citation]);

" In order to make a determination as to penalty, all twelve jurors must agree if you can ... If you cannot, then I will discharge you.

Nothing I have said requires you to reach a verdict of which penalty to impose in this case. The possibility of a hung jury is an inevitable by-product of the requirement that a verdict must be unanimous."

(Proposed Instruction 24, Modified 8.88; CT 12: 3332; Penal Code §190.4(b); *People v. Gainer* (1977) 19 Cal. 3d 835, 852.)

" In order to make a determination as to penalty, all twelve jurors must agree, if you can ... If you cannot, then I will discharge you."

(Proposed Instruction 24A, Modified CALJIC 8.88, ¶6; CT 3333, citing *People v. Belmontes* (1988) 45 Cal.3d 744, 813-814);

" You are permitted to return a verdict for death only if you conclude that the aggravating factors outweigh the mitigating so substantially that a death sentence is justified and appropriate under all the circumstances. In such a case, you are permitted to return a verdict of death, but you are not required to do so ..." or,

" If you determine that the aggravating factors substantially outweigh the mitigating factors, you may return a finding of death or a finding of life in prison without the possibility of parole."

(Proposed Instruction 24B, Modified CALJIC 8.88, ¶4, CT 3334, citing

Jackson v. Dugger (11th Cir. 1988) 832 F.2d 1469, 1473-1474 [no presumption the death penalty is ever the proper penalty]; U.S. Const., 8th & 14th Amendments);

" A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offenses or about the defendant, which in fairness, sympathy, compassion or mercy, may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense."

(Proposed Instruction 24C, Modified CALJIC 8.88, ¶3, CT 3335, citing *People v. Ray* (1996) 13 Cal.4th 313, 355-356.);

" You shall now retire and select one of your members to act as foreperson. He/she will preside over your deliberations. It is the foreperson's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

In order to reach a verdict, all twelve jurors must agree to the decision. As soon as all of you have agreed upon a verdict, so that,

when polled, each may state truthfully that the verdict expresses his vote, have it dated and signed by your foreperson and then return with it to this courtroom. Return the unsigned verdict form.

From this time on, you will receive no visitors from any source whatever. If, in the course of your deliberations, you have any manner that you desire to take up with the Court, you will notify the Deputy Sheriff in charge, who will furnish to you a written form upon which your foreperson will write you request, and the Deputy Sheriff in charge will deliver that request to the Court. The case now remains with you."

(Proposed Instruction 26, Modified CALJIC 17.50, CT 12: 3337 [no citation]);

" In this case, there are five possible verdicts. These various possible verdicts are set forth in the forms of verdicts which you will receive. Only one of the possible verdicts may be returned by you. If you have all agreed upon one verdict, the corresponding form is the only verdict form to be signed. The other forms are to be left unsigned. The five possible verdicts are as follows:

1. We, the jury in the above-entitled cause, find that the aggravating circumstances do not outweigh the mitigating circumstances. Therefore, the punishment shall be life imprisonment without possibility of parole;

2. We, the jury in the above-entitled cause, find that the aggravating circumstances outweigh the mitigating circumstances. However, we determine the punishment shall be life in prison without possibility of parole;

3. We, the jury in the above-entitled cause, find that the aggravating circumstances are equal to the mitigating circumstances. Therefore, the punishment shall be life imprisonment without the possibility of parole.

4. We, the jury in the above-entitled cause, find we are unable to determine whether the aggravating circumstances outweigh the mitigating circumstances. However, all twelve of us agree that the punishment shall be life in prison without possibility of parole.

5. We, the jury in the above-entitled cause, find that the aggravating circumstances substantially outweigh the mitigating circumstances and we determine the punishment shall be death."

(Proposed Instruction 27, Modified CALJIC 17.49; CT 3338 [no citations]).

Moreover, in a lengthy Proposed Instruction 29 (CT 12: 3342-3344) defense counsel offered a modified version of CALJIC 8.85, striking the factors that had no relevance to the case at issue, including factors (e) [victim as participant], (f) [moral justification], (g) [duress or substantial domination of another], and (j) [accomplices]. (See, RT 92: 19477; see also, *Argument XIX, post.*) In the proposed instruction defense

counsel then listed 33 specific "mitigating factors [that] also include any sympathetic, compassionate, merciful, or other aspect of the defendant's background, character, record, or social, psychological or medical history that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial," which he argued had been adduced by the evidence and necessitated a modification to the standard CALJIC 8.85 factor (k) language, ultimately given by the court. (CT 12: 3250.) Among the many cases cited, counsel relied upon *People v. Sears, supra,* 2 Cal.3d at p. 190, *People v. Lanphear, supra*, 36 Cal.3d at p. 167, and *Lockett v. Ohio, supra,* 438 U.S. at pp. 603-605. (RT 92: 19477-19479.) In addition to refusing defense counsel's motion to strike unrelated factors, the trial court agreed the 33 delineated factors in the proposed modification of CALJIC 8.85, including whether brain dysfunction affected his ability to think, whether drug addiction affected his behavior, his potential for rehabilitation, his value to friends and family, his remorse, and multiple variations of the effect of trauma on childhood, adolescent and adult emotional and psychological development, etc., were "appropriate" defense argument for jury consideration, but again erroneously ruled the proposed instructions were "not appropriate, in my opinion, and need not be given" to the jury. (RT 92: 19480: 8-22; see, *Boyde v. California, supra,* 494 U.S. at p. 384.)

Finally, even though the court agreed to modify CALJIC 8.85 as proposed by defense counsel (RT 92: 19447-19450), it failed to do so when it actually instructed the jury (CT 3264; RT 96: 20439-20440). The proposed instruction would have added the important language to the final sentence of 8.85, as follows:

" Since you, as jurors, decide what weight to be given the evidence in aggravating and the evidence in mitigation, you are instructed that any mitigating evidence standing alone may be the basis for deciding that life without possibility of parole is the appropriate punishment."

(CT 12: 3325; Proposed Instruction 15; *People v. Brown* (1985) 40 Cal.3d 512, 540; *People v. Williams* (1988) 45 Cal.3d 1268, 1322-1324);

E. THE PROPOSED 'OCHOA' INSTRUCTION.

Defense counsel's pinpoint Proposed Instruction 28, derived from *People v. Ochoa* (1998) 19 Cal.4th 353, read as follows:

" Sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation.

However, family members may offer testimony of the impact of an execution on them if, by doing so, they illuminate some positive quality of the defendant's background or character which is offered as a basis for a sentence less than death."

(CT 12: 3339.)

Louis's brother, Larry Peoples, had testified during the retrial on the impact on the family and Louis's positive qualities:

" I would like to tell this jury that I hope and I pray that they will not kill my brother and that he's shown

humanity to his children, my children, to my family, and that the impact on my family would be devastating."

(RT 92: 19338: 22-25.)

When counsel pointed out that Judge Delucchi had brought the instruction to counsel's attention in the first penalty phase (RT 59: 12066), Judge Platt remarked, "[Judge Delucchi's] not listed as an authority on it." (RT 92: 19470: 17-18.) Judge Platt ruled that despite Larry Peoples' testimony, he would not allow the proposed instruction:

" It's a correct statement in terms of what the limitation is and upon what basis [Larry Peoples' testimony] is admissible.

It's already been testified to. And it can be argued that that is a factor that illuminates some positive quality of the defendant and why the impact of execution is significant for them to consider. But it's argument.

And I don't see it's appropriate in an instruction. I'm not disputing that what *Ochoa* said, or that's what Judge Delucchi allowed or didn't allow to be read as an instruction. I just don't find it to be appropriate place or an appropriate comment for an instruction. It's not an instruction."

(RT 92: 19472: 24-28 - 19473: 1-8.)

Appellant also moved for a new trial based upon the trial court's refusal to instruct as proposed. (RT 97: 20662-20663.) As this Court recently pointed out in *People v. Bennett* (2009) 45 Cal.4th 577, 601, evidence such as that adduced from Larry Peoples, "as we explained [in *People v. Ochoa, supra*, 19 Cal. 3d at p. 456] ... constitutes permissible indirect evidence of a defendant's character ..." Accordingly, the trial court clearly erred when it refused the proffered instruction, thereby violating appellant's enumerated state and federal constitutional rights. (*People v. Osband, supra,* 13 Cal.4th at 705-06; *Simmons v. South Carolina, supra,* 512 U.S. at 156.)

F. CONCLUSION

For all the forgoing reasons, the proposed defense instructions were reasonable efforts to explain the jurors' duties, to limit aggravation to statutory factors, and to pinpoint the principles consistent with appellant's theory of mitigation. The trial court, however, unreasonably rejected them. (CT 12: 3313-3347; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Bonin* (1988) 46 Cal.3d 657, 699-70; *People v. Williams* (1988) 45 Cal.3d 1268, 1324; *People v. Melton* (1988) 44 Cal.3d 713, 769-70; *People v. Rodriguez* (1986) 42 Cal.3d 730, 789-90; *People v. Davenport* (1985) 41 Cal.3d 247, 288-90.) Indeed, one juror is all that is needed to spare the defendant from the death penalty, and the failure and refusal to modify or supplement the instructions as proposed by counsel was prejudicial, especially in light of the first jury's inability to reach a verdict, the second jury's expression of impasse, and the trial court's improper charge to the jury, as set forth

in *Argument IV, ante*. As the court wrote in *Mills v. Maryland* (1988) 486 U.S. 367, 383-84:

> " [N]o one on this court was a member of the jury that sentenced [Louis Peoples]. We cannot say with any degree of confidence which interpretation [of the court's instructions] the jury adopted .... The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing."

Similarly, in *McDowell v. Calderon, supra,* 130 F.3d at 839, the court noted:

> " Jurors' uncorrected confusion regarding the law may lead to verdicts reached outside the channel required by *Godfrey* [*v. Georgia*, *supra*, 446 U.S. at 426-427], and the Eighth Amendment."

Because the trial court undermined appellant's reasonable efforts to properly instruct the jury and violated his enumerated rights, the judgment of death must be reversed.

XVII.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE PENALTY RETRIAL WHEN THE TRIAL COURT DENIED HIS MOTION TO REMOVE A BIASED JUROR, WHO SUBSEQUENTLY REFUSED TO DELIBERATE, AND BECAUSE OTHER JURORS INJECTED EXTRANEOUS MATERIAL INTO DELIBERATIONS.

A verdict may be set aside, or reversal of judgment rendered on appeal, where juror misconduct, such as in the present case, violates a defendant's rights to impartial and unbiased jury, to due process, to fair trial, to a reliable and individualized determination of punishment based upon material facts and evidence adduced at trial, and to be free from cruel and unusual punishments. (U.S. Const., 5th, 6th, 8th, and 14th Amend.; Cal. Const., art. 1, §§1, 7, 13, 15, 16, 17; Penal Code §1089; *Remmer v. United States* (1954) 347 U.S. 227; *In re Winship* (1970) 397 U.S. 358; *Beck v. Alabama* (1980) 447 U.S. 635; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Smith v. Phillips* (1982) 455 U.S. 209; *Dyer v. Calderon* (1998) 151 F.3d 970; *United States v. Hendrix* (9th Cir. 1977) 549 F.2d 1225; *People v. Dykes* (2009) 46 Cal.4th 731, 809-812; *People v. Loker* (2008) 44 Cal.4th 691, 747; *People v. Williams* (2006) 40 Cal.4th 287, 334-335; *People v. Ault* (2004) 33 Cal.4th 1250; *People v. Nesler* (1997) 16 Cal.4th 561; *In re Carpenter* (1995) 9 Cal.4th 634; *People v. Marshall* (1990) 50 Cal.3d 907; *People v. Honeycutt* (1977) 20 Cal.3d 150.)

Appellant filed a motion for new trial based in part upon claims of juror misconduct. It was opposed in writing, argued, and denied without an evidentiary hearing on August 4, 2000. He is entitled to de novo review of his claim and an independent determination of a mixed question of law and fact as to whether misconduct and prejudice occurred. (CT 13: 3379-3411; 3386-3387; 3414-3417; RT 97: 20630-20632; 20654-20659; 20663; *People v. Ault, supra*, 33 Cal.4th at 1263.) In addition, as discussed following, appellant moved to excuse Juror Number 7 during trial, and the trial court abused its discretion in denying the motion. Juror Number 7's misconduct during trial, and his refusal to deliberate with other jurors, were also subjects of the motion for new trial. (See also, *Argument V, ante*, pp. 285-286.)

A motion for new trial must be made prior to judgment, and may be either oral or in written. (Section 1181-1182; *People v. Haldeen* (1968) 267 Cal.App.2d 478, 481.) It has long been recognized that the admission of irrelevant, prejudicial evidence is an error of law committed during the course of trial under paragraph 5 of Section 1181, and a basis for granting a new trial. (*People v. Daily* (1881) 59 Cal. 600; *People v. Martin* (1910) 13 Cal.App. 96; *People v. Perkin* (1948) 87 Cal.App.2d 365.) As noted in *People v. Drake* (1992) 6 Cal.App.4th 92, 97:

> " '[Section 1181] should not be read to limit the constitutional duty of the trial courts to ensure that defendants be accorded due process of law ... The Legislature has no power, of course, to limit this constitutional obligation by statute. [Citation.]'

(*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [189 Cal. Rptr. 855, 659 P.2d 1144.].)"

Juror misconduct is an enumerated ground for new trial as set forth in paragraphs 3-4 of section 1181, when "the jury has ... been guilty of any misconduct by which a fair and due consideration of the case has been prevented ...," or where "the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors." (*People v. Pierce* (1979) 24 Cal.3d 199, 206; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108-1111; *In re Carpenter, supra,* 9 Cal.4th 634; *People v. Nesler, supra,* 16 Cal.4th 561; *People v. Ault, supra,* 33 Cal.4th 1250; *People v. Bowers* (2001) 87 Cal.App.4th 722; *People v. Perez* (1992) 4 Cal.App.4th 893.) It is clear that inadvertent exposure or innocent reception of extraneous information during deliberations constitutes "misconduct," and raises a presumption of prejudice. (*People v. Nesler, supra*, 16 Cal.4th at 579; *People v. Hogan* (1982) 31 Cal.3d 815, 846; *People v. Wong Loung* (1911) 159 Cal. 520.) In this case extraneous information was introduced during deliberations and communicated to other jurors, creating an unrebutted presumption of prejudice. (*People v. Honeycutt, supra,* 20 Cal.3d at 156; *People v. Pierce, supra,* 24 Cal.3d 199, 207; *Dyer v. Calderon, supra,* 151 F.3d at 981.) In *People v. Ault, supra,* 33 Cal.4th at 1258, this Court affirmed the standard "test recited in *Nesler*, *supra*, 16 Cal.4th 561, 578-579, to the effect that when a juror commits misconduct by receiving extraneous material, prejudice – i.e., a substantial likelihood of actual bias – will be found if either (1) the extraneous material itself is 'inherently' prejudicial, or (2) the nature of the misconduct and the surrounding

circumstances indicate it is substantially likely a juror was actually biased."

In the present case, the trial court could have held an evidentiary hearing in light of juror allegations of misconduct, but the presumption of prejudice was undisputed and unrebutted. (RT 97: 20654-20659; *People v. Ault, supra,* 33 Cal.4th 1250; *People v. Nesler, supra,* 16 Cal.4th 561; *People v. Hedgecock* (1990) 51 Cal.3d 395, 414-415.) Instead, the trial court accepted as true the direct affidavits of Juror Number 1 (CT 13: 3392-3393), Juror Number 3 (CT 13: 3394), and Juror Number 5 (CT 13: 3395-3396), and declarations of defense counsel's post-verdict jury investigator, Karen Fleming, Ph.D., regarding interviews conducted with Jury Foreperson Number 6 (CT 13: 3397-3401), Juror Number 11 (CT 13: 3402-3406), and Juror Number 4 (CT 13: 3407-3411):

> " [T]he Court would have every right to exclude that testimony [Jurors 4, 6 and 11] or that – any information and not consider it in the motion for new trial. They are not in an appropriate form. They are not from the jurors themselves.
>
> The Court has not done that. The Court has considered all six of the referenced juror information.
>
> Three of them being affidavits [Jurors 1, 3 and 5], three of them being affidavits filed by Ms. Fleming.
>
> (RT 97: 20654: 15-26.)

In point of fact, three of the six declarations submitted by defense investigator Fleming were her affidavits based upon interviews with jurors (1,3 and 5), but the trial

court considered as *true* all averments of potential misconduct during deliberations, including evidence that: 1) after the court examined Juror Number 7 and his wife during the trial, Juror Number 1 declared that Juror Number 7 was "angry" and refused to deliberate; 2) Juror 10 improperly imparted his lay opinions on the effects of drugs based upon his personal experience; 3) Juror 12 discussed with other jurors the length of time it takes to process an automatic appeal if there is a death verdict; 4) Juror 12 discussed the nature of the system and future of capital punishment in other states; and, 5) according to Juror 5, other jurors discussed whether sentencing appellant to death meant he would not be put to death in light of considerations 3) and 4). (See, CT 13: 3392-3411; see also, *People v. Dykes, supra*, 46 Cal.4th at pp. 809-810.)

California courts have long recognized the Judiciary's independent powers in the area of jury conduct, and have found no "substantial conflict" between balancing the need to "prevent instability of verdicts, fraud, and harassment of jurors ...," and the desirability "to give the losing party relief from wrongful conduct by the jury." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 348; *People v. Rhodes* (1989) 212 Cal.App.3d 541, 549-550.) Thus, while Evidence Code section 1150 prohibits intrusion into the "mental processes" of jurors in order to impeach a verdict, in *People v. Hutchinson* (1969) 71 Cal. 2d 342, 351, in reversing the trial court's order denying motion for new trial, this Court distinguished mental processes from extraneous "objective facts" introduced during deliberations:

> " We therefore hold that jurors are competent witnesses to prove objective facts to impeach a verdict under section 1150 of the

Evidence Code ...

The bailiff's remarks and the tone of their delivery constitute statements and conduct that are 'likely to have influenced the verdict improperly.' (Evid. Code §1150; see *People v. Gidney, supra*, 10 Cal.2d 138, 146.) The affidavit of the juror is therefore admissible to prove the statements and conduct of the bailiff."

Appellant here was not attempting to impeach the death verdict at retrial with inadmissible "mental processes or reasons for assent or dissent" among jurors. Rather, he objectively demonstrated the "improper influences ... open to sight, hearing, and the other senses and thus subject to corroboration." (*People v. Hutchinson, supra*, 71 Cal.2d at 350 [citation omitted]; see also, *People v. Rhodes, supra*, 212 Cal.App.3d at pp. 549-554.) The trial court abused its discretion in denying the motion for new trial because appellant provided un-rebutted evidence of misconduct, and this Court should reverse the judgment on independent review because he was denied his enumerated constitutional rights. (*People v. Ault, supra,* 33 Cal.4th at p. 1255; *People v. Nesler, supra,* 16 Cal.4th at pp. 581-582.)

A. Injection of Extraneous Material Into Deliberations

With respect to the claims outlined in 2) - 5) above, the court ruled:

" As it relates to the discussions by jurors of the appellate process, defendant may or may not ever die, and their use of drugs.

There is an insufficient basis for evidence that's provided in the affidavits, including the ones that I did not have to consider, but have considered. That there was just no showing that it impacted or affected their decision-making process.

Whether or not it should have been done, I agree it probably should have not. But there's just nothing that indicates that impacted their decision to vote for or against the death penalty."

(RT 97: 20659: 5-16.)

As pointed out above, an offer of proof of the injection of extraneous material into deliberations does not allow – or require – consideration of jurors's "decision-making process" (RT 97: 20659) in order to impeach the verdict. (*People v. Hutchinson, supra*, 71 Cal.2d at p. 351.) The moving party need not show "blameworthy conduct, as might be suggested by the term 'misconduct,' [but] it nevertheless 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 had no opportunity to confront, cross-examine, or rebut." (*People v. Nesler, supra,* 16 Cal.4th at p. 579; emphasis added.) In the present case, Juror Number 1 declared that Juror Number 10 introduced "his own drug use and drug use of his family members and strongly maintained that drugs were not a mitigating factor in this case." (CT 13: 3392.) Juror Number 3 corroborated Juror Number 1 by declaring that Juror Number

10 "tried every drug imaginable [and] did not believe drugs had anything to do with what Louis did." (CT 13: 3394; see also, CT 13: 3403-3404 [Fleming/Juror 11].)

The importance of appellant's methamphetamine use as mitigation cannot be overemphasized. The expert testimony of Dr. Woods, Dr. Wu, and Dr. Amen at the retrial demonstrates the nature of its central theme in the case for life imprisonment. All three physicians provided converging opinion testimony that methamphetamine had likely damaged Louis's brain and deeply affected his ability to control himself during the time he committed the crimes at issue; Dr. Mayberg vigorously contested those opinions as part of prosecutor's rebuttal and argument for the death penalty. (See, *Statement of Facts, ante*, pp. 50-62; see also, *Argument IX, ante*.) By rejecting trial counsel's repeated proffers during both trials, Judge Platt refused to admit lay witness testimony to personal experiences with methamphetamine upon the prosecutor's "misleading" objection (RT 35: 7169), and termed "the person under the influence ... [as] not the source in a reliable fashion in any means" for providing opinion testimony based upon personal experience; the defense proffer had presented an "absolutely ludicrous" proposition. (RT 35: 7174: 11-12; 87: 18311; see, *Argument VIII, ante.*) Ironically, however, Judge Platt made short shrift of declarations of Jurors Number 1 and 3, who swore under oath that they were exposed to Juror Number 10's "strong" lay opinion injected into deliberations to undermine the mitigating value of expert defense opinions and support a death verdict. (CT 13: 3392-3394.) The trial court "agree[d] it probably should not have been done," but Juror Number 10's introduction of extraneous opinions during deliberations based

upon his own drug use raises a presumption of prejudice that was never rebutted; the trial court simply evaded the juror misconduct presented by erroneously concluding:

> " There is an insufficient basis for evidence [of misconduct] that's considered in the affidavits ... [and] no showing that it impacted or affected their decision-making process."
>
> (RT 97: 20659: 8-14.)

Indeed, the injection of extraneous personal experience and opinion into deliberations, including the very lay opinions on methamphetamine the trial court refused to allow as mitigation evidence, effectively turned Juror Number 10 into an unexamined, biased rebuttal witness for the prosecution. Thus, the material was not only extraneous to evidence admitted at trial but highly prejudicial to appellant, who was denied the opportunity to present lay testimony to corroborate expert opinion in mitigation of punishment, or to rebut Juror Number 10's personal opinions. (*People v. Williams, supra*, 40 Cal.4th at pp. 333-334.)

Similarly, jurors injected extraneous information into deliberations through discussions on the political framework for the death penalty and its implications for appellant's sentence. As Juror Number 1 declared, Juror Number 12 "explained to the jurors that Louis would actually be much safer if he were on death row ...., [and] the death penalty would be abolished in years to come and Louis would never be executed." (CT 13: 3392; see also, CT 13: 3405 [Fleming/Juror 11].) Juror Number 5 declared she did "not believe that Louis will ever actually be executed ...; [w]e discussed other states that

are abolishing the death penalty and California is not far behind." (CT 13: 3395; see also, CT 13: 3410 [Fleming/Juror 4].) According to Juror Number 1, Juror Number 12's "discussion" occurred after the jury had declared itself deadlocked 9 to 3. (CT 13: 3392; RT 97: 20621-20622.) As pointed out in *Argument XVI, ante*, despite the trial court's instruction "that life in prison without possibility of parole means exactly what it says ..., [and] the death penalty means exactly what it says, that the defendant will be executed" (CT 12: 3306), Juror 12 ignored the instruction and improperly encouraged others to do so as well. Judge Platt applied the same erroneous standard to Juror 12 that he had applied to Juror Number 10's misconduct, i.e., "there's just nothing in there that impacted their decision to vote for or against the death penalty." (RT 97: 20659: 14-16.)

The issue is not whether appellant proved the introduction of the extraneous material into jury deliberations actually "impacted their decision to vote for or against the death penalty," as Judge Platt stated (RT 92: 20659), but as reiterated in *People v. Nesler, supra,* 16 Cal.4th at p. 578, the inquiry focuses on whether the material may have done so because the material "'came from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' *(Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [85 S.Ct. 546, 549-550, 13 L.Ed.2d 424], citations and fn. omitted.)" (See also, *People v. Williams, supra*, 40 Cal.4th at pp. 333-334 [bias will be found if extraneous material is inherently and substantially likely to have influenced a juror]; *post*, p. 569.)

The introduction of untested personal experience with drugs and unreliable

political and sociological factors during deliberations in this case derived from sources outside the courtroom – unlike the introduction of biblical verses by a juror in a case of overwhelming evidence in aggravation (*People v. Danks, supra*, 32 Cal.4th at 305-308), or where the jury may have been unaffected by the reading of biblical verses and no change in the split of juror votes occurred (*People v. Williams, supra*, 40 Cal.4th at pp. 334-336). The extraneous material injected here was introduced in a much closer case and in a far more prejudicial setting. Even though the timing of Juror Number 10's injection of his biased opinions in deliberations on penalty in the retrial is unknown, the introduction of the extraneous material is undisputed and raises an unrebutted presumption of prejudice, especially when coupled with the trial court's rulings forbidding defense counsel from introducing lay opinion testimony at the risk of sanctions. Moreover, not only did Juror Number 12's injection of extraneous material into deliberations violate the court's instructions, but disregarding instructions is tantamount to refusing to deliberate and violates the juror's oath to truly try the case. (*People v. Pierce* (1979) 24 Cal.3d 199, 206-207; *People v. Perez* (1992) 4 Cal.App.4th 893, 906-909; *People v. Castorena* (1996) 47 Cal. App.4th 1051, 1066-1067; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 251-261.) Juror 12 effectively lightened the burden of responsibility for an individualized determination of punishment by presenting extraneous material into deliberations *after* the jury declared a second 9-to-3 deadlock, *after* the trial court failed to poll jurors, and *after* it improperly charged minority jurors to continue deliberations and role play. (See, *Argument IV*, *ante*.)

In *People v. Williams, supra*, 40 Cal.4th at pp. 333-334, this Court reiterated the standard on review for prejudice as a result of a finding of misconduct, citing *In re Carpenter, supra*, 9 Cal4th 634:

> " '[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record ...
>
> .....
>
> Speaking in reference to the introduction of extraneous material to jurors, we explained: '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.' (Citation.)"

In light of the first jury's inability to reach a verdict, the length of deliberations in the retrial, the expression of a deadlock after twenty hours, instructional errors and judicial

misconduct during deliberations, as set forth in *Argument IV, ante*, reversal is required to rectify the injection of extraneous matters into deliberations, in violation of appellant's enumerated constitutional and statutory rights.

B. The Trial Court Abused its Discretion in Denying Defense Counsel's Motion to Excuse Juror Number 7 for Misconduct, and The Juror's Refusal to Deliberate Provided Additional Misconduct and Evidence of Bias Against Appellant.

The *Motion for New Trial* alleged that Juror Number 7 refused to deliberate. Juror Number 1's supporting declaration recited that Juror Number 7 entered deliberations, "angry from the beginning ..., [and] discussed that his wife had been questioned in court ..., that it would not be a good idea to bring family members to view the proceedings, [and] said he would never vote for life." (CT 13: 3392.) The trial court ruled:

> " [I]t was not error, and was not misconduct ...
> And there's absolutely nothing that indicates that
> [Juror Number 7] did not deliberate. He just had
> a position about the penalty based upon the evidence,
> as far as the Court can see."
> (RT 97: 20655: 23-26.)

Defense counsel argued in the motion for new trial that the court should have removed Juror Number 7 after inquiry on April 20, 2000, because he and his wife had discussed matters outside the record as a result of Deputy District Attorney George Dunlap's improper comments made concerning Michael Quigel that were overheard by

members of courtroom gallery, including Juror Number 7's wife. (See, RT 97: 20619.) Michael Fox moved to excuse Juror Number 7 after the April 20th hearing "to protect the sanctity of the panel." (RT 88: 18515: 11-12.) The trial court denied the motion, stating "I do not find any prejudice, although the great potential certainly was there." (RT 88: 18516: 21-23.)

As previously noted in *Argument V, ante*, pp. 285-286, the court examined several witnesses to Dunlap's "absolutely reckless ... comment related to [Michael Quigel] ... in the presence of persons [including Juror Number 7's wife] you do not know the identity of ..., [and it is] absolutely is inexcusable ..., [coming] so close to being sufficient conduct to justify a mistrial ..." (RT 88: 18517: 3-10.) Juror Number 7 was examined by the court *after* his wife overheard Dulap's improper comments to the gallery in the courtroom. When the court denied the motion for mistrial on April 20, 2000, it also denied the motion to excuse Juror Number 7, erroneously finding his testimony under oath, and the conflict between his testimony and his wife's, not "sufficient basis for prejudice to justify removal ..." (RT 88: 18519: 24-25.)

Review of the record, however, reveals that Juror Number 7 admitted discussing Quigel's custody status with his wife during the lunch recess on April 20, after Quigel testified in the morning session:

> " I think she made reference to, 'The man [Quigel] in the jumpsuit was interesting,' and I made the reference to, 'It surprised me too' ... I think it surprised all of us.

We weren't expecting to see that ..., someone in custody ..."

(RT 88: 18484: 2-27.)

After Juror Number 7 testified, his wife denied having a conversation with him about Quigel, who was the subject of Dunlap's improper comment:

" Mr. Fox: Was there any discussion over the lunch break about the witness that testified previous, the gentleman in custody? Did you and your husband make any comment about him?

Mrs. XXXXX: No.

Mr. Fox: Any discussion about Mr. Quigel?

Mrs. XXXXX: No, no."

(RT 88: 18515: 10-17.)

While a trial court is afforded wide discretion in the manner of holding timely hearings to determine whether a juror should be removed for possible misconduct (*People v. Prieto* (2003) 30 Cal.4th 226, 274), a juror who is shown to be biased is "unable to perform the duty to fairly deliberate and thus is subject to discharge." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051.) Quigel was a key witness for the defense – called in the guilt phase and on retrial of the penalty phase – to establish that appellant had purchased methamphetamine one day before the *Village Oaks* murders, and to show that he manifested physical symptoms consistent with methamphetamine abuse and addiction. The prosecution vigorously challenged the credibility of Quigel and the defense mitigation case

in mitigation, which centered on the theme of drug abuse and addiction. (See, *Arguments V, VIII, ante*.) The trial court did not find Juror Number 7 remained unbiased after admitting his "surprise" at Quigel's in-custody status and discussing it with his wife, provided no explanation as to why Juror Number 7's wife would deny even discussing Quigel over the lunch recess with her husband, and "although the great potential certainly was there," it simply found "nothing has been communicated" to Juror Number 7. (RT 88: 18519: 12-23.) To the contrary, if there was nothing to hide, it is reasonable to assume Juror Number 7's wife would have admitted the conversation occurred. Juror Number 7 really admitted discussing Quigel's custody status with his wife, notwithstanding the trial court's admonition:

> " It is the duty of jurors during recesses or adjournment not to converse amongst yourselves or with anyone else on any subject connected with this trial, or to allow anyone else to converse with you concerning the trial, or on any matter connected with the trial. And it is the duty of jurors not to form or express opinions thereon until the cause is finally submitted to you for your decision."
>
> (RT 88: 18476: 4-11;CALJIC .50; Penal Code §1122, subd. (a).)

The danger at issue here is that "a juror who is actually biased [and] unable to perform the duty to fairly deliberate ..." remained on the jury. (*People v. Barnwell, supra*, 41 Cal.4th at 1051.) The trial court's claim that if it excused Juror Number 7 "we would

rapidly have ... gone through more than the five alternates that we have," is neither supported by the record nor a ground for retaining a biased juror. It was an abuse of discretion not to excuse Juror Number 7. (RT 88: 18519: 16-18; *ibid.*; *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.)

Furthermore, the motion for new trial was based in part upon the declaration of Juror Number 1 that Juror Number 7 communicated his displeasure with other jurors about being questioned by the court, and warned them against bringing family members to court as observers. In addition, Juror Number 7 apparently refused to deliberate because he was "angry from the beginning ...,[and] said he would never vote for life." (CT 13: 3392.) Judge Platt, who had improperly admonished jurors and urged them to consider changing their positions by role playing when he learned three jurors held up a unanimous decision after six votes on punishment had been taken over twenty hours of deliberations, implied at the hearing on the motion for new trial that a majority death-penalty juror, such as Juror Number 7, did not need to engage in the role-playing process. The juror who refused to even consider a vote for life imprisonment was doing nothing more taking "a position about the penalty based upon the evidence, as far as the Court can see." (RT 97: 20655: 23-26; see, *Argument IV, ante*.) As this Court pointed out in *People v. Leonard* (2007) 40 Cal.4th 1370, 1410, quoting from *People v. Cleveland* (2001) 25 Cal.4th 466, 485, a juror who refuses to deliberate commits misconduct:

> " 'Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the

beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.'"

Although disagreeing with the trial court's denial of the motion for new trial and finding the offending juror in the *Leonard* case had committed misconduct by refusing to deliberate, the Court found the error was harmless. The 11 other jurors who did deliberate had all reached the same conclusion as the biased juror, i.e., defendant was guilty of the crimes charged, and, therefore, "the inference is inescapable that they would have reached the same conclusion if they had discussed the case together."(*Id.*, at p. 1411.)

In the present case, the determination of the appropriate punishment upon retrial requires an individualized decision and is subject to close scrutiny. Juror misconduct in the retrial of the penalty determination injected non-statutory factors and resulted in an arbitrary and capricious sentence of death and structural defects in the trial mechanism itself, thereby violating appellant's previously enumerated federal and state constitutional rights. (*Arizona v. Fulminante* (1991) 449 U.S. 279, 309.) The misconduct was presumptively prejudicial, created bias against appellant, and the error cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Smith v. Phillips, supra*, 455 US. at 217; *People v. Williams, supra,* 40 Cal. 4th at 336; *People v. Ault, supra,* 33 Cal.4th at 1271; *People v. Nessler, supra*, 16 Cal.4th at 578-79; *People v. Pierce, supra,* 24 Cal.3d at 207.)

XVIII.

SUBJECTING APPELLANT TO A PENALTY RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A VERDICT VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction.

The guilt phase and first penalty phase of appellant's trial were rife with prosecutorial misconduct. (See *Arguments III, V, VI, IX, X, XI, XIII* and *XIV, ante*.) At appellant's first penalty trial, the jury deliberated over three days and after eight votes declared itself at impasse on the issue of penalty. (RT 60: 12339-12364.) After returning for further deliberations, on the fifth day the jury declared that it was "deadlocked" after four additional votes; the vote was eight to four in favor of life upon inquiry of jurors. Judge Delucchi declared a mistrial. (RT 60: 12367-12370; CT 9: 2518.) Having repeatedly and fruitlessly objected to the prosecutor's rampant misconduct at the first penalty trial, and with two-thirds of the deadlocked jury voting to spare appellant's life, appellant moved to bar a retrial. (CT 9: 2509-2518.) The motion was argued and denied on December 20, 1999. (RT 61: 12487-12496.)

After the second jury – which declared a deadlock after six votes over twenty hours of deliberation during seven days, and deliberated a total of twelve days and thirty-three hours – returned a verdict of death, appellant again argued in his motion for new trial, that the retrial and resulting verdict were unconstitutional. (CT 11: 3282-3283; RT 97: 20610-20613.) The court denied that motion on August 4, 2000 as well. (RT 97: 20635-20638.)

Appellant here argues that subjecting him to retrial after the first jury deadlocked violated his state and federal constitutional rights. First, Penal Code section 190.4, subdivision (b), which provides that if a jury is unable to reach a unanimous verdict as to penalty the court shall impanel a new jury to try the issue, is unconstitutional as applied to appellant because of the rampant, egregious misconduct of the prosecutor and the jury's deadlock at 8 to 4 for life. That prosecutorial misconduct also triggered double jeopardy protections barring retrial of the penalty phase. Finally, retrial of penalty after the first penalty jury had hung violated both the state and federal constitutions. Subjecting appellant to a penalty retrial deprived him of his state and federal rights to due process, a fair trial, a unanimous verdict by an impartial jury, a reliable, non-arbitrary death verdict, to be free from being placed twice in jeopardy, and to be free from cruel and unusual punishment. (U.S. Const., Amends. 5, 6, 8, & 14; Cal. Const., art. I, §§ 1, 7, 15, 16, & 17.)

B. Section 190.4, subdivision (b), Providing for Retrial of the Penalty Phase Upon the Inability of a Penalty Phase Jury to Reach a Unanimous Verdict is Unconstitutional As Applied to Appellant and, Under the Circumstances of This Case, Retrial is Also Barred by Double Jeopardy Principles.

At the time a mistrial was declared, ending deliberations in the first penalty phase of appellant's trial, two-thirds of the jury believed appellant deserved to live. (CT 9: 2518; RT 60: 12368; RT 97: 20611; 20635.) Only four jurors believed a death sentence was appropriate. The minority jurors had been subjected to misconduct by the prosecutor that can be said, without hyperbole, to shock the conscience. Prosecutorial misconduct

was so pervasive during the prosecutor's closing argument in the first penalty trial that Judge Platt took the extraordinary step of attempting – unsuccessfully – to prevent prosecutorial misconduct in argument in the penalty retrial of disclosing specific instances of misconduct during argument in the first penalty phase:

> " So both counsel know and the record reflects why the Court has gone through the previous closing arguments, I view my role at this point in the trial and argument as assuring that if a death verdict is returned, that there is nothing in argument by the prosecution that can be argued as prosecutorial misconduct ..."
>
> (RT 94: 19960: 7-14; see *Argument V, ante*, pp. 265-266.)

Defense counsel had enumerated many of the prosecutor's arguments in the first penalty trial in his motion to admonish and prohibit the prosecutor from repeating "egregious misconduct" in the penalty retrial, including:

> " 1. Repeatedly telling the jury that the defense in this case was a sham;
>
> 2. Disparaging the integrity of defense counsel;
>
> 3. Arguing facts not in evidence;
>
> 4. Attempting to inflame the jury;
>
> 5. Suggesting that any juror blocking a unanimous verdict would be wiping out months of personal sacrifice for all of the jurors;

6. Disparaging the exercise of the right to present a defense;

7. Vouching for a prosecution witness; and,

8. Misstating the law."

(CT 11: 2643.)

During hearing on the initial motion, the trial court refused to take steps to curtail improper arguments, but the day before arguments were to be presented in the penalty retrial, it went to great lengths to detail some of what it perceived to be improper arguments by the prosecutor during the first penalty trial. The court admonished the prosecutor it would be improper to argue during his closing argument in the retrial: 1) "that it takes one of you for a verdict not to happen" (RT 94: 19932 [60: 12099]); 2) "injection of personal opinion" (RT 94: 19934-19935 [60: 12102; 12113]; 3) "any reference to it being shameful, disgraceful nature, cowardice" to call family members to testify in mitigation (RT 94: 19936-19940 [RT 60: 12147; 12154; 12155]); and, 4) any reference to society's fears of "serial killers" (RT 94: 19941 [RT 60: 19941].

Although the entire trial was riddled with misconduct, at the first penalty trial the prosecutor had focused his attention on the alleged "cowardice" of a "serial killer" who brought his two children into court, and improperly described appellant's presentation of other family members in his case in mitigation as "shameful." (RT 59: 12147-12148; 12154.) Moreover, knowing full well that appellant had expressed remorse to Pastors Kilthau and Skaggs, as well as to members of his own family, the prosecutor exploited the erroneous rulings of the court and manipulated the truth by arguing the only expression of

remorse was made to a "paid" defense expert who "teach[es] gimmicks [to] defense lawyers ... for a fee" (RT 60: 12182; 12183):

> " Dr. Gretchen White ... came in and talked about the defendant's remorse. Made some statement, oh, yes, he was remorseful. Bull. This is a defense expert, paid by the defense, interviewing the defendant ..., and counsel will argue them. Bull. I take offense to it." (RT 60: 12184.)[231]

Indeed, after unlawfully vouching for Dr. Mayberg (RT 48: 10028) in the guilt phase of the trial, the prosecutor continually denigrated appellant's assigned counsel and expert witnesses; he described defense brain science experts, Dr. Wu, Dr. Amen and Dr. Buchsbaum, as "twisted," and defense counsel as "trying to shove down your throat ... scarey science," which the prosecutor personally found "frightening," "a joke," "insulting," and nothing more than "bull" presented to the jury by a "silk smooth" defense attorney . (RT 48: 10025-10031; 12183.)

The unquestionable goal of the prosecutor was to inflame the jurors' passions and

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[231] As will be recalled, Judge Platt had disclosed at the initial hearing on remorse prior to the first penalty trial: "Self-serving as [letters to family members] may be ..., I can draw a specific example where a person I was prosecuting for a capital offense in the penalty phase had two letters read that he wrote to his children – not to the children of the victim, but to his children – apologizing for how he ruined their life.

And when the court allowed those in, I went back to my office, I threw things around, I hit the wall, I knew what was going to happen, how it was going to be argued. And that was something that was very critical to the jury." (RT 50: 10350-10351; see, *Argument VI, ante,* pp. 303-304.)

obtain a death verdict by any means, including improper arguments and urging the court to make erroneous rulings and then exploiting those rulings in arguments on the lack of remorse, molest and crime reconstruction. Although he fell short of that goal, the ensuing mistrial allowed him a second bite at the apple, depriving appellant of his state and federal constitutional rights, enumerated above.

1. Appellant's Penalty Retrial was Barred by Double Jeopardy Principles Because of Pervasive, Prejudicial Prosecutorial Misconduct at the First Penalty Trial Designed to Avoid a Life Verdict and to Obtain a Death Verdict by Any Means.

As the United States Supreme Court wrote in *Oregon v. Kennedy* (1982) 456 U.S. 667, 671-672:

> " The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. [Citation.] As part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal. [Citation.]'."
>
> (See U.S. Const., Amends. 5 & 14.)

The California Constitution similarly protects a defendant from being put twice in jeopardy. (Cal. Const. art. I, §15.) Both the United States Supreme Court and this Court have recognized that prosecutorial misconduct which triggers a mistrial can activate double jeopardy protections barring retrial. (*Oregon v. Kennedy, supra,* 456 U.S. at p. 679; *People v. Batts* (2003) 30 Cal.4th 660, 695.) This Court observed in *People v. Batts,*

supra, 30 Cal.4th at p. 665, that "the United States Supreme Court held in *Oregon v. Kennedy* (1982) 456 U.S. 667..., that under the federal double jeopardy clause a retrial is prohibited following the grant of a defendant's mistrial motion only if the prosecution committed the misconduct *with the intent to provoke a mistrial*." (Emphasis in original.) In *People v. Batts*, this Court concluded that the California Constitution provides even greater protection to a defendant than the federal constitution where prosecutorial misconduct has precipitated a mistrial. It identified two circumstances under which such misconduct will bar a retrial, at the same time noting that it was not "attempting to articulate a double jeopardy test that [would] be applicable in all circumstances." (*People v. Batts, supra,* 30 Cal. 4th at p. 695.)

The two circumstances identified in the opinion under which "the double jeopardy clause of the California Constitution...bars retrial following the grant of a defendant's mistrial motion [are] (1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial, and also (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal - and a court, reviewing the circumstances as of the time of the misconduct, determines from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal. (Citations.)" (*People v. Batts, supra*, 30 Cal.4th at p. 695.)

People v. Batts addressed whether a retrial is barred after the defense has made a

successful motion for a mistrial because of the misconduct of the prosecutor (*People v. Betts, supra*, 30 Cal.4th at p. 666), but the same principles should apply where a mistrial in the form of a hung jury is attributable to the misconduct of the prosecutor. The justification for allowing a retrial after a hung jury is that the deadlock constituted "manifest necessity" for the mistrial, removing it from double jeopardy protections. (See, *Oregon v. Kennedy, supra,* 456 U.S. at p. 672.) However, where, as here, a mistrial follows and emanates from extreme prosecutorial misconduct, there is no "manifest necessity" and that justification evaporates.

Appellant's loss of his "valued right to have his trial completed by a particular tribunal" (*Oregon v. Kennedy, supra,* 456 U.S. at pp. 671-672, quoting *Wade v. Hunter* (1949) 336 U.S. 684, 689) was devastating here. Eight jurors voted to imprison appellant to life imprisonment despite the prosecutor's egregious misconduct throughout the guilt phase and first penalty phase. The loss of that "particular tribunal"– that is the loss of the measured consideration of his fate by a jury inclined in his favor and untainted by the prosecutor's poisonous tactics – "deprived [appellant] of a reasonable prospective of an acquittal" (*People v. Batts, supra*, at p. 666) and requires that his death verdict be reversed.

2. Because of Rampant, Prejudicial Prosecutorial Misconduct at Appellant's First Penalty Trial and the Fact That Two-Thirds of the Deadlocked Jurors had Voted to Spare Appellant's Life, Penalty Retrial was Barred by Fundamental Fairness and Violated His State and Federal Rights to Due Process, a Fair Trial, a Unanimous Verdict by an Impartial Jury, a Reliable, Non-Arbitrary Death Verdict, and to Be Free From Cruel and Unusual Punishment.

Separate and apart from any double jeopardy considerations, the misconduct of a prosecutor can be so egregious that the prosecution should be prohibited from seeking the death penalty. The Eighth Amendment to the United States Constitution and the similar provisions of the California Constitution require heightened reliability in death penalty cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Appellant maintains that the prosecutorial misconduct in this case was so extreme, and continued so unabated despite objection and judicial warning, that constitutional principles, chief among them fundamental fairness, due process, and the right to a reliable, non-arbitrary death verdict, barred retrial of the penalty, and now require reversal of the death verdict.

Prosecutorial misconduct as a bar to seeking the death penalty was cogently discussed in *State v. Baker* (1998) 310 N.J. Super. 128, 708 A.2d 429. In that case the Appellate Division upheld the superior court judge's decision to enter an order precluding a penalty phase trial, thereby preventing the State of New Jersey from seeking the death penalty, based upon the misconduct of the prosecutor. The prosecutor had gone into the jury room after the guilt verdict was returned and observed the charts prepared by the jury

during its deliberations "crystalizing its thought processes and the factual findings underpinning its conclusion." This information came to light when the prosecutor shared that information with a member of the news media. (*Id.*, at p. 132, 708 A.2d at p. 431.) The prosecutor's conduct was described by the trial court as "'an act of inexcusable neglect'" committed by a person "'who should have known better.'" (*Ibid.*) The trial court precluded the death penalty on both double jeopardy and fundamental fairness grounds, and the order was upheld on the latter ground. As the appellate court explained:

> " We appreciate that the principle of fundamental fairness, standing alone as a *ratio decidendi*, is an amorphous doctrine. We need not, however, explore its parameters because this is such a clear case. . . Where the wrongful and unconscionable conduct of a public official has offended the rights both of an individual defendant and of the criminal justice system generally, the principle of fundamental fairness thus demands an appropriate remedy adequate to vindicate the resultant perversion of the judicial process as well as defendant's resultant prejudice. Such a remedy mush be fashioned because toleration of such conduct 'would erode public confidence in the impartiality and fairness of the judicial process.'" (*Id.* at p. 138, 708 A.2d at p. 435 (citations omitted).)

The court in *State v. Baker* acknowledged the significance of precluding the State of New Jersey from seeking the death penalty:

> "We appreciate that there is a countervailing interest of the public that

criminal prosecutions not be thwarted and that wrongdoers be brought to account. We are satisfied, however, that that interest has been fully satisfied here by the unaffected return of the first-degree murder verdicts." (*State v. Baker, supra*, at p. 139, 708 A.2d at p. 435.)

Of importance to the court in *State v. Baker* was not only that the prosecutor was now privy to the deliberative processes of the jury, which might give him an advantage in the penalty phase if the same jury were to hear the case, but also that the defendant had lost the benefit of that first jury. (*State v. Baker, supra,* at p. 134, 708 A.2d at p. 433.)

The unfairness inherent in the prosecutor's being permitted to benefit from his own misconduct was emphasized by the court, which found that as a result his misconduct the prosecutor had waived the discretionary right to seek the death penalty:

" We add one final observation. It is, of course, within the sole discretion of the Prosecutor to seek the death penalty. Deliberate prosecutorial misconduct tainting the integrity of the penalty phase proceeding and prejudicing a capital defendant's right to a fair penalty proceeding may simply be viewed as a waiver by the Prosecutor of his right to exercise that discretion. The Prosecutor may not have intended to waive the death penalty. But that is the necessary consequence of his misconduct." (*State v. Baker, supra*, at pp. 139-140; 708 A.2d at p. 435.)

Quoting the trial court, the Appellate Division emphasized:

" 'This is a death penalty case and calls for enhanced scrutiny and

> vigilance considering that the State, as representative of the People, is seeking not to imprison the defendant, but to ... extinguish his life. The admonition of Justice Story, in the early double jeopardy decision of the U.S. Supreme Court, *United States v. Perez,* [9 *Wheat.* 579], 22 U.S. 579 [6 L.Ed.165] (1824) at page 580, bears due consideration: 'in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.'" (*State v. Baker*, *supra*, at p. 140; 708 A.2d at p. 433.)

In the present case, the prosecutor did not inadvertently stumble upon jury secrets. He misstated law and fact to both judge and jury, exploited erroneous rulings, distorted the truth, repeatedly argued personal opinion, and used inflammatory tactics and language to disparage appellant and his assigned counsel in order to obtain a death verdict. In these circumstances, appellant's previously enumerated rights were violated by penalty retrial of the penalty phase, and the death verdict should be reversed. (*Woodson v. North Carolina, supra,* 428 U.S. at pp. 304-305.)

C. Appellant's Penalty Retrial After the Original Penalty Jury Failed to Reach a Verdict Violated His State and Federal Constitutional Rights To Be Free From Cruel and Unusual Punishment.

Prior to 1978, California followed the more enlightened trend and prohibited the retrial of the penalty phase following a hung jury. (*People v. Kimble* (1988) 44 Cal.3d 480, 511.) An overwhelming majority of the jurisdictions that allow the death penalty to

be imposed do not permit the penalty phase to be retried after a jury has been unable to reach a unanimous verdict as to the penalty.[232] As one of the few remaining jurisdictions that permits a penalty retrial following a hung jury, California's death penalty scheme is an anomaly and contrary to the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *Woodson v. North Carolina*

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[232] The death penalty is prohibited in fifteen states: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Of the 35 other states and federal jurisdiction with the death penalty, 25 states and the federal government (18 USCA§848(a) West Supp. 1995) prohibit retrial upon a hung jury: Ark. Stat Ann. § 5-4-603 (c)(1993); Col. Rev. Stat. §18.1.3-1201(2)(b) (II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp 1994); La. Code Crim. Proc.Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(1)(v) (Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp.1995); SD Codified Laws Ann. §23A-27A-4 (1988); Tenn.Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art.37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994). Only 4 states, Alabama, Arizona, Indiana and Nevada explicitly authorize penalty retrials (Ala. Code § 13-A-5-46(g) (2002); Ariz. Crim. Code § 13-703.01L (2002); Ind. Code § 35-50-2-9(f) (2002); Nev. Rev. Stat. 175.556 (2003)), and two states apparently authorize retrial (Connecticut and Kentucky) by judicial decision. (*State v. Daniels* (Conn. 1988) 542 A.2d 306, 317; *State v. Ross* (Conn. 2004) 849 A.2d 648, 726, fn. 68; *Skaggs v. Common.* (Ky. 1985) 694 S.W.2d 672, 682; *Dillard v. Common.* (Ky. 1999) 995 S.W.2d 366, 374.)

(1976) 428 U.S. 280, 301.) The penalty retrial following the hung jury violated appellant's federal constitutional rights to a fair jury trial, due process, equal protection, a reliable penalty determination and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as state constitutional protections in article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

Appellant recognizes that this Court recently, in *People v. Taylor* (April 15, 2010, S062562), Slip Opn. pp. 69-70, rejected the argument that subjecting a defendant to a penalty retrial after the first jury deadlocked violates the Eighth Amendment's proscription against cruel and usual punishment. Appellant asks this Court to reconsider that decision in light of the facts of this case. Even if it determines that not every retrial of a penalty phase results in cruel and unusual punishment, appellant submits that where, as here, the majority of the deadlocked jury vote for life, a retrial does indeed result in an Eighth Amendment violation.

Analysis of a claim that a death penalty scheme violates the cruel and unusual punishment prohibition of the Eighth Amendment involves two inquiries: (1) "Objective indicia that reflect the public attitude toward a given sanction" (*Gregg v. Georgia* (1976) 428 U.S. 153, 173), including the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" (*Enmund v. Florida* (1982) 458 U.S. 782, 788); (2) "informed by [these] objective factors to the maximum possible extent" (*Coker v. Georgia* (1977) 433 U.S. 584, 592), the

Court "bring[s] its own judgment to bear on the matter" (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 788-789) to determine whether the sanction "comports with the basic concept of human dignity at the core of the Amendment." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 182.)

This consensus is born out of a recognition that concern for fundamental fairness and human dignity requires that a capital defendant only be "forced to run the gauntlet once" on death. (*Green v. United States* (1957) 355 U.S. 184, 190.) Normally, "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." (*Richardson v. United States* (1984) 486 U.S. 317, 324.) This general rule has been held applicable to capital penalty proceedings. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108–110.) However, most states allowing the death penalty have recognized that only one penalty trial is permissible. (See, footnote 232, *ante*.) Even if double jeopardy does not apply, it is still indisputable that death is a penalty different from all others. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 188 (joint opinion of Stewart, Powell and Stephens, JJ.).) No capital defendant should be subjected to repeated attempts by the State to sentence him to death, "thereby subjecting him to embarrassment, expenses and ordeal, and compelling him to live in a continuing state of anxiety and insecurity." (*United States v. Scott* (1978) 437 U.S. 82, 95.) Such penalty retrials also take a tremendous toll on the other trial participants – defense counsel, the prosecutors, the trial judge and court personnel, and the families and friends of the victims and defendants.

Compelling a capital defendant to endure the ordeal of a second, full blown trial on

whether he will live or die is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 101; *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304-305.) Compelling a capital defendant to endure a second penalty trial where a majority of the first jury sought to preserve his life is even more at odds with those evolving standards of decency. Accordingly, appellant's death penalty should be reversed.

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XIX.

THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS RENDERED BOTH PHASES OF APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR AND REQUIRES REVERSAL OF THE CONVICTIONS ENTERED AND THE UNLAWFUL SENTENCE IMPOSED.

Appellant has demonstrated numerous prejudicial errors in the preceding arguments. Each of these errors provides reasons to reverse the judgment. Should this Court disagree, however, and find each error individually harmless, or some claims valid but not amounting to a constitutional violation, the cumulative effect of those errors establishes that a miscarriage of justice occurred. Reversal may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 US. 393, 399; *People v. Ramos* (1982) 30 Cal.3d 553, 581, revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791; *People v. Buffum* (1953) 40 Cal.2d 719, 726; *People v. Taylor* (2000) 26 Cal.4th 1155, 1184; *People v. Holt* (1984) 37 Cal.3d 436, 459; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388.)

Indeed, in this case defense counsel moved for a mistrial and a new trial based upon

the cumulative effect of the errors – including prosecutorial and judicial misconduct. (See, CT 13: 3389; RT 45: 9283-9293.) This Court has recognized that reversal may be required where the cumulative effect of misconduct is greater than the sum of the individual errors asserted. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244; *People v. Hill* (1998) 17 Cal.4th 800, 844-847.)

Appellant has demonstrated that numerous errors of state and federal constitutional dimension occurred during or related to the guilt phase of trial, many of those same errors were repeated at the penalty retrial, and that each such error individually mandates reversal. These errors variously deprived appellant of his rights to fair trial, an unbiased jury, confrontation, due process, heightened capital case due process and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Taken together, and in any combination, these errors undoubtedly produced a fundamentally unfair trial. Due to the cumulative error, a new trial is required. (*Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Derden v. McNeel* (5th Cir. 1992) 978 F.2d 1453; *Taylor v. Kennedy* (1978) 436 U.S. 478, 487, fn. 15 [several flaws in state court proceedings combine to create reversible federal constitutional error].)

Moreover, when errors of federal magnitude combine with non-constitutional errors, all of the errors should be reviewed together under a *Chapman* standard. In *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59, the court summarized the multiple errors committed at the trial level, and concluded:

" Some of the errors reviewed are of constitutional

dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, or was not harmless error... (Citations.)"

As discussed in previous arguments, the errors asserted also affected the penalty phase verdict on retrial. Any guilt phase error which might be found harmless under customary tests of guilt phase prejudice might nonetheless have the effect at penalty phase of negating a lingering doubt as to guilt, thereby tainting the penalty verdict and requiring reversal of the penalty judgment:

> "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; see also, *State v. Dixon* (1991) 125 N.J. 223, 249-250 [penalty reversed because of guilt phase evidence which was either proper or else harmless error at guilt phase but which was inadmissible and prejudicial with respect to issue of penalty]; *People v. Hamilton* (1963) 60 Cal.2d 105, 136 [disapproved on unrelated grounds in *People v. Daniels* (1991) 52 Cal.3d 815, 866]; Goodpaster, *The Trial of Life: Effective Assistance of Counsel in Death Penalty*

Cases (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled 'Guilt Phase Defenses and Their Penalty Phase Effects'].)

Most penalty phase errors implicate a defendant's federal constitutional rights. The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 885.) The due process clause of the Fourteenth Amendment protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case also necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so does the Eighth Amendment prohibit the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors which taint the fairness of the trial and present an "unacceptable risk ... of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505; *Holbrook v. Flynn* (1986) 475 U.S. 560; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828.)

The test for prejudice from federal constitutional errors is that reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the errors complained of did not contribute to the verdict obtained." *(Chapman v. California* (1967)

386 U.S.18, 24; see generally, *Yates v. Evatt* (1991) 500 U.S. 391, 403; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 754 [noting that state appellate courts are not required to consider the possibility that penalty phase error may be harmless, and recognizing that harmless error analysis will in some cases be "extremely speculative or impossible"].) Accordingly, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, emphasis in original.) When any of the errors constitutes a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors, constitutional and otherwise, was harmless. (*People v. Williams*, *supra*, 22 Cal.App.3d at pp. 58-59.)

The errors in this case also compel reversal of the penalty on the basis of the state-law prejudice test for non-constitutional errors at penalty phase. In *People v. Brown* (1988) 46 Cal.3d 432, 446-448, this Court reaffirmed the "reasonable possibility" harmless error standard articulated in *People v. Hines* (1964) 61 Cal.2d 164, 168-170 (disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-775, fn. 40, and *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137. Under this high standard it is very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. It is "the same in substance and effect" as the "reasonable doubt" standard of *Chapman v. California*. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; see *People v. Brown*, *supra,* 46 Cal.3d at p. 467.) It is a "more exacting

standard" than the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, used for assessing guilt phase error. (*People v. Brown*, *supra,* 46 Cal.3d at p. 447.) While a remote possibility that an error affected the outcome is insufficient for reversal (*ibid.* at 448), only in an "extraordinary" case can a death sentence be affirmed under this test if penalty phase error has occurred. (*People v. Hines*, *supra* at p. 170.)

For the foregoing reasons, the finding of guilt and the judgment of death must be reversed because of the cumulative effect of the errors in this case.

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XX.

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

In *People v. Schmeck* (2005) 37 Cal.4th 2040, 303-304, this Court held that for purposes of federal review "routine" challenges to California's capital punishment system will be considered "fairly presented" even when appellant "does no more than (i) identify the claim in the context of the facts; (ii) note that we previously have rejected the same or similar claim in a prior decision; and (iii) ask us to reconsider that decision." Following are claims presented both to urge reconsideration and to preserve them for federal review:

A. Delay in the Process and Execution of Sentence

On August 4, 2000, appellant was sentenced to death. Counsel to pursue the automatic appeal from that judgment was not appointed until March 15, 2006. In light of the time it takes to obtain counsel (almost six years in appellant's case) and to pursue the automatic appeal and meritorious habeas corpus claims in state and federal court, subjecting appellant to the uncertainty and ever-present tension of being on death row for such an extended time constitutes cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution of the United States.

Justice Stevens in a memorandum opinion respecting the denial of certiorari in *Lackey v. Texas* (1995) 514 U.S. 1045, observed that although the court in *Gregg v. Georgia* (1976) 428 U.S. 153, held the Eighth Amendment does not prohibit capital

punishment, that decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see *Id.* at p. 177 (Opinion of Stewart, Powell, and Stevens, JJ.), and (2) the death penalty might serve "two principal social purposes; retribution and deterrence." *Id.* at p. 183. (*Lackey*, *supra*, 514 U.S. 1045.) Justice Stevens noted that arguably neither ground retained any force for prisoners who have spent 17 years under a sentence of death, and that such delay should be reason to find the death penalty unconstitutional.

The concerns expressed in *Lackey* apply equally to appellant's death sentence. To date appellant has had to endure nearly ten years under sentence of death, and will have to endure several more years before the automatic appeal process is completed, afer which even more time will be required to litigate meritorious claims in habeas corpus proceedings. The claim here is twofold: Delay in itself constitutes cruel and unusual punishment, and the actual carrying out of appellant's execution would serve no legitimate penological ends. These are issues that have not been addressed by the United States Supreme Court (*Lackey v. Texas, supra*, 514 U.S. 1045); federal appellate courts have addressed only the first of these issues, and to date have rejected the argument. (See *Carter v. Johnson* (5th Cir. 1997) 131 F.3d 452; *Bonin v. Calderon* (9th Cir. 1996) 77 F.3d 1155, 1160-1161; *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491). Since the current state of post conviction review renders a lengthy stay on death row inevitable in California, the sentence of death should be reversed as violative of the Eighth and Fourteenth Amendments, irrespective of whether such a sentence is ever ultimately carried out. To carry out the execution many years after the sentence serves no legitimate penological need and constitutes

cruel and unusual punishment, in violation of the state and federal constitutions. Consequently, the Court should reconsider its position on this point, and the judgment of death should be vacated, and a sentence of life imprisonment without the possibility of parole should be imposed. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 45; *Ceja v. Stewart* (9th Cir. 1998) 134 F.3d 1368, 1378 (Fletcher, J., dissenting).)

B. Penal Code Section 190.2 Is Impermissibly Broad

A constitutionally valid system of capital punishment must provide a meaningful way to narrow the number of death-eligible murder cases. California's statutory scheme does not do so. (*Furman v. Georgia* (1972) 408 U.S. 238; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; *Zant v. Stephens* (1983) 462 U.S. 862, 878.)

This Court should reconsider its prior precedent and hold that Penal Code section 190.2(a) is so inclusive that it violates the Eighth and Fourteenth Amendments.

C. The Broad Application of Section 190.3, factor (a), Violated Appellant's Rights

In the present case, the prosecutor relied principally upon the "circumstances of the crime" under factor (a), including victim impact evidence, which this Court has ruled falls within the meaning of those circumstances. (*People v. Zamudio* (2008) 43 Cal.4th 327, 324-325.) As this case demonstrates from the evidence and argument presented by the prosecutor, the "aggravating factors" apply to virtually all of the facts of any murders that may be prosecuted. As a result the capital sentencing scheme violates the Fifth, Sixth, Eighth Amendments to the United States Constitution because it permits the jury to assess the aggravating factors and impose death for no other reason than "that a particular set of facts surrounding a murder ..., were

enough in themselves, and without some narrowing principles to apply to facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363; cf., *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988; *People v. Kennedy* (2005) 36 Cal.4th 595, 641.)

This Court should reconsider its prior position and hold that section 190.3 is overbroad and results in arbitrary and capricious death judgments, in violation of the Eighth and Fourteenth Amendments.

D. Penalty Instructions Are Impermissibly Vague and Ambiguous Standards.

CALJIC 8.88 permits the death penalty to be imposed whenever jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT12: 3264.) The phrase "so substantial" leaves the matter entirely in the hands of jurors with untrammeled discretion and is impermissibly vague, fails to channel or limit the sentencer's discretion, and leads to arbitrary and capricious sentencing decisions. (*Maynard v. Cartwright, supra,* 486 U.S. at 362.)

This Court has decided the phrase does not violate constitutional standards. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider its position and overturn its prior precedent.

E. The Use of Restrictive Adjectives in Mitigating Factors Impermissibly Acted to Bar Consideration of Mitigation in this Case. The Failure to Instruct that Mitigating Factors Are only Potential Precluded a Fair, Reliable and Evenhanded Application.

The inclusion of "extreme" in factor (d) of Penal Code section 190.3, as read in CALJIC

8.85 (CT 12: 3249), acted as a bar to meaningful consideration of mitigation, in violation of the Fifth, Sixth, Eighth Amendments to the United States Constitution, an argument this Court has previously rejected. (*People v. Avila* (2006) 38 Cal.4th 491, 614.)

Moreover, each of the factors (d), (e), (f), (g), (h) and (j), includes the qualifiers "whether or not" and impermissibly invites jurors to aggravate the sentence upon non-existent or irrational aggravating factors, and thereby precludes a reliable, individualized capital sentencing determination as required by constitutional law. (*Zant v. Stephens, supra*, 462 U.S. 862, 879.) It is likely the jurors in appellant's case aggravated his sentence because they had identified some of these factors as aggravating factors, especially when the trial court permitted expansive victim impact testimony and prosecutorial argument attacking appellant's character and alleged lack of remorse, thereby making it more likely the jury unlawfully treated appellant "as more deserving of the death penalty than might otherwise be by relying upon ... illusory circumstances." (*Stringer v. Black* (1992) 503 U.S. 222, 235; Cf., *People v. Boyd* (1985) 38 Cal.3d 762, 772-775.)

This Court should reconsider its position and overturn its prior precedent. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

F. The Death Penalty is Unconstitutional Because It Does Not Require Findings that are Unanimous, Written or Beyond a Reasonable Doubt.

The failure to require unanimity in findings on aggravating factors, and written and other specific findings by the jury regarding aggravating factors, deprived appellant of his rights under the Fifth, Sixth, Eighth Amendments to the United States Constitution. (*California v. Brown* (1987) 479 U.S. 538, 543.) This Court has rejected the arguments presented here, but appellant

urges the Court to reconsider them. (See, *People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137; *People v. Rogers* (2006) 39 Cal.4th 826, 893.)

G. The Death Penalty Violates the Eighth and Fourteenth Amendments to the United States Constitution and International Norms of Humanity and Decency.

The United States Supreme Court has questioned the death penalty as part of the "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101) under international standards, found the execution of juveniles to be unconstitutional (*Roper v. Simmons* (2005) 543 U.S. 551, 554), and compared punishment "by death" as a "risk" of "sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana* (2008) 554 U.S. - , 128 S.Ct. 2641, 2650.)

Appellant urges the Court to reconsider the constitutionality of the death penalty.

CONCLUSION

Based upon the foregoing, appellant's convictions, true special circumstance findings, and judgment of death must be reversed.

DATED: May 4, 2010

Respectfully submitted,

PHILLIP H. CHERNEY
Attorney for Appellant,
LOUIS JAMES PEOPLES.

CERTIFICATION OF WORD COUNT

As attorney of record herein, and pursuant to California Rules of Court, rules 8.204 and 8.630(b)(1)(A), I hereby declare and certify that this brief contains 164,370 words in 13 point *WordPerfect* computerized format, and that I have been granted permission to file an overlength brief under Rule 8.630-8.631 by order of this Court, dated October 23, 2009.

I declare the foregoing is true and correct to the best of my knowledge under penalty of perjury this 4th day of May, 2010, at Visalia, California.

PHILLIP H. CHERNEY

DECLARATION OF SERVICE BY MAIL
RE: PEOPLE V. LOUIS JAMES PEOPLES, S090602
(Alameda County Superior Court No.135280;
San Joaquin County Superior Court No.SP062397A)

I, Phillip H. Cherney, declare that I am an attorney licensed to practice law in the State of California, State Bar No. 76053, and my business address is 214 South Johnson Street, Visalia, California, 93291.

On May 5, 2010, I served the following persons either personally, or at the addresses listed, with a true copy of *Appellant's Opening Brief*, enclosing the same in a sealed envelope, postage fully paid, and providing it to FedEX at Visalia, California, for delivery, as follows:

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I declare under penalty of perjury that the foregoing is true and correct this 5th day of May, 2010, at Visalia, California.

Phillip H. Cherney